

Indian Constitutionalism
Ambedkar University, Delhi (2019)

Arudra Burra, IIT Delhi

Course packet I: the making of the Indian Constitution

1. Arun Thiruvengadam, “Origins and Crafting of the Constitution” from *The Constitution of India: A Contextual Analysis*
2. Granville Austin, “The Constituent Assembly – Microcosm in Action” from *The Indian Constitution: Cornerstone of a Nation*
3. B. Shiva Rao, “B. N. Rau – A Biographical Sketch” from *India’s Constitution in the Making*
4. Rakesh Ankit, “State before Partition: Indias Interim Government under Wavell,” *South Asia: Journal of South Asian Studies*

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Course packet II: the making of the Indian Constitution – primary documents

1. Documents on the Cabinet Mission Plan, May 1946 from B. Shiva Rao, ed. *The Framing of India's Constitution: Select Documents (vol. I)*
2. B. N. Rau, "Opting in and opting out" from B. Shiva Rao, ed., *India's Constitution in the Making*
3. The Indian Independence Act, 1947

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Course packet III: nationalist readings of the Indian Constitution

1. Jawaharlal Nehru, "Speech on the Aims and Objects of the Constituent Assembly," *Constituent Assembly Debates (13 December 1946)*
2. Rajeev Bhargava, "Introduction," from *Ethics and Politics of the Indian Constitution*
3. Uday S Mehta, "Indian Constitutionalism: Crisis, Unity, and History," *The Oxford Handbook of the Indian Constitution*

CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME I

Friday, the 13th December, 1946

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Eleven of the Clock, Mr. Chairman (The Hon'ble Dr. Rajendra Prasad) in the Chair.

RESOLUTION *RE*: AIMS AND OBJECTS

Mr. Chairman : Pandit Jawahar Lal Nehru will now move the Resolution which stands in his name.

The Hon'ble Pandit Jawahar Lal Nehru (United Provinces: General): *[Mr. Chairman, this Constituent Assembly has not been in session for some days. It has done much formal business, but more is yet to be done. We have been cutting our way and clearing the ground on which we intend to erect the edifice of a constitution. It, however, seems proper that before we proceed further we should clearly understand where we are going and what we intend building. It is apparent that on such occasions details are unnecessary. In building, you will, no doubt, use each brick after mature consideration. Usually, when one desires to construct a building, one must have a plan for the structure that one wishes to erect and then collect the material required. For a long time we have been, having various plans for a free India in our minds, but now, when we are beginning the actual work, I hope, you will be at one with me when I say, that we should present a clear picture of this plan to ourselves, to the people of India and to the world at large. The Resolution that I am placing before you defines our aims, describes an outline of the plan and points the way which we are going to tread.

You all know that this Constituent Assembly is not what many of us wished it to be. It has come into being under particular conditions and the British Government has a hand in its birth. They have attached to it certain conditions. We accepted the State Paper, which may be called the foundation of this Assembly, after serious deliberations and we shall endeavour to work within its limits. But you must not ignore the source from which this Assembly derives its strength. Governments do not come into being by State Papers. Governments are, in fact the expression of the will of the people. We have met here today because of the strength of the people behind us and we shall go as far as the people not of any party or group but the people as a whole--shall wish us to go. We should, therefore, always keep in mind the passions that lie in the hearts of the masses of the Indian people and try to fulfil them.

I am sorry there are so many absentees. Many members who have a right to come and attend the meeting are not here today. This, in one sense, increases our responsibility. We shall have to be careful that we do nothing which may cause uneasiness in others or goes against any principle. We do hope that those who have abstained, will soon join us in our deliberations, since this Constitution can only go as far as the strength behind it can push it. It has ever been and shall always be our ardent desire to see the people of India united together so that we may frame a constitution which will be acceptable to the masses of the Indian people. It is, at the same time,

manifest that when a great country starts to advance, no party or group can stop it. This House, although it has met in the absence of some of its members, will continue functioning and try to carry out its work at all costs.

The Resolution that I am placing before you is in the nature of a pledge. It has been drafted after mature deliberation and efforts have been made to avoid controversy. A great country is sure to have a lot of controversial issues; but we have tried to avoid controversy as much as possible. The Resolution deals with fundamentals which are commonly held and have been accepted by the people. I do not think this Resolution contains anything which was outside the limitations laid down by the British Cabinet or anything which may be disagreeable to any Indian, no matter to what party or group he belongs. Unfortunately, our country is full of differences, but no one, except perhaps a few, would dispute the fundamentals which this Resolution lays down. The Resolution states that it is our firm and solemn resolve to have a sovereign Indian republic. We have not mentioned the word 'republic' till this time; but you will well understand that a free India can be nothing but a republic.

On this occasion, when the representatives of the Indian States are not present, I desire to make it clear how this Resolution will affect the Indian States. It has also been suggested, and the suggestion may take the form of an amendment laying down that since certain sections of the House are not present, the consideration of the Resolution may be postponed. In my opinion, such an amendment is not in keeping with the spirit of the times, because if we do not approve the first objective that we are placing before ourselves, before our country and before the world at large, our deliberations will become meaningless and lifeless, and the people will have no interest in our work. Our intention regarding the States must be early understood. We do desire that all sections of India should willingly participate in the future Indian Union but in what way and with what sort of government rests with them. The Resolution does not go into these details. It contains only the fundamentals. It imposes nothing on the States against their will. The point to be considered is how they will join us and what sort of administration they will have. I do not wish to express my personal opinion on the matter. Nevertheless I must say that no State can have an administration which goes against our fundamental principles or gives less freedom than obtaining in other parts of India. The Resolution does not concern itself with what form of government they will have or whether the present Rajas and Nawabs will continue or not. These things concern the people of the States. It is quite possible that the people may like to have their Rajas. The decision will rest with them. Our republic shall include the whole of India. If a part within it desires to have its own type of administration, it will be at liberty to have it.

I do not wish that anything should be added to or subtracted from the Resolution. It is my hope that this House will do nothing that may appear in Papers, so that, at no time, should people, who are concerned with these problems but who are not present here, be able to say that this House indulged in irregular talk.

I desire to make it clear that this Resolution does not go into details. It only seeks to show how we shall lead India to gain the objectives laid down in it. You will take into consideration its words and I hope you will accept them; but the main thing is the spirit behind it. Laws are made of words but this Resolution is something higher than the law. If you examine its words like lawyers you will produce only a lifeless thing. We are at present standing midway between two ears; the old order is fast changing, yielding place to the new. At such a juncture we have to give a live message to India and to the world at large. Later on we can frame our Constitution in whatever words we please. At present, we have to send out a message to show what we have resolved to attempt to

do. As to what form or shape this Resolution, this declaration will ultimately take, we shall see later. But one thing is, however, certain: it is not a law; but is something that breathes life in human minds.

I hope the House will pass the Resolution which is of a special nature. It is an undertaking with ourselves and with the millions of our brothers and sisters who live in this great country. If it is passed, it will be a sort of pledge that we shall have to carry out. With this expectation and in this form, I place it before you. You have copies of it in Hindustani with you. I will therefore not take more of your time to read it one way, or, I will, however, read it in English and speak further on it in that language.]*

I beg to move:

"(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith worship, vocation, association and action, subject to law and public morality; and

(6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to Justice and the law of civilised nations, and

(8) this ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

"Sir, this is the fifth day of this first session of the Constituent Assembly. Thus far we have laboured on certain provisional and procedural matters which are essential. We have a clear field to work upon; we have to prepare the ground and we have been doing that these few days. We have still much to do. We have to pass our Rules of Procedure and to appoint Committees and the like, before we can proceed to the real step, to the real work of this Constituent Assembly, that is, the high adventure of giving shape, in the printed and written word, to a Nation's dream and aspiration. But even now, at this stage, it is surely desirable that we should give some indication to ourselves, to those who look to this Assembly, to those millions in this country who are looking up to us and to the world at large, as to what we may do, what we seek to achieve, whither we are going. It is with this purpose that I have placed this Resolution before this House. It is a Resolution and yet, it is something much more than a resolution. It is a Declaration. It is a firm resolve. It is a pledge and an undertaking and it is for all of us I hope a dedication. And I wish this House, if I may say so respectfully, should consider this Resolution not in a spirit of narrow legal wording, but rather to look at the spirit behind that Resolution. Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion. And so, I cannot say that

this Resolution at all conveys the passion that lies in the hearts and the minds of the Indian people today. It seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future. It is in that spirit that I venture to place this Resolution before the House and it is in that spirit that I trust the House will receive it and ultimately pass it. And may I, Sir, also, with all respect, suggest to you and to the House that when the time comes for the passing of this Resolution let it be not done in the formal way by the raising of hands, but much more solemnly, by all of us standing up and thus taking this pledge anew.

The House knows that there are many absentees here and many members who have a right to come here, have not come. We regret that fact because we should have liked to associate with ourselves as many people, as many representatives from the different parts of India and different groups as possible. We have undertaken a tremendous task and we seek the co-operation of all people in that task; because the future of India that we have envisaged is not confined to any group or section or province or other, but it comprises all the four hundred million people of India, and it is with deep regret that we find some benches empty and some colleagues, who might have been here, absent. I do feel, I do hope that they will come and that this House, in its future stages, will have the benefit of the co-operation of all. Meanwhile, there is a duty cast upon us and that is to bear the absentees in mind, to remember always that we are here not to function for one party or one group, but always to think of India as a whole and always to think of the welfare of the four hundred millions that comprise India. We are all now, in our respective spheres, partymen, belonging to this or that group and presumably we shall continue to act in our respective parties. Nevertheless, the time comes when we have to rise above party and think of the Nation, think sometimes of even the world at large of which our Nation is a great part. And when I think of the work of this Constituent Assembly, it seems to me, the time has come when we should, so far as we are capable of it, rise above our ordinary selves and party disputes and think of the great problem before us in the widest and most tolerant and most effective manner so that, whatever we may produce, should be worthy of India as a whole and should be such that the world should recognise that we have functioned, as we should have functioned, in this high adventure.

There is another person who is absent here and who must be in the minds of many of us today--the great leader of our people, the father of our Nation (*applause*)--who has been the architect of this Assembly and all, that has gone before it and possibly of much that will follow. He is not here because, in pursuit of his ideals, he is ceaselessly working in a far corner of India. But I have no doubt that his spirit hovers over this place and blesses our undertaking.

As I stand here, Sir, I feel the weight of all manner of things crowding around me. We are at the end of an era and possibly very soon we shall embark upon a new age; and my mind goes back to the great past of India to the 5,000 years of India's history, from the very dawn of that history which might be considered almost the dawn of human history, till today. All that past crowds around me and exhilarates me and, at the same time, somewhat oppresses me. Am I worthy of that past? When I think also of the future, the greater future I hope, standing on this sword's edge of the present between this mighty past and the mightier future, I tremble a little and feel overwhelmed by this mighty task. We have come here at a strange moment in India's history. I do not know but I do feel that there is some magic in this moment of transition from the old to the new, something of that magic which one sees when the night turns into day and even though the day may be a cloudy one, it is day after an, for when the clouds move away.

we can see the sun later on. Because of all this I find a little difficulty in addressing this House and putting all my ideas before it and I feel also that in this long succession of thousands of years, I see the mighty figures that have come and gone and I see also the long succession of our comrades who have laboured for the freedom of India. And now we stand on the verge of this passing age, trying, labouring, to usher in the new. I am sure the House will feel the solemnity of this moment and will endeavour to treat this Resolution which it is my proud privilege to place before it in that solemn manner. I believe there are a large number of amendments coming before the House. I have not seen most of them. It is open to the House, to any member of this House, to move any amendment and it is for the House to accept it or reject it, but I would, with all respect, suggest that this is not moment for us to be technical and legal about small matters when we have big things to face big things to say and big things to do, and therefore I would hope that the House would consider this Resolution in this big manner and not lose itself in wordy quarrels and squabbles.

I think also of the various Constituent Assemblies that have gone before and of what took place at the making of the great American nation when the fathers of that nation met and fashioned out a constitution which has stood the test of so many years, more than a century and a half, and of the great nation which has resulted, which has been built up on the basis of that Constitution. My mind goes back to that mighty revolution which took place also over 150 years ago and to that Constituent Assembly that met in that gracious and lovely city of Paris which has fought so many battles for freedom, to the difficulties that Constituent Assembly had and to how the King and other authorities came in its way, and still it continued. The House will remember that when these difficulties came and even the room for a meeting was denied to the then Constituent Assembly, they took themselves to an open tennis court and met there and took the oath, which is called the Oath of the Tennis Court, that they continued meeting in spite of Kings, in spite of the others, and did not disperse till they had finished the task they had undertaken. Well, I trust that it is in that solemn spirit that we too are meeting here and that we, too, whether we meet in this chamber or other Chambers, or in the fields or in the market-place, will go on meeting and continue our work till we have finished it.

Then my mind goes back to a more recent revolution which gave rise to a new type of State, the revolution that took place in Russia and out of which has arisen the Union of the Soviet Socialist Republics, another mighty country which is playing a tremendous part in the world, not only a mighty country but for us in India, a neighbouring country.

So our mind goes back to these great examples and we seek to, learn from their success and to avoid their failures. Perhaps we may not be able to avoid failures because some measure of failure is inherent in human effort. Nevertheless, we shall advance, I am certain in spite of obstructions and difficulties, and achieve and realise the dream that we have dreamt so long. In this Resolution which the House knows, has been drafted with exceeding care, we have tried to avoid saying too much or too little. It is difficult to frame a resolution of this kind. If you say too little, it becomes just a pious resolution and nothing more. If you say too much, it encroaches on the functions of those who are going to draw up a constitution, that is, on the functions of this House. This Resolution is not a part of the constitution we are going to draw up and it must not be looked at as such. This House has perfect freedom to draw up that Constitution and when others come into this House, they will have perfect freedom too to fashion that constitution. This Resolution therefore steers between these two extremes and lays down only certain fundamentals which I do believe, no group or party and hardly any individual in India can dispute. We say that it is our firm and solemn resolve to have an Independent sovereign republic. India is bound to be sovereign, it is bound to be independent and it is bound to

be a republic. I will not go into the arguments about monarchy and the rest, but obviously we cannot produce monarchy in India out of nothing. It is not there. If it is to be an independent and sovereign State, we are not going to have an external monarchy and we cannot have a research for some local monarchies. It must inevitably be a republic. Now, some friends have raised the question: "Why have you not put in the word 'democratic' here. Well, I told them that it is conceivable, of course, that a republic may not be democratic but the whole of our past is witness to this fact that we stand for democratic institutions. Obviously we are aiming at democracy and nothing less than a democracy. What form of democracy, what shape it might take is another matter? The democracies of the present day, many of them in Europe and elsewhere, have played a great part in the world's progress. Yet it may be doubtful if those democracies may not have to change their shape somewhat before long if they have to remain completely democratic. We are not going just to copy, I hope, a certain democratic procedure or an institution of a so-called democratic country. We may improve upon it. In any event whatever system of Government we may establish here must fit in with the temper of our people and be acceptable to them. We stand for democracy, It will be for this House to determine what shape to give to that democracy, the fullest democracy, I hope. The House will notice that in this Resolution, although we have not used the word 'democratic' because we thought it is obvious that the word 'republic' contains that word and we did not want to use unnecessary words and redundant words, but we have done something must more than using the word. We have given the content of democracy in this Resolution and not only the content of democracy but the content, if I may say so, of economic democracy in this Resolution. Others might take objection to this Resolution on the ground that we have not said that it should be a Socialist State. Well, I stand for Socialism and, I hope, India will stand for Socialism and that India will go towards the constitution of a Socialist State and I do believe that the whole world will have to go that way. What form of Socialism again is another matter for your considerations. But the main thing is that in such a Resolution, if, in accordance with my own desire, I had put in, that we want a Socialist State, we would have put in something which may be agreeable to many and may not be agreeable to some and we wanted this Resolution not to be controversial in regard to such matters. Therefore we have laid down, not theoretical words and formulae, but rather the content of the thing we desire. This is important and I take it there can be no dispute about it. Some people have pointed out to me that our mentioning a republic may somewhat displease the Rulers of Indian States. It is possible that this may displease them. But I want to make it clear personally and the House knows. that I do not believe in the monarchical system anywhere, and that in the world today monarchy is a fast disappearing institution. Nevertheless it is not a question of my personal belief in this matter. Our view in regard to these Indian States has been, for many years, first of all that the people of those States must share completely in the freedom to come. It is quite inconceivable to me that there should be different standard and degrees of freedom as between the people in the States and the people outside the States. In what manner the States will be Parts of that Union that is a matter for this House to consider with the representatives of the States. And I hope in all matters relating to the States, this House will deal with the real representatives of the States. We are perfectly willing, I take it, to deal in such matters as appertain to them, with the Rulers or their representatives also, but finally when we make a constitution for India, it must be through the representatives of the people of the States as with the rest of India. Who are present here. (*Applause*). In any event, we may lay down or agree that the measure of freedom must be the same in the States elsewhere. It is a possibility and personally I should like a measure of uniformity too in regard to the apparatus and machinery of Government. Nevertheless, this is a point to be considered in co-operation and in consultation with the States. I do not wish, and I imagine this Constituent

Assembly will not like, to impose anything on the States against their will. If the people of a particular State desire to have a certain form of administration, even though it might be monarchical, it is open to them to have it. The House will remember that even in the British Commonwealth of Nations today, Eire is a Republic and yet in many ways it is a member of the British Commonwealth. So, it is a conceivable thing. What will happen, I do not know because that is partly for this House and partly for others to decide. There is no incongruity or impossibility about a certain definite form of administration in the States, provided there is complete freedom and responsible Government there and the people really are in charge. If monarchical figure-heads are approved by the people of the State, of a particular State, whether I like it or not, I certainly will not like to interfere. So I wish to make it clear that so far as this Resolution or Declaration is concerned, it does not interfere in any way with any future work that this Constituent Assembly may do, with any future negotiations that it may undertake. Only in one sense, if you like, it limits our work, if you call that a limitation, i.e., we adhere to certain fundamental propositions which are laid down in the Declaration. Those fundamental propositions, I submit, are not controversial in any real sense of the word. Nobody challenges them in India and nobody ought to challenge them and if anybody does challenge, well, we accept that challenge and we hold our position. (*Applause*).

Well, Sir, we are going to make a constitution for India and it is obvious that what we are going to do in India, is going to have a powerful effect on the rest of the world, not only because a new free independent nation comes out into the arena of the world, but because of the very fact that India is such a country that by virtue, not only of her large size and population, but of her enormous resources and her ability to exploit those resources, she can immediately play an important and a vital part in world affairs. Even today, on the verge of freedom as we are today, India has begun to play an important part in world affairs. Therefore, it is right that the framers of our Constitution should always bear this larger international aspect in mind.

We approach the world in a friendly way. We want to make friends with all countries. We want to make friends in spite of the long history of conflict in the past, with England also. The House knows that recently I paid a visit to England. I was reluctant to go for reasons which the House knows well. But I went because of a personal request from the Prime Minister of Great Britain. I went and I met with courtesy everywhere. And yet at this psychological moment in India's history when we wanted, when we hungered for messages of cheer, friendship and co-operation from all over the world and more especially from England, because of the past contact and conflict between us, unfortunately, I came back without any message of cheer, but with a large measure of disappointment. I hope that the new difficulties that have arisen, as every one knows, because of the recent statements made by the British Cabinet and by others in authority there, will not come in our way and that we shall yet succeed in going ahead with the co-operation of all of us here and those who have not come. It has been a blow to me, and it has hurt me that just at the moment when we are going to stride ahead, obstructions were placed in our way, new limitations were mentioned which had not been mentioned previously and new methods of procedure were suggested. I do not wish to challenge the bona fides of any person, but I wish to say that whatever the legal aspect of the thing might be, there are moments when law is a very feeble reed to rely upon, when we have to deal with a nation which is full of the passion for freedom. Most of us here during the Past many years, for a generation or more have often taken part in the struggle for India's freedom. We have gone through the valley of the shadow. We are used to it and if necessity arises we shall go through it again. (*Hear, hear*). Nevertheless, through all this long period we have thought of the time when we shall have an opportunity not merely

to struggle, not merely to destroy, but to construct and create. And now when it appeared that the time was coming for constructive effort in a free India to which we looked forward with joy, fresh difficulties are placed in our way at such a moment. It shows that, whatever force might be behind all this, people who are able and clever and very intelligent, somehow lack the imaginative daring which should accompany great offices. For, if you have to deal with- any people, you have to understand them imaginatively; you should understand them emotionally; and 'of course, you have also to understand them intellectually. One of the unfortunate legacies of the past has been that there has been no imagination in the understanding of the Indian problem. People have often indulged in, or have presumed to give us advice, not realising that India, as she is constituted today, wants no one's advice and no one's imposition upon her. The only, way to influence India is through friendship and co-operation and goodwill. Any attempt at imposition, the slightest trace of patronage, is resented and will be resented. (Applause). We have tried, I think honestly, in the last few months in spite of the difficulties that have faced us, to create an atmosphere of co-operation. We shall continue that endeavour. But I do very much fear that that atmosphere will be impaired if there is not sufficient and adequate response from others. Nevertheless, because we are bent on great tasks, I hope and trust, that we shall continue that endeavour and I do hope that if we continue, that we shall succeed. Where we have to deal with our own countrymen, we must continue that endeavour even though in our opinion some countrymen of ours take a wrong path. For, after all, we have to work together in this country and we have inevitably to co-operate, if not today, tomorrow or the day after. Therefore, we have to avoid in the present anything which might create a new difficulty in the creation of that future which we are working for. Therefore, so far as our own countrymen are concerned, we must try our utmost to gain their co-operation in the largest measure. But, co-operation cannot mean the giving up of the fundamental deals on which we have stood and on which we should stand. It is not co-operation to surrender everything that has given meaning to our lives. Apart from that, as I said, we seek the co-operation of England even at this stage which is full of suspicion of each other. We feel that if that co-operative is denied, that will be injurious to India, certainly to some extent probably more so to England, and to some extent, to the world at large. We have just come out of the World War and People talk vaguely and rather wildly of new wars to come. At such a moment this New India is taking birth-renascent, vital, fearless. Perhaps it is a suitable moment for this new birth to take place out of this turmoil in the world. But we have to be cleared at this moment, we, who have this heavy task of constitution building. We have to think of this tremendous prospect of the present and the greater prospect of the future and not get lost in seeking small gains for this group or that. In this Constituent Assembly we are functioning on a world stage and the eyes of the world are upon us and the eyes of our entire past are upon us. Our past is witness to what we are doing here and though the future is still unborn, the future too somehow looks at us, I think, and so, I would beg of this House to consider this Resolution in this mighty prospect of our past, of the turmoil of the present and of the great and unborn future that is going to take place soon. Sir, I beg to move. (*Prolonged Cheers*).

Mr. Chairman: Shri Purushottam Das Tandon will second the Resolution.

The Hon'ble Shri Purushottam Das Tandon (United Provinces: General): ***[Mr. Chairman,** I fully support the Resolution moved by my brother Pandit Jawahar Lal Nehru. Today's session of the Constituent Assembly is an historical occasion. After centuries such a meeting has once more been convened in our country. It recalls to our mind our glorious past when we were free and when assemblies were held at which the Pandits met to discuss important affairs of the country. It reminds us of the Assemblies of age of

Introduction*

Outline of a Political Theory of the Indian Constitution

Rajeev Bhargava

In 1950, for the first time in their history, a diverse collection of individuals and groups became the people of a single book, one that reflects their commitment to protect their mutual rights and which articulates a collective identity. This volume deals with some aspects of that unique document.

I

WHY AN INDIAN POLITICAL THEORY?

Our collective endeavour and quite certainly one of my own primary motivations behind this seminar was ambitious: to try and resuscitate political theory in India (an objective I shared with many of the participants, particularly Bhikhu Parekh) and to eventually evolve a form of political theory that is suitable to us and which simultaneously opens up Western political theory as it exists today. This is neither insignificant nor easy. A cursory glance at contemporary political theory is sufficient to show that though some of its content may have universal reach, its form remains parochial. Political philosophy as it exists today takes little inspiration from non-Western societies, hardly refers to their problems

* I would like to thank my students Aryama, E. Arvind, and Jaby Mathew, as well as Tani Sandhu and Anthony Stephen, for their help in preparing the introduction.

and takes little notice of how cross-cultural issues imbibe distinct inflections or internal colourations at different places. The examples discussed in political philosophy hardly ever relate directly or immediately to the specific context of these societies. For all the talk of pluralism and multiculturalism in Western political theory, there is barely a mention of how these issues arise or are tackled in places such as India. Worse still, political philosophers show little curiosity about the experience of non-Western societies.

Take the philosophical debate on affirmative action. The Indian experience of this important issue is older than that of most countries, preceding by several decades the US experience, but the best articles written on this subject fail to take the Indian experiment into account. The story of other issues is no different. How can we not conclude that Western political theory remains Eurocentric or even Anglo-Saxon? This is not to say that the entire responsibility for this state of affairs rests with Western political theorists. Indian thinkers have contributed in no small measure to this state of affairs. We remain insulated from the experience of other Asian and African countries and have unthinkingly pursued an agenda shaped entirely by the concerns of a few Western countries—mainly Britain, the US, France, and maybe Germany.

My remarks above should not give rise to a misunderstanding. I am *not* suggesting that we must from now on ignore mainstream Western political theory; such a move would be suicidal for Indian political theorists. At any rate it is not a meaningful option before us. However, the almost exclusive attention bestowed on a small number of Western countries must surely be a matter of concern and self-reflection. Our blindness to other European countries is shocking. Consider the Belgium experience on the issue of language. India and Belgium can certainly learn a thing or two from one another about deep cultural differences that emanate from linguistic diversity. But can we think of a single book that discusses the comparative experience of linguistic diversity in India and Belgium? Has political theory been even faintly affected by a comparison of the experiences of these two countries? Or take the case of Switzerland. How many of us are aware of the interface and overlap of religion and language in Switzerland and their impact on Swiss politics. Quite clearly, the West towards which we remain almost permanently oriented comprises a handful of hegemonic countries.

Having assumed responsibility for the somewhat dismal state of Indian political theory and admitted a degree of collective guilt, I do not wish

to let Western political theorists off the hook easily. I honestly believe that aspiring political philosophers anywhere in the world must take a crash-course in Indian politics, society, and culture. Furthermore, internationally known political theorists should consider a mandatory sabbatical in an Indian university to really come to grips with the deep diversity and the nearly incommensurable but co-existing worldviews and clusters of values that are an integral part of the daily life of India. Debates around group rights, self-determination, differentiated citizenship, gender equality, secularism, and constitutionalism will surely be considerably enriched by the Indian experience. A genuine search for trans-cultural ideals is impossible without such cross-references. The search for alternatives, a hallmark of the Centre for the Study of Developing Societies (CSDS), must also have an impact on political theory in India.

POLITICAL THEORY AND THE CONSTITUTION

It might now be asked why in order to revive interest in political theory, should we turn to the study of law and the Constitution. It is not my argument that only a study of the Constitution can refurbish political theory in India. However, a study of the Constitution would be particularly useful for two important reasons. First, debates in the Constituent Assembly are fascinating, rich in detail, and provide an extremely nuanced public discussion of issues that are the staple diet of political theory anywhere in the world. I cannot think of any other forum in which extensive political deliberation and argument over procedural and substantive issues relating to Indian society can be found. For one interested in reviving Indian political theory, the Constitution and the debates which preceded it are the most obvious sites to go.

This is obvious now, but only in hindsight, for the political theory of the Indian Constitution is among the most scandalously neglected topics. This need not have been the case. After all, in the period before Independence and in its immediate aftermath, the teaching of politics and law complimented one other. Not only was the study of law an integral part of the study of the political institutions, a detailed study of the Constitution was considered absolutely vital for the understanding of politics. But this was not the case after the 1960s. The focus had shifted from the study of political and legal institutions to large political processes and social movements. To be sure this was partly legitimate. But the pendulum had swung decisively in the more reductive direction. The internal logic and dynamics of constitutional law was suppressed and

replaced by loose, speculative generalizations about social structures as if the nature of the legal system could simply be read off the social structure. By the late 1960s, law and political science were mutually estranged. The study of constitutions may not have been wholly neglected, but all the excitement centred on broadly conceived social structures and the study of constitutions gradually came to be considered boring and pedantic.

This was not the only problem. As current academic fashions began to see law as an ephiphenomenon of social relations and to view legal institutions as expressions of particular social interests, constitutions themselves came to be seen as embodiments of elite interests and strategies, as mere reflections of the interests of the propertied classes, indicative at best of a compromise between landlords and the bourgeoisie. If I am not mistaken, the otherwise admirable work of Shibani Chaubey and Shobhan Lal Dutta Gupta falls in this category.

The immediate consequence of this radically reductive treatment was that constitutions were rarely seen as moral texts, to be understood and interpreted in terms of values and ideals. To normatively inclined political theorists this was a disappointing outcome, particularly so because of their penchant for seeing moral values, ideals, conceptions of the good life on almost every inch of the social landscape. So the unchallenged reign of explanatory social science and legal positivism saw the systematic neglect of moral philosophy, normative political theory, liberalism, and the study of constitutional law. A distrust or unfamiliarity with normative concepts, the marginal place of political theory in social science, the inadequate manner in which political theory was itself imagined, all ultimately led to a blindness towards the moral resources of the Constitution. To students who naturally harbour high ideals at their age, a study of constitutions abstracted from ethical values could only appear pointless and tiresome, especially if it was further reduced to a tardy examination of its formulaic articles.

In short, it is important to see the Constitution as a moral document, as embodying an ethical vision. This is not to say that germinal work on the Indian Constitution is altogether absent. To begin with, there are historical studies that focus on the context that led to the framing of the Indian Constitution. Then there are politico-legal readings, somewhat technical and narrower in focus, that describe the character of the Indian polity, including the structures of governance. The work of Jennings¹ and C.H. Alexandrowicz² comes immediately to mind in this regard.

Other works see their defining characteristic in terms of an attempt to do both. Granville Austin³ explicitly makes the claim that he is writing political history.

Though of very high calibre, these works are conspicuously non-theoretical and relatively indifferent to the moral concerns in the Constitution. True, there are exceptions. One scholar who immediately comes to mind in this regard is Upendra Baxi (a contributor to this volume), whose work was at once legal, political, and theoretical. In his contribution here, inspired by what he calls the Kabyle-Bourdieu perspective in contemporary social theory, he introduces an ethnographic approach to constitutions and attempts to make it relevant to comparative constitutional theory. However, even he would agree that most available work on the Indian Constitution is non-philosophical and under-emphasizes its normative potential. A political-theoretic approach to the Indian Constitution is therefore urgently required.

When I speak of the absence of a political-theoretic perspective on the Indian Constitution, I have three things in mind. First, existing work has insufficiently elaborated the conceptual structure of the Constitution and has shown little interest in the possible meanings or detailed analysis of frequently deployed terms such as 'rights', 'citizenship', 'minority', and 'democracy'. Furthermore, there is little attempt to construct a coherent vision of society and polity conditional upon an interpretation of the key concepts of the Indian Constitution.

The second weakness is that existing work on the Constitution *inadequately grasps the structure of ideals embedded in the Constitution*. I am not suggesting that the best work on the Constitution is silent on the values it upholds; nonetheless, it fails to properly articulate or provide a critical interpretation of these values. For example, Austin deploys the distinction between negative and positive liberty drawn by Isaiah Berlin and makes the useful point that the Indian Constitution is guided as much by the second as by the first. But this is where his discussion of normative values ends. My claim is that we need to move much further in this direction.

My third and final point is that the Indian Constitution must be read in conjunction with the Constituent Assembly Debates in order to refine and raise to a higher theoretical plane the *justification* of values that undergird it. A philosophical treatment of a value is woefully incomplete if a detailed justification for it is not provided. When the framers of the Constitution chose to guide Indian society and polity by a particular set

of values rather than others, they could not have done so without a set of reasons, many of which are not made properly explicit. Howsoever sketchy and incomplete their arguments may have been, it is difficult to imagine that they did not exist. Political philosophers must articulate and refine these arguments so that an informed and meaningful debate on the character and value of the Indian Constitution may exist in future. I believe all the contributions in this volume go a long way towards not only making the competing arguments in the Constituent Assembly more explicit than they originally were but also in the direction of providing them a theoretical quality with as little distortion as possible.

WHAT DOES A POLITICAL-THEORETIC READING OF THE CONSTITUTION ENTAIL?

None of this is possible unless we begin a study of the Constitution with a great deal of hermeneutic charity. Thus, the first task before us is to ask just what it is that the Constitution is trying to say, to identify the broadest possible range within which all of us, coming as we do from diverse background and different presuppositions, try to fix the meaning of the text. We must not only identify the diverse overall meanings of the text but also its variable local meanings, the different ways in which each article specifies the meaning of a particular cluster of value terms. In the volume, a detailed discussion of equality is undertaken by Ashok Acharya. Upendra Baxi and Valerian Rodrigues elaborate the idea of citizenship. Sanjay Palshikar focuses on ideas of property in the Constitution. Suhas Palshikar outlines two distinct notions of the state, one which embodies the distinctly liberal idea of neutrality and the other which is more perfectionist and in his terms instrumentalist. He also speaks of different conceptions of democracy and welfare found in the Constitution. Rochana Bajpai discusses the notion of minority rights in great detail. Similar discussions of individual and group rights, procedural and substantive conceptions of democracy, and conceptions of negative and positive liberty are available in other contributions to this volume.⁴

We also need to ask questions that occur routinely to political philosophers. To take a random example, does the Constitution recognize all moral rights possessed by citizens? If not, which of them does it recognize? Are these rights only against the state or are they also against other fellow citizens? Must they be conceived as rights against anyone at all? What importance does the Constitution accord to the rights that it recognizes? Is the section on duties consistent with the section on

Fundamental Rights? In India, rights are often posed against duties, without adequate awareness that duties are a necessary correlate of rights. If this is indeed the case and if a tension between duties and rights nonetheless continues to exist, then what explains this tension? Perhaps it arises because the Constitution prescribes duties over and above rights? Or is the Indian Constitution predominantly rights-based? Is its liberalism compromised to the extent that it is not predicated on rights? What justifies this possible surplus? Does the Constitution support liberty, equality, and fraternity in equal measure? If so, how does it balance them? And what of power? Is the Constitution a framework for balancing liberty against power?

Also pertinent is the question concerning the overall character of the Constitution. Suppose that one says that broadly speaking, it is liberal-democratic. Is this sufficient? Probably not, because to many the real issue has to do with the interpretation and elaboration of the precise form of the liberal democracy enunciated by it, and more importantly the many ways in which it meaningfully challenges every single feature of liberal democracy as conventionally understood. If the challenge is successful, how much does it go in a communitarian direction? Or should it be read as anticipating, even espousing, a model of deliberative democracy along lines argued in the American context by political and legal theorists such as Cass Sunstein or Dennis Thompson and Amy Gutmann?

More to the point, some of the debates in the Constituent Assembly reflect a tussle between at least five competing visions. Two of these, the social-democratic vision of Nehru and the liberal-democratic Ambedkarite one, are closely related. The third is the non-modernist, quasi-communitarian vision of Gandhi, distinctly at odds with the other two but still inclusive. A fourth, represented by persons such as K.T. Shah, was radically egalitarian and came closest to the vision of the Left; and the fifth is what we have now come to call the Hindutva ideology. The articulation of these visions is the concern of several essays such as those by Peter deSouza and Thomas Pantham. But it constitutes the very core of Bhikhu Parekh's contribution to this volume.

However, Parekh focuses on only two of these visions. Parekh views the Constitution as a statement of national identity. The first important constituent of this identity is that it is self-determined. The India envisaged by the Constitution belongs to its people. Second, it is both a civilization and a nation-state. Third, it is committed to principles of

need to evaluate the comparative worth of different interpretations of the same ideal embodied in different political institutions. Since an ideal acquires considerable, if not supreme, authority once it gets expressed in the Constitution, it must also be used, at least occasionally, to arbitrate in a conflict of interpretation over values. I believe that one significant reason for taking the Constitution seriously is that it can do this job of arbitration.

Let me give two examples. The first is the relationship between individual and group rights. On the one hand, there is the view that political discourse in India is dominated by community rights. When the language of rights arrived in India and was adopted in an Indian context charged with strong community values, it got detached from its individualist moorings and was applied to communities. On the other hand, another view exists that a characteristically un-Indian Constitution imposed an individualist morality on a community-oriented Indian society and did not care even to recognize group rights. Does the Constitution prioritize individual rights or group rights? Even a cursory glance of the Constitution dispels both these misinterpretations. In India, both sets of rights were recognized and no clear guideline was provided for just when one is to override the other, and no general criteria were provided to resolve conflicts between the divergent types of rights. An attempt was made instead to balance them, with the scales tilting marginally in favour of individual rights.

The second example is that of secularism. In India a fierce debate has raged over the value of secularism, but both those who support and those who oppose it assume that it is modelled exactly on the American variant, or rather on a particular interpretation of the American variant in which secularism is identified with a strict wall of separation between religion and state for the sake of individualistically construed values of freedom and equality. However, a close reading of the Constitution gives a different picture. Secularism in India has meant neither the mutual exclusion of religious and state institutions nor strict neutrality of the state with respect to all religious groups. Rather, it has meant what I have called principled distance, a value-based strategy that presupposes disestablishment and that enjoins the state to intervene in or abstain from such interventions depending upon whether specific values integral to the secular ideal are advanced.⁶ Moreover, intervention does not always mean restrictions on religious activity but also includes support for them. Further, many of these values are also given a non-individualist

interpretation. For example, religious liberty is also interpreted to mean the autonomy for groups to maintain their own religious practices. Another value—peace—is also conceived as a relation between communities, as communal harmony, and not in individualist Hobbesian terms. What is true of the ideas of rights and secularism may also hold for other concepts. In short, there is good reason to believe that attending closely to the Constitution would dispel misunderstandings of some of our key values and ideals.

In her essay for this volume, Gurpreet Mahajan appears to agree with my view, but others do not. For example Pratap Bhanu Mehta argues that the state's professed objective of respecting religion, by restraining itself from not interfering in it, is persistently at odds with its other objective of reforming it. Implicit in the idea of reform is disrespect for at least some of its features. The courts evade this dilemma by making a somewhat forced distinction between the essential and inessential features of religions and by taking recourse to the claim that its reformist measures are confined to a religion's inessential features—that by leaving the core of a religion untouched by intervention, no disrespect is shown to religion. This view is different from my own idea of principled distance, which embodies a critical respect towards religion. An appeal to the Constitution and the debates which preceded it might help decide whether separation in India was ever intended to mean the exclusion of religion or a principled distance towards it.

WHY STUDY THE CONSTITUENT ASSEMBLY DEBATES?

It might be agreed that we must conduct a philosophical and moral reading of the Constitution. But it might then be asked why must a study of this kind be accompanied by an examination of the debates in the *Constituent Assembly Debates*. Almost all the contributors to this volume, with the exception of Baxi and Mehta, refer to these debates. And only Nigam, at least partially, questions the validity of doing so. Is Nigam on the right track? Is it pointless looking backwards? Why risk committing the originalist fallacy? It may well be appropriate for the historian of legal and political ideas to look for original intentions. But why should the contemporary political theorist be interested in them? Why not take account of changed circumstances and redefine the normative function of the Constitution?

Broadly speaking, I agree with a view such as Dworkin's that judges must not transform themselves into conceptual historians who are hell-

bent on rediscovering the world of the original framers and who evaluate current social practices in terms of laws as they were in the minds of those who first made them. We must abandon this project not because original intentions cannot be captured—to a large extent they can. However, current legal practice cannot be tied to original intentions for the simple reason that both the language and the world are likely to have radically transformed since the Constitution was written. In America, where the Constitution was written in late eighteenth century, it is surely absurd to apply values and standards of that era to the twenty-first century. However, in India, the world of the original framers and our own world may not be that different. Sixty years is a long time under conditions of modernity but not long enough to conceptually demarcate a society into two radically different worlds. I for one do not hold the view that our conceptions, values, and ideals have transformed so deeply to have separated us from the world of the Constituent Assembly. A history of our Constitution is still very much a history of the present.

Moreover, we may by now be suffering from amnesia about the real point underlying several of our legal and political practices, and have lapsed into a state of inarticulacy about why they are valued or justified, simply because somewhere down the road we began to take them for granted. These reasons have now slipped into the background and are screened off from our consciousness even though they continue to be the animating principle of current practices. This forgetting is harmless when the going is good. But when these practices are challenged or threatened, a sustained inarticulacy about their underlying purpose and justificatory reasoning can damage these practices even more. This can be prevented only when we undo this forgetting and retrieve the original articulations that may be much clearer and sharper precisely because they were achieved amidst debate and controversy and in much harder times. Consider the partition of India and the articulation of secularism in its immediate aftermath. The underlying point of secularism must have been articulated with a greater deal of perspicacity at that time than is possible even in this current phase of communalization. In short, to get a handle on current constitutional practices, to grasp their value and meaning, we may have no option but to go back in time to the Constituent Assembly Debates and perhaps even further back to the colonial era.

I have tried to unravel the complex motivations behind the seminar in which the papers in this volume were presented and to explain why a

historical, normative, and political theory enquiry about the Constitution must begin collectively and earnestly in India. This idea of initiating such a process began to stir in the late 1980s but it was only in the early 1990s that some of us began to think seriously about it. The intellectual urgency for this and the discontent about the absence of a significant tradition of legal and political philosophy in India found expression at the end of a seminar organized on minority rights by Dhiru Bhai Sheth in Simla in November 1994. I still remember how for two wonderful hours on a car journey from Simla to Kalka we discussed the virtues and faults of the Indian Constitution and the urgency to explore its modern and liberal-democratic, as well as its culturally inflected, potential. It was then decided that a study week on the philosophy on the Indian Constitution should be proposed to the Institute of Advanced Study. I took upon myself the task of writing a brief proposal on this, but did nothing about it for the next few years.

Yet, it is a slight exaggeration to say that I did *nothing* about it. I may not have put down much about it on paper, but I talked freely and frequently about it. Potential participants were spoken to and the possibility of holding a workshop explored. Oxford University Press showed considerable interest in the topic. There was even talk of inaugurating a major project on the Constitution on the eve of 50 years of the birth of Constituent Assembly of India. That was in December 1996. But nothing happened thereafter. Then, as we neared 2000, a seminar was planned to commemorate 50 years of the Indian republic. This was discussed with friends but once again not put down on paper. Meanwhile others, better endowed in terms of efficiency and secretarial assistance, held seminar after seminar on the Indian Constitution. I even participated wistfully in some of them. In the spring of 2000, as a C.R. Parekh fellow at the CSDS, I was given the mandate and the finances to organize a seminar. The theme was already before me. And thus, first the seminar and then the book began to take definite shape.

II

WHY DO WE NEED CONSTITUTIONS?

Why did the leaders of the movement for national independence adopt a constitution? What was the point of binding ourselves with a constitution? Why do people have written constitutions anyway?

It is widely agreed that one reason for having constitutions is the need to restrict the exercise of power. Modern states are excessively powerful, and are believed to have a monopoly of force and coercion. What if the institutions of such states fall into the wrong hands, who then abuse this power? Many believe that this is not just a hypothetical possibility but inherent in the exercise of power and therefore in the nature of states. Even if these institutions were created for our safety and well-being, they can easily turn against us. Experience of state power the world over shows that most states are prone to harming the interests of at least some individuals and groups. If so, we need to draw the rules of the game in such a way that this tendency of states is continuously checked. Constitutions provide these basic rules and therefore prevent states from turning tyrannical.

This traditional reason is not the only one supporting constitutions. The framers of our Constitution were deeply aware of three other reasons, two of which were already known but had been systematically underemphasized and a third which they themselves helped shape. Traditionally, constitutions were meant to control the power of the state so as to enable people to live decently. But this idea presupposes an unbridgeable distance between people and the state. It assumes a powerless people who need the help of law to control state power. But what if people themselves have power? What if the power of the state comes from an original power that resides in the demos, the people? Why then would we need constitutions? Democracy, it might be argued, is an alternative to constitutionalism. State power might be limited not by some higher law but by the power of the people.

This is an attractive but flawed idea. It is flawed because in practice, power never really resides in all the people but largely in the majority. The tyranny of the non-democratic state of which individuals might be victims is replaced in democracies by the tyranny of the majority. If so, we need constitutions to check the tyranny of a majoritarian, democratic state. We need constitutions because they give us laws to protect not only individuals but also minority groups.

Moreover, constitutions are required not only to protect vulnerable individuals and groups but virtually everyone against human vulnerability in general. It is important not to forget that human beings are fallible, that they sometimes forget what is good for them in the long run, and that they yield to temptations which bring them pleasure now but pain later.⁷ It is not unknown for people to acquire the mentality of the mob

and act on the heat of the moment only to rue the consequences of the decision later. By providing a framework of law culled over from years of collective experience and wisdom, constitutions prevent people from succumbing to currently fashionable whims and fancies. Constitutions anticipate and try to redress the excessively mercurial character of everyday politics. They make some dimensions of the political process beyond the challenge of ordinary politics. The framers of the Indian Constitution were familiar with each of these three reasons for having a constitution. They understood that constitutions are needed both to check state power and majority tyranny and also to control the destabilizing swings generated by popular passion.

So far we have spoken of what constitutions dis-enable us from doing. However, constitutions also provide us with peaceful, democratic means with which to bring about profound social transformation. Moreover, for a hitherto colonized people, constitutions announce and embody the first real exercise of political self-determination. Nehru understood both these points well. The demand for a Constituent Assembly, he claimed, represented a collective demand for full self-determination, as only a Constituent Assembly of elected representatives of the Indian people had the right to frame India's Constitution, without external interference. Second, he argued, the Constituent Assembly is not just a body of people or a gathering of able lawyers. Rather, it is a 'nation on the move, throwing away the shell of its past political and possibly social structure, and fashioning for itself a new garment of its own making.' The Indian Constitution was designed to break the shackles of traditional social hierarchies and to usher in a new era of freedom, equality, and justice. Inscribed in the intentions of the framers of the Indian Constitution was the potential of a breakthrough in constitutional theory: constitutions exist not only to disenable people in power but also to empower those who traditionally have been deprived of it. Constitutions give vulnerable people the power to achieve collective good.

III

THE INDIAN CONSTITUTION

ACHIEVEMENTS

First, it is no mean achievement to have committed ourselves to universal franchise, especially amidst widespread belief that traditional hierarchies

in India are congealed and more or less ineliminable and when the right to vote has only recently been extended to women and to the working class in stable Western democracies. Franchise in India was restricted before the adoption of the Constitution. Citizenship was based on what Dahl calls 'the contingent principle of inclusion', that is, restricted to only those qualified to rule and who could claim citizenship.⁸ Citizenship in the Constitution, is based instead on the categorical principle of inclusion: to be an adult member in the society is sufficient qualification for full citizenship of the state. Rights of citizenship, including the right to vote, were justified by exclusive reference to this principle. In a society ravaged by persistent social inequalities and marked by a subordinate role for women within the patriarchal system, how could this come about?

I offer three possible reasons. The first is the influence of liberal individualist ideas in which the self is constituted not by a place within the group arena, but in abstraction from it. (Such ideas are unlikely to have influenced those who played a key role in public deliberations.⁹) A second reason may well have to do with the less explicit, unconscious motivations of political actors. In a country dominated by poor peasants belonging either to backward castes or falling altogether outside the caste structure, a restricted franchise would certainly have meant their exclusion from the political process. In a numbers-dominated democratic system, this could have significantly weakened the bargaining power of Hindus. I remain unpersuaded by this strongly communitarian, almost communal, argument. A third reason might have to do with the growth of the idea of the nation. It is more or less integral to the concept of the nation that members who comprise it are equal. If so, and if the idea of democracy has been accepted, then no member of the said nation can be excluded from the exercise of franchise. This response needs further examination.

In 1916, 19 members of the Imperial Legislative Council, including Madan Mohan Malaviya, Tej Bahadur Sapru, and Mohammad Ali Jinnah, sent a signed memorandum to the viceroy, outlining a scheme of self-government for India which claimed that without self-government, Indians in India feel that 'though theoretically they are equal subjects of the king, they hold a very inferior position in the British empire.'¹⁰ The memorandum continued:

Humiliating as this position of inferiority is to the Indian mind, it is almost unbearable to the youth of India whose outlook is broadened by education

and travel in foreign parts where they come in contact with other free races. In the face of these grievances and disabilities, what has sustained the people is the hope and the faith inspired by promises and assurances of fair and equal treatment by the sovereign.¹¹

The signatories argued that to regain self respect the Indian people needed not merely good government or efficient administration but a government 'that is acceptable to the people because it is responsible to them'.

The memorandum to the viceroy reflects how Western modernity was lived from the inside by the elites of a conquered culture. A traditionalist refusal of Western modernity would have entailed a turning away from popular rule, but Indian elites embraced the idea and complained, in the name of that very idea, that to be denied self-rule is to be demeaned, to be diminished in one's own eyes. Moreover, this loss of self-esteem was a shared experience—the experience of humiliation was irreducibly collective. The emotional power of nationalism is derived from this register of collective pride and humiliation.¹² Therefore, self-respect could only be restored and felt collectively. Self-government had to be a collective matter too.

But how large must this collectivity be? Should it be restricted to the aspiring elite, denied full access but already on the margins of power? It is of course true that a link exists between nationalism and self-governance and the nationalist demand is indistinguishable from the demand for self-governance, but why should the nation include the entire people? Why could it not be restricted to a small elite? Why should everyone govern or why should some govern in the name of everyone? Why have universal franchise? Why must nationalism be almost identical to democracy?

One possible answer to these questions may be that the particular form of community known as a nation is a functional requirement of a distinctively modern society where social ranks, no longer fixed and immutable, are up for grabs; and the smooth operation of which requires flexible, context-free agents who not only move freely across physical and social space but communicate easily with each other. This freedom from social rank and content brings with it the idea of symmetrical (equal) relations as well as a degree of individualization. It follows that ideas of equality and individualism go hand in hand with the idea of a nation. The making of a nation, therefore, is the process of binding together a

particular kind of people, those who have begun more or less to see themselves as individuals and relate to each other as equals. The functional tie envisaged by this account assures that no particular temporal sequence need be followed; a nation-state may precede or succeed a modern society of individualized and equalized human beings.

If what is said above is true, then we have at least some explanation for why no one within the social order can really be left out of the nation. If social hierarchy and strongly particularized identities cease to matter, then no reason exists to exclude anyone (or so it appears, because nationalism does bring with it its own forms of strong exclusions). Liah Greenfeld has helpfully drawn our attention to a change in the semantics of the term 'nation'.¹³ In the late thirteenth century, the term 'nation' meant a community of opinion where the constituents of the said community were representatives of cultural and political authority. In short, a nation was a group of social elites. In the sixteenth century, however, the meaning of the term 'nation' changed: it began to be applied to the entire population of a country and became synonymous with the word 'people'. This change in meaning signalled the symbolic elevation of the rabble into an elite, its movement from the wings on to centre stage, from irrelevance to relevance. Henceforth, every member of the population could partake of this superior, elite quality. The transformation of a rabble into a people and of a people into an elite presupposes a profound change in the way societies are imagined—from hierarchical communities to networks consisting of free and equal individuals.

This effected yet another change; in the self-understanding of the nation or the people, the nation exists prior to and independent of the political organization of society, which has the power to give itself a constitution. I have already touched upon the background which makes this possible and which includes, among other things, complex constituents such as a particular frame of time and of common action, and I shall therefore not spend much time on it. The important point I want registered is that the idea of the basic rules of society as stemming from the common action of a people, of a nation, is identical with the democratic idea, for which sovereignty is located within a people, each of whom is fundamentally equal to one another. As Greenfeld puts it, 'Nationalism was the form in which democracy appeared in the world, contained in the idea of the nation as a butterfly in a cocoon.'¹⁴

This is precisely what appears to have happened in India. Once the idea of a nation took root among the elite, a conception of a political

order growing out of the will of every single member of society, and eventually the idea of democratic self-government, could not but have followed. The idea of universal franchise lay securely within the heart of nationalism. In the Constitution of India Bill (1895), the first non-official attempt at drafting a constitution for India, the author (probably Tilak) did not contest that the 'sovereign power of India is vested in the sovereign of Great Britain and Ireland, the supreme head of the Indian nation' or challenge the authority of the viceroy as representative of the sovereign. He did, though, declare at the same time that every citizen—that is, anyone born in India—had a right to take part in the affairs of the country and to be admitted to public office, and therefore hoped that 'under the benign government of the British', Indian citizens would 'in future enjoy and use the rights proposed to the greatest advantage of their country and the British government.'¹⁵

The Motilal Nehru Report (1928) reaffirms this conception of citizenship. Section 9 of the report reiterates that every person of either sex who has attained the age of 21 is entitled to vote for the House of Representatives or Parliament. It defines the word citizen as any person who is born, or whose father is either born or naturalized, within the territorial limits of the commonwealth and has not been nationalized as a citizen of any other country.¹⁶ The Motilal Nehru Report is unequivocal about the powers of government as derived from the people.

In his presidential address to the National Convention of Congress Legislators (1937), Jawaharlal Nehru opposed the Government of India Act (1935) for not representing the will of the nation. He declared that the convention stands for a genuine democratic state in India where political power has been transferred to the people as a whole. Such a state, he said, can only be created by the Indian people themselves, through the medium of the Constituent Assembly elected on the basis of adult suffrage, and having the power to determine finally the constitution of the country.¹⁷ Not much more evidence is required to substantiate my claim that democracy came to India in the guise of nationalism, with universal franchise as the most important and legitimate instrument by which the will of the nation was to be properly expressed.

The second achievement was to reinforce and reinvent forms of liberal individualism implicit in a commitment to civil liberties, once again in a context suffused with communitarian values that are indifferent or hostile to individual autonomy. A commitment to civil liberties flows directly from acceptable norms of dissent and the availability of political liberty

within the confines of a liberal state. As early as the beginning of the nineteenth century, Ram Mohan Roy protested against a regulation curtailing the freedom of the press. He argued that a state that is responsive to the needs of *individuals* and ready for intervention on their behalf makes available to them the means by which such needs are communicated, and must therefore permit unrestricted liberty of publication. The demand for a free press and opposition to its gagging persisted throughout British rule, particularly when the press was the principal instrument for the propagation and consolidation of India's nationalist ideology. Consider the fierce opposition to the infamous Rowlatt Act, which gave the colonial state enormous emergency powers, similar to war-time controls. It is true that opposition to this act was not expressed in ways that were obviously liberal, but in its substantive content the protest was fundamentally liberal and individualist. An opposition to arbitrary detention is as classically liberal as you can get, and this liberalism had a pronounced individualist character.

Third, against the background of communalism and despite its manifest incompatibility with individual rights, a commitment to group rights (the right to the expression of cultural particularity) indicates that the framers of the Constitution were more than willing to face up to the challenges of what more than four decades later has come to be known as multiculturalism. The question of group rights needs further scrutiny. The prospect of the breakdown of hierarchical communities—that is, emotional solidarities that are shot through with asymmetrical relations—provoked many responses. One such viewpoint, known in India as 'communalism', legitimizes a full-blooded conflictual relationship between communities that may view each other as equals, but are obsessively self-focussed and intent upon maximizing their own interests at the expense of the other. Distinct from both hierarchical communitarianism and an egalitarian communalism is *individualist egalitarianism*, a view committed to equality among individuals and marked by a drive towards abstract universalism and *communitarian egalitarianism* that forges a relationship of equal *respect* among communities. Two features distinguish the aforementioned views: one has to do with their attitude to difference, and the other with their understanding of the source of this difference. In individualist egalitarianism, differences are due to individual choice or to a culturally neutral, socially generated circumstance that must be ignored or eliminated in order to achieve an egalitarian order. In communitarian

egalitarianism, differences are a result of irreducibly diverse cultural backgrounds and need to be properly recognized and affirmed rather than jettisoned from the egalitarian framework.

The strategy of the individualist response is to treat difference as a disadvantage suffered by a group; the removal of disadvantages by working through and eventually dissolving groups into individuals is, therefore, a natural objective of state policy. From the perspective of the collectivist viewpoint, this strategy fails to understand how groups sustain culture and why every cultural difference is not a disadvantage that must be shed; the eradication of difference is undesirable and impossible. Instead, a parity between irreducibly different cultural communities is required. This does not mean that particular cultural communities never disappear or assimilate into other communities; however, it does mean that a culture-neutral, homogeneous society consisting only of radically self-directing individuals is an impossibility. Though both the individualist and the collectivist responses were in the making in the early twentieth century, post-war liberalism articulated and theorized the former at the expense of the latter.

It is important not to read the mind of the political elite in India within the interpretive grid of post-war liberalism, which, to ward off hierarchical communitarianism and communalism, relies exclusively upon the resources of individualist egalitarianism. The Indian political elite may not have made a distinction between hierarchical and egalitarian communities—they frequently failed to keep the idea of communalism distinct from egalitarian communitarianism. But it is difficult to deny that the discourse of mutual respect between cultural communities was always within their reach.¹⁸ To counter the challenge of hierarchical communitarianism and communalism, they relied on and frequently wavered between individualist and non-individualist egalitarianism. The Constituent Assembly Debates reflect this tension. The political elite in India, working with the resources of a ragbag liberalism, was sensitive to both individual and group rights, and wrestled with the tension between them within the context of a forever-threatening anti-liberal conception embedded in the then existing political practice. The Constitution too reflects, and was perhaps even born out of, this turmoil, and uneasily tries to reconcile individual rights with group rights.

In this volume, Rochana Bajpai examines the discussion of preferential provisions for religious minorities in the Constituent Assembly Debates

and identifies why political safeguards for them were withdrawn, and why community rights were restricted to the preservation of their cultural identities. She argues that to explain why this happened purely in terms of the logic of Partition is inadequate. This issue of the rights of religious minorities is also dealt with extensively by Gurpreet Mahajan. Although the issue of special provisions for the *Adivasis* of India (Scheduled Tribes) has been dealt with briefly in some essays in this volume (Rochana Bajpai, Ashok Acharya, Christophe Jaffrelot), the failure to deal with their issues separately is admittedly a major weakness of this volume.¹⁹

Fourth, a constitutional commitment to caste-based affirmative action programmes shows how far ahead India was compared to other nations. Can one forget that affirmative action programmes in the US were begun after the 1964 Civil Rights Movement, almost two decades after they were constitutionally entrenched in India? But how does a commitment to affirmative action programmes sit with liberal values? Here it is important to remember that liberalism must not be viewed only as a doctrine of individual rights; nor was it believed to be so by more articulate members of the Constituent Assembly. For example, take the views of Sardar K.M. Pannikar, who in the Sarojini Naidu Memorial Lecture (1961) argued that Indian liberalism was made up of two streams, each with 'a fairly long history'.²⁰ For Pannikar, the founder of the first stream was Ram Mohan Roy, who, 'by emphasizing the right of women to freedom and the establishment of casteless society put the Hindu people on the road to liberal transformation and contributed to the growth of liberal thought in India'.²¹ The second stream comprised figures like K.C. Sen and M.G. Ranade, but more importantly Swami Vivekananda, who 'introduced into orthodox Hinduism the spirit of social justice'. By disassociating institutions such as caste and prohibitions like widow remarriage from the Hindu religion and by espousing the view that the reform of such practices is a matter essentially of social justice, Vivekananda spurred a movement of reordering Hindu society infused with liberal principles.

Pannikar also argues that Gandhiji's ascendancy within the Congress initiated a programme of political action based on the same ideas for which liberalism stood. The Congress not only advocated political liberalism but emphasized the 'rights of the individuals and the value of essential freedoms, the rule of law, secularism in politics and faith in social justice'. Two features stand out in this account as constitutive of liberalism: equality and social justice. Pannikar's vision of liberalism in

general and of Indian liberalism in particular is far more in consonance with the core values of liberalism than the identification of it exclusively with individualistically construed rights. Some of these issues are discussed in this volume with considerable deftness by Gopal Guru, who agrees that by abolishing all feudal titles and upholding the principle of the equal worth of all persons, the Indian Constitution has the potential to bring about a major social revolution.

A concern for liberal justice is nowhere more evident than in constitutional provisions for affirmative action programmes.²² To tackle the basic inequalities already existing in the Indian social structure, and to make the formal political empowerment of severely disadvantaged groups more effective, the introduction of constitutionally protected preferential treatment of these groups was thought necessary. It was widely recognized that a mere right to vote and to equality of opportunity is insufficient to ensure meaningful, effective social and political equality. Thus, apart from several general provisions to the right of equality, special constitutional measures were taken to protect and advance the interests of the Scheduled Castes and Scheduled Tribes. For example, Article 334 provides for reservations for seats in legislatures for these groups; similarly, under Article 335 the claims of Scheduled Castes and Scheduled Tribes are taken into consideration while making appointments to public services. Here, the makers of the Constitution appealed not only to backward-looking principles justifying compensation to victims of past harm but also to a forward-looking liberal principle that aims at future equality of opportunity. Indeed, it was precisely because past injustice continued to be a source of current injustice that programmes of affirmative action were believed to be necessary.

Two essays in this volume deal specifically with the complex issue of affirmative action in India. Ashok Acharya's essay seeks to track the trajectory of affirmative action policies in India and tries to highlight its distinguishing features by comparing it to the experience of the US. In India, affirmative action programmes are part of the Constitution. They seek to strike a balance between formal and substantive conceptions of equality and in the process recognize specific marginalized groups as beneficiaries of these programmes. Furthermore, policies of affirmative action have taken the form of quotas. In the US, on the other hand, affirmative action programmes were a result of executive orders and remain outside the Constitution, are tied to the framework of liberal individualism and do not take the form of quotas. This comparative

perspective enables us to grasp that the present form of affirmative action is neither inevitable nor permanent.

Acharya also identifies and examines various justifications for affirmative action, all of which he subsumes under liberalism. He examines three arguments; the first is the argument from the principle of non-discrimination. The non-discrimination principle fails to tackle continuing discriminatory practices or to offset structural inter-group inequalities. Since affirmative action policies are meant to tackle precisely these problems, they cannot be properly supported by this argument. The equal opportunity argument is ambiguous between a formal approach and a substantial one. One might expect the substantial approach to undergird affirmative action policies, but even this approach has its problems. Affirmative action programmes in India are best defended by the group disadvantage argument, which requires a policy of radical redistribution that brings us to the threshold of equality of results, though it stops well short of it. Along with the idea of compensating for historically disadvantaged groups, this principle nearly justifies quotas in the Indian context.

Acharya is, however, critical of the extension of this argument to cover the Other Backward Classes (OBCs). The implementation of the Mandal Commission Report, he believes, has compromised both the effectiveness of quotas as a policy of compensatory justice as well as the right to equal opportunity. In his contribution to this volume, Christophe Jaffrelot, appears to take the opposite view, arguing that affirmative action policies for the OBCs should or at least could have been initiated earlier. He argues that in the Constituent Assembly there appears to be a general consensus that the term OBC should be left as vague as possible. People and parties with divergent backgrounds all appear to have collaborated to leave this term ambiguous so that no identifiable group could claim the benefits that might accrue from such policies. Jaffrelot also claims that reservation under joint electorates has failed to secure adequate representation for the Scheduled Castes.

Fifth, by introducing the articles concerning Kashmir and the Northeast, the Indian Constitution anticipates the very important concept of asymmetric federalism. Valerian Rodrigues claims that asymmetric federal provisions embody the idea of 'differential citizenship'.²³

All these are what might be called the substantive achievements of the Constitution. However, there were also some procedural achievements. First, the Indian Constitution reflects a faith in political

deliberation. The Constituent Assembly Debates demonstrate a common commitment to the idea that political outcomes will not be only a reflection of the self-interest of currently well-organized groups but will also embody inclusive principles which encompass even the interests of groups that are ill-organized or invisible at that time. This open-endedness indicates the willingness of people to modify their existing preferences—in short, to justify outcomes by reference not to self-interest but to reason. It also shows a willingness to recognize the creative value in difference and disagreement. This point is not adequately mentioned, a grave error in my view, because what is required instead is its elaborate celebration. It shows that the Constitution is more than a combination of rights-based procedures and goal-based outcomes; it is not just an attempt to bring together negative and positive rights but espouses a substance-sensitive, broadly conceived procedure of arriving at acceptable outcomes.

Further, it reflects a spirit of compromise and accommodation. For many, these are terms not of moral commendation but of disapproval and degradation. I am not sure I agree. Not all compromises are bad. If something of value is traded off for mere self-interest or for a morally degrading choice, then we naturally have compromised in the bad sense. However, if one value is partially traded off for another value, especially in an open process of free deliberation among equals, then the compromise arrived in this manner can hardly be objected to. We may lament that we could not have everything, but to be able to secure a bit of all things important cannot be morally blameworthy. This may have something to do with a conjunctive rather than disjunctive mode of thinking, which allows for the conception of separation of spheres or for a Hegelian-type reconciliation. Both were exemplified in different ways in the Indian Constitution.

Finally, a commitment to the idea that decisions on the most important issues must be arrived at consensually rather than by majority vote is equally morally commendable. However, not everyone in this volume considers this to be an achievement and there is some truth in what they say. Upendra Baxi argues that the Constitution-makers were forced to embody subaltern expectations in ways that 'negotiated avoidance of wholesale derangement of dominant expectations. They accomplished this in a whole variety of compromising ways, by a mix of the "symbolic" and "instrumental" strategies'. Similarly, Nigam argues that the Constituent Assembly was not a terrain where different people participated in the Habermasian rational-critical mode of deliberation

to arrive eventually at a consensual 'single will'. Rather, the assembly was a site where different groups came together under the compulsion and logic of power to have a negotiated settlement. The compromise was not only fragile but also morally objectionable from the perspective of those who benefit least from it. Thus, for Nigam it is a gross exaggeration to claim that the Constitution is a rationally deliberated moral document.

CRITICISMS

The Indian Constitution can be subjected to many other criticisms of which I will briefly mention four: first, that it is unwieldy; second, that it is unrepresentative; third, that it is fruitlessly ambiguous; and, fourth, that it is an alien document.

The criticism that it is unwieldy is predicated on the assumption that the entire constitution of a country must be found in one compact document. Some countries have a single compact document called the constitution. Others lack a single document and their constitution consists exclusively of several written documents. In India, we have a single document, though it is not as compact as the US Constitution. Nowhere is the Constitution identified *exhaustively* with a single document. If so, the Indian Constitution is unwieldy only if we compare it to, say, the US Constitution, and only on the supposition that the entire US Constitution is contained in that compact text. But that supposition is clearly mistaken. If so, there is nothing particularly unwieldy about the Indian Constitution.

The fact is that a country's constitution lies not only in a compact bounded document but also in other written documents that have constitutional status. In the case of India, these include not only the many amendments to the Constitution made over the years by Parliament but also some key judgements of the Supreme Court. This also underlines the importance of not restricting the understanding of the Constitution in terms of the intentions of the original framers. The nature of the Constitution is at least partly constituted of the way it is made to work by the courts and Parliament. In this volume this point is substantiated in the contributions of Nivedita Menon, Sanjay Palshikar, Pratap Bhanu Mehta, and Peter deSouza; it is also registered in the distinction made by Upendra Baxi between constitutions as texts (C1) and constitutional law (C2), the site of ongoing interpretative practices of authoritative interpretative communities. In my perspective then, every constitution is an amalgam of C1 and C2. Indeed Baxi wishes to go further and interpret C2 even more broadly to include within it not only the

interpretations of courts but also of other 'non-authoritative communities', such as those who are part of larger social movements.

The second criticism of the Constitution is that it is unrepresentative. Here we must distinguish two components of representation: one that might be called 'voice' and the other 'opinion'. The voice component of representation is important. People must be recognized in their own language or voice, not in the language of masters. If we look at the Indian Constitution from this dimension, it is indeed unrepresentative because members of the Constituent Assembly were chosen by a restricted franchise, not by universal suffrage. However, if we examine the other dimension, we may not find it altogether lacking in representativeness.

Austin's claim that almost every shade of opinion was represented in the Constituent Assembly may be a trifle exaggerated but may also have something to it. To show what I mean, allow me to conduct a thought experiment. Suppose that members of the Constituent Assembly were elected not by restricted franchise but by universal suffrage, what kind of members would there be? Would they have been substantially different from the ones actually chosen? I doubt if the quality of representativeness would have been substantially different in 1946 than, say, in 1952 when universal suffrage was put into practice. If so, even with universal suffrage, we would have got roughly the same kind of Constituent Assembly. Suppose further that the voice component was fully respected and that the assembly did become truly representative. Would the actual content of the Constitution have been substantially different? My own view is that given the enormous social diversity in India and our procedural commitments, the content of the Constitution may not have been dramatically different from the one we actually have. Anyhow, the embedded textual intention in the Constitution must be seen to provide us an open normative resource rather than supply a rigid normative regime whose contours were fixed once and for all by the framers.

Still one may wonder if am being naively starry-eyed about the past? I do not think so, because it is my belief that societies receive and invent special moments in crucial phases of their collective life history that are replete with great opportunity, and in which individuals and groups try to transcend their particular preferences to arrive at collective judgement about the common good. It is of course true that they cannot succeed fully, but the outcome occasionally has the imprint of that effort. Is it a coincidence that the *nukkad* (crossroads) of every other small town has a statue of Ambedkar with a copy of the Indian Constitution?

Far from being a mere symbolic tribute to him, in my view this expresses the feeling among Dalits that the Constitution reflects many of their aspirations.

A third criticism claims that the Constitution is morally unstable and does not provide an unambiguous criteria in conflicting situations. This charge is predicated on the assumption that a constitution must give us a general criterion to resolve all value-conflicts and yield a clear prescriptive decision. Now it is true that some moral documents embody a theory that provides a general policy for resolving conflicts between an unambiguous good and an equally unambiguous evil. However, between these two extremes on the continuum lie all the values that actually shape our public conduct and which cannot be disambiguated and fixed for all times.

The Constitution of India, or indeed of any other country, does not embody just one value. It attempts to realize multiple values, some mutually related and others not only distinct but following quite different moral trajectories. The Indian Constitution seeks to nurture national unity but also to protect regional autonomy. It grants liberty to individuals but must also seek to limit these liberties to realize the common good. It is committed to freedom of expression but also to civic peace. Although these values do not necessarily come into conflict with one another, they may frequently do so. Value conflict is an endemic feature of any constitution. No constitution is unambiguously committed to only one set of values and it is unreasonable to expect that it will make explicit mention of a general principle by which to lexically order these values. No constitution can mention very precisely what we must do if there is a conflict between individual liberty and the common good. If so, a constitution must remain an internally riven, quite unstable moral document, forever needing fresh interpretation, contextual judgements, and attempts at reconciliation and compromise. The refusal of the framers to give us well-delineated criteria to settle all moral conflicts is the strength, not the weakness, of the Constitution. A sophisticated democratic constitution cannot yield unambiguous general criteria for resolving conflicts.

Now there is a view in political theory that not only is value conflict necessarily present in human affairs but also that it is irreconcilable. On this view, the gain in some moral value must always entail a corresponding loss in some other value. For example, the translation of many of our goals into the language of rights, while consistent with individual dignity,

also increases mutual distrust and hostility and undermines social solidarity. Thus we must either sacrifice individual dignity or fraternal love; we cannot have both. We cannot escape being tragically torn between different values, and this conflict frequently surfaces as real-life, tangible moral dilemmas with which we must live. Something must be sacrificed or compromised. As the American economists would say, there simply has to be a trade-off.

None of the two views or strategies mentioned above—one that urges us to tolerate our tragic moral life and the other that bludgeons us into believing that a higher general principle unearthed or invented by ingenious philosophers can resolve moral conflict—is correct. Even so, the first view is infinitely more accurate and sensitive to our real situation. The dilemmas we continually face disappear only if we are blind to important values. We may also make this blindness our own existential condition; we may live as if other values do not matter. But sooner or later these more neglected dimensions of our moral existence catch up with us. Indeed, they strike back with a vengeance, damaging our commitment to even that value which we had mistakenly privileged earlier. It is best not to delude ourselves into embracing simplistic, Manichean solutions. So what is the way out?

For a start, let me defend the strategy of compromise. Not all compromises are bad. They appear so only from the perspective of those who espouse a single general principle or those with a Manichean view of the world, that is, the moral purists or the moral monists. So suppose there is a conflict between freedom of expression and civic peace, and in order to maintain peace we limit freedom. I do not think this is a bad compromise because here a genuine moral value is given up for the sake of another equally significant value. It does not follow from this, of course, that all compromises are good. If a value is given up to satisfy a whim, self-interest or plain greed, then such a trade-off is not morally defensible and must be condemned. But if we strive towards two or more values which cannot all be realized and then trade them off against each other, in that case, provided one value is not overwhelmingly given up in favour of the other, the compromise arrived at cannot be dismissed as morally unworthy. Many such compromises were arrived at by the Constituent Assembly and incorporated in the Constitution. To my mind, only some of these compromises are morally objectionable.

However, I wonder if this tragic view of the world associated with moral pluralism is not linked to what we may call the disjunctive mode

of thinking. By disjunctive mode of thinking I mean a manner of thought that is obsessed with a mutually exclusive this or that. This may be contrasted with what one can call a conjunctive mode of thought, in which it is possible to have both this and that. Examples of such conjunctive thinking and being are to be found in the idea of separation of spheres, as when we agree to do something in one sphere but not in the other. We may allow the expression of some preferences in private but not in public, some forms of entertainment in one type of public domain but not in others. Another form of conjunctive thinking places different values at different levels. Things which conflict at the same level live harmoniously when at different levels. A third example of conjunctive thinking comes with the introduction of temporality into our discussion, a feature curiously but remarkably absent in much contemporary political-theoretic discussion of value pluralism. Here you can have both X and Y, but not now. Introducing X now will create the conditions for not only the attainment of Y later but also for the eventual reconciliation of X and Y. Now this is an element found in Hegel's dialectical thinking and in contemporary Hegelians such as Charles Taylor who work with his idea of reconciliation. The attempt to reconcile apparently conflicting moral values is not always a dangerous disaster as many liberals imagine, but a necessary feature of transcendence. In an inspired passage in his famous book on the Indian Constitution, Austin remarks that the principle of accommodation, much the same as reconciliation, is India's original contribution to constitution-making and is possible only by virtue of the supreme Indian ability to think, without dogmatism, at different levels.

The Constitution reflects compromise, accommodation, and, in some measure, Hegelian reconciliation, all of which exemplify the conjunctive mode of thought.

The fourth and final criticism alleges that the Indian Constitution is entirely an alien document, borrowed article by article from Western constitutions, and thus sits uneasily with the cultural ethos of the Indian people. This is what in a different context I have called the cultural inadaptability thesis, one that I associate with vulgar Gandhianism. In this view the Constitution of India is deeply flawed because its cultural and normative vocabulary is totally at odds with the cultural and normative grammar in terms of which the real people of India conduct their life. One member of the assembly claimed that the ideals on which this Draft Constitution was framed have no manifest relation to the fundamental spirit of India. He predicted that such a constitution would

prove unsuitable to the Indian context and break down soon after its operationalization. Another member called it a slavish imitation, a surrender to the West. A third put it more sensuously 'we wanted the music of *veena* or *sitar* but here we have the music of an English band'.²⁴ How far is this charge true?

The more specific charge against the Indian Constitution is that it reflects a model of Western liberal democracy that might reflect the values and ethos of the tiny Westernized upper caste but is radically different from the cultural system with the help of which the Indian people make sense of their life. As such it can only be imposed on these people from the outside, probably through coercion by the state. I agree that the Indian Constitution is modern and partly Western. But as we shall see, this does make it entirely alien.

First, many Indians made a rational claim to be Western, with hyper-Westernization becoming a form of protest against the problematic areas in their own traditions. Ram Mohan Roy started this and it is continued to this day by Dalits. Indeed, as early as 1841, it was noticed that the Chamars, despised untouchables of northern India, were not afraid to use the newly introduced legal system and bring suits against their landlords. Second, when Western modernity began to interact with local cultural systems, something like a hybrid culture began to emerge, possibly by creative adaptation, for which an analogue can be found neither in Western modernity nor in indigenous tradition. These new phenomena resemble Western modern and traditional entities and can be mistaken one for the other, but they escape the interpretative grid and discourse relating to both. This cluster of newly developed phenomena forged out of Western modern and indigenous traditional cultural systems forged a different, alternative modernity. In non-Western societies, different modernities emerged as non-Western peoples tried to break loose not only from their own past practices but also from the shackles of a particular version of Western modernity imposed on them.

A weaker version of the cultural inadaptability thesis also exists. This variant does not argue for the impossibility or general difficulty of modernity's entry into India but claims that despite the efforts of early social reformers, the discourse of liberal-democracy could not, entirely for contingent specific historical reasons, be implanted on Indian soil. For example, the discourse of rights was disengaged in India from its original individual moorings and attached to religious communities. This view is found in Kaviraj, Khilnani, and even in Hansen.²⁵ I am not entirely

persuaded by this view. For a start, this perspective fails to account for questions that are crying for explanation. Why did India adopt the constitution that it did? Why were Fundamental Rights accorded a central place within the Constitution? Why adopt a constitution in the first place? Why the scramble to protect the rights of individuals and only a grudging acceptance for group rights? And, in a deeply hierarchical society, why such scant opposition to universal franchise, to the ban on untouchability, and to formal gender equality? I believe it more plausible to argue that at least since Ram Mohan Roy, and well before the radical politicization of the Indian National Congress, a distinct liberal stream existed, which merged with and inherited a diffuse but persistent strain of something akin to a liberal view within local Indian traditions; that Western modernity could make a considerable impact on an aspiring middle strata of Indian society because it genuinely articulated and responded to their needs. Moreover, liberalism came to India not only through the spoken or printed word but as directly embedded in certain practices, as a structural feature of institutions and technologies.

A third version of this criticism, in my view more subtle, is found in Hansen, who proposes that though the language of negative individual rights, defined in opposition to colonial power, existed in India, it was eventually subordinated to the rights of communities. But Hansen merely asserts this claim without citing any evidence to support his claim. True, the language of collective rights had a visible and sometimes overwhelming presence in India but it hardly follows from this that it automatically subsumed the other language of individual rights. In fact, Hansen's claim begs a number of questions. Were the two languages always seen as mutually exclusive? Did one have to necessarily subordinate the other? Could they not complement one another, occupying and responding to different spheres of equally valuable human aspirations? Indeed, his claim sits uncomfortably with his own view that 'the agrarian movements of the 1970s reveal that as commercialization and democratization transform class and status, the language of rights and entitlements—the right to protest, assert oneself, to be heard by the government—has become naturalized in rural India.'²⁶ This language of political assertion and protest is part precisely of the discourse of 'negative rights defined in opposition to colonial power'. In conclusion, I would concur with Austin's remarks that though non-Indian, the Indian Constitution is not un-Indian and that most Indians have shown little fondness for traditional politics understood as the rule of the many

privileged view. At any rate Indians live far more comfortably on the margins between tradition and modernity than most ideologues of modernism or traditionalism are prepared to believe.

LIMITATIONS

Let me now briefly come to the limitations of the Constitution. First, the Indian Constitution has a very centralized idea of national unity. Second, it appears to have glossed over some important issues of gender justice, particularly concerning matters to do with the family. Third, it does not have enough safeguards to ensure a minimal representation of minorities in the legislature; it too easily side-stepped the issue of political representation of minorities. Fourth, some of the restrictions imposed from the very beginning on liberty and rights always had the potential to generate what Baxi calls 'the rightless people'. For Baxi, the Indian Constitution has been frequently 'consistent of the violent translation of the democratically enfranchised citizens into rightless peoples' (p. 109 of this volume). Fifth, I have never been fully convinced why in a poor developing country, certain basic socio-economic rights were relegated to the section on Directive Principles rather than made an integral feature of our Fundamental Rights. Sixth, although it works with a worthwhile conception of social justice, it does not provide adequate institutional mechanisms to realize it. Parekh's essay elaborates this point, as it does the Gandhian point implicit in the seventh critique—that it is insufficiently attentive to rural India. I shall not write in detail about each of these limitations. I focus on two limitations that have been partly addressed by the Supreme Court of India, and then raise a deeper question about the overall character of the Indian Constitution.

One of the fundamental ideas of the Indian Constitution is that all of us, irrespective of caste, religion, language, gender, race, and region have a fundamental interest in leading a decent life. To lead a decent life is to pursue one's freely chosen or endorsed conception of a worthwhile life and, unless physical suffering is a constitutive element in one's idea of a worthy existence, to be free from physical suffering. A modicum of material well-being is essential to our ability to remove physical suffering or the possibility thereof. If this is so, we all have moral rights against others that they do not interfere with the fulfilment of our basic needs and equally a similar moral right against those who have economic or political power to facilitate those conditions under which these needs are fulfilled. In short, all of us have moral rights to a minimum income,

to adequate housing, to primary healthcare and, under modern conditions, to primary education. The Indian Constitution recognizes not only the traditional rights to civil and political liberties but also the moral right to an adequate means of livelihood, the right to work, to education, and to public assistance in cases of unemployment, old age, sickness, and disablement. In short there is an explicit recognition of socio-economic rights in the Constitution. However, as in the Irish Constitution, most of the traditional, civil and political rights are made justiciable and socio-economic rights are not. These latter rights, as we all know, were made part of the section entitled the Directive Principles of State Policy. A question worth asking is why were these rights also not constitutionally entrenched? Why, given their importance, particularly in developing countries such as India, are they still subject to the ordinary process of legislation?

Generally there are three arguments made against the constitutionalization of socio-economic rights and, therefore, of privileging civil and political rights for constitutional entrenchment.²⁷ The most important one is that socio-economic rights make demands on scarce resources, while civil and political rights do not. One assumption guiding this view is that wherever a demand is made on scarce resources, conflict is inevitable. However, no such conflict ensues when the scarcity of resources is not at issue. But how justified is this assumption? Is it true that where scarce resources are not involved, conflict is avoided and that therefore, while conflicts are at the heart of socio-economic rights, civil and political rights are free of such conflicts. This is hardly the case. As my point about the value conflict made clear, the right to freedom of expression may conflict with the right to privacy. Similarly the individual right to freedom of conscience may conflict with the collective right of a religious group to autonomous religious practices. None of these are conflicts over material resources, yet it can hardly be denied that such conflicts exist. If, despite these conflicts, we can constitutionally entrench civil and political rights, why single out socio-economic rights for a non-justiciable status on the ground that they are inherently conflictual?

A second argument against the constitutional entrenchment of socio-economic rights is that unlike civil and political rights these rights demand state action. On this view, civil and political liberties set limits on the power of governments but do not demand that the state do something. However, this argument is specious. It is simply not true to say that civil and political liberties make no demands on the state. Consider, for

example, the right to vote, which is a political right. The right to vote requires that the state hold fair and free elections. This entire business of holding and managing election requires that a great deal of resources be spent by the state. The right to vote cannot be exercised without extensive positive action by the state. Then again, take the right to the freedom of expression. This right demands from the state that it creates conditions by which a public sphere is formed and nurtured and within which people can freely express themselves and communicate with one another. The state may need, for example, to set up an independent broadcasting service. This requires positive action by the state. For free expression and communication, the state must also ensure that any interference with such expressions or communications is checked. This too requires extensive action on the part of the state and the expenditure of material resources.

Most of our civil and political rights are protected at considerable expense and with positive help from a large governmental machinery. The view that one set of rights require only that the state abstain from interfering, and that the other set demands that the state act in certain ways is either wrong or utterly simplistic. A third view is that socio-economic rights can be exercised only if the state spends a vast amount of resources, which are simply not available at its disposal. Now this view misreads the content of many of these rights. For example the right in question is not an unlimited right to any type of education or to any type of healthcare or standard of living. The rights in question ensure a minimal level of decent existence—for example, a minimum wage, primary healthcare, or education. The resources needed for this can and should be available to public agencies. No one has a right to higher education or to a heart transplant, but we must all have rights to functional literacy or to basic immunization from some fatal diseases. In short, I am not entirely convinced that such rights should remain non-justiciable. At any rate this is an issue worth exploring, even though the current *Zeitgeist* is entirely against any thinking of this kind.

A final limitation is addressed forcefully by Gopal Guru. For him, the Indian Constitution must be evaluated not only by invoking the principle of secularism but equally by adequate standards of social justice. Gopal Guru asks if constitutional provisions have succeeded in creating the cultural conditions which enable mutual and equal recognition. Have the state and its institutions 'succeeded in augmenting the moral stamina of civil society so that it could accept the claims for recognition of the

untouchables?’ For Guru, the Constitution does not empower the state to intervene in market-driven ‘humiliations’. Moreover, it fails to penetrate the inner cultural/moral self of the upper castes. This creates a lasting tension between moral and legal rights. For Guru this tension is internal to the constitutional understanding of untouchability, defined exclusively in terms of those castes which were considered as defiling. The experience of untouchability captures the sites where it takes place but not its source—the upper castes. The upper caste person may avoid being touched ‘on the ground that he values his atomized self more than any moral commitment to affectionately touch others’. In other words, for Guru the Indian Constitution is not equipped to generate the moral vocabulary of love, care, and concern. Moreover, since the upper castes retain the ritual power to define what is touchable and untouchable, continue to define the purity-pollution line, and retain the right to associate with whoever they wish to, the pervasiveness of untouchability remains entrenched. For Guru, constitutional provisions do not provide sufficient conditions for achieving cultural goods like recognition and dignity.

I would like to end the discussion with a limitation in the Constitution that the framers could not possibly have addressed. One of the most pressing issues before us now is how to continue the project of social revolution ushered in by the Constitution in a more culturally sensitive way—that is, in a way which is far more culturally sensitive to all the diverse groups in our society and specially sensitive to our most marginal groups. Modern constitutionalism came to us from the West and was extremely handy to fight imperialism. Yet, in very subtle, unnoticed, unacknowledged ways, behind our backs it also linked to the exclusion and suppression of indigenous peoples, of women, of linguistic and ethnic minorities, of other backward castes and classes, and, finally, to what we have now come to call ‘Dalits’. Moreover, the language of contemporary theories of modern constitutionalism is dominated by certain authoritative traditions which interpret the key evaluative terms within a certain narrow range and which have all been developed by mainstream Western cultural traditions. Therefore, we need to explore the extent to which the language of the Indian Constitution, resistant as it was to imperialism and facilitative as it was to the birth of a new egalitarian social era, is still prone to marginalizing and excluding all those people who have been traditional victims in our society, even as it helps them to lead a decent life with dignity and some self-respect. These

people can use this language and yet be troubled by it. We need to explore the precise form and the exact source of this trouble, this tension.

Given these limitations and weaknesses, is there a case for a wholesale change in the Constitution? It can hardly be a reasonable person’s position that the Constitution is immutable. The Constitution is a socially constructed document and must change with the times. However, the whole point of a written constitution is lost if it is changed at will. At issue here then is the following problem:

On the one hand, we may feel that there is little reason why decisions made in the past by our forefathers, and embodied in the Constitution, should be binding on us. On the other hand, we could be faced by the chronic myopia of present-day citizens who might shipwreck themselves, and in a moment of drunkenness destroy everything in one fell swoop and affect the ability of a society to consolidate its gains. We cannot be too rigid either way. We cannot treat the Constitution with sanctimonious reverence, too sacred to be touched, nor can we allow frivolous attempts to revise the Constitution every time a political deadlock occurs or there is a new government in power. This middle path is found by allowing for constitutional amendments but making them difficult. By making constitutional amendments difficult, citizens are encouraged to resolve political problems by processes of negotiation, bargaining and mutual learning. Obligatory delays have the same effect: they too give all parties more time for thought. But how long can we proceed with piecemeal constitutional amendments? Why not introduce major constitutional reforms? Is there a need for such reforms? I do not fully know the answer to these questions. Implicit in what I have said so far is that this is not required. However, we can still specify the conditions under which any constitutional reform must take place.

First, there should be free and open debate on constitutional change over a sufficiently long period. Second, something as basic as constitutional reform must pass the test of unanimity. Every group must be fully involved in the process of debate and discussion and a decision on any particular reform should be taken only if different groups coming from different perspectives and background still manage to converge on it. Every decision on reform must have legitimacy, which is to say that no one affected by it should have a reasonable ground for complaint that his best interests have been neglected or subverted. So, my own position on reviewing the Constitution is this: yes, there is nothing immutable about it but, given that the basic structure is sound in that it encourages

freedom and equality for everyone, any reform must be undertaken with a great deal of caution and only if it is morally legitimate (where moral legitimacy depends on inclusiveness in debate and consent on reasonable grounds). Any attempt to bring about changes in the Constitution which appears unreasonable to any section of society will lack legitimacy and will in the long run be detrimental to the overall interests of our country.²⁸

NOTES

1. Ivor Jennings, *Some Characteristics of the Indian Constitution* (Oxford: Oxford University Press, 1953).
2. C.H. Alexandrawicz, *Constitutional Developments in India* (Oxford: Oxford University Press, 1957).
3. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966).
4. No book dealing with a particular theme can cover all its major ingredients. Although this volume attempts to articulate the major values embodied in the Constitution, it does not always achieve its objective. For example, many of the normative ideals in the Directive Principles of State Policy have been dealt with perfunctorily. No one has dealt adequately with the section on fundamental duties. Needless to say, it has deliberately left out governmental mechanisms and procedural details from its deliberations.
5. See Rajeev Bhargava, 'Liberal, Secular Democracy and Explanations of Hindu Nationalism', in Andrew Wyatt and John Zavos (eds), *Decentering the Indian Nation* (London: Frank Cass, 2003).
6. Rajeev Bhargava, 'Giving Secularism Its Due', *Economic and Political Weekly*, July, 1994; 'Political Secularism', in John Dryzet, B. Honing, and Anne Philips (eds), *A Handbook of Political Theory* (Oxford: Oxford University Press, 2006).
7. Jon Elster and Rune Slagstad (eds), 'Introduction', in *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1993), pp. 8–14.
8. Robert Dahl, *Democracy and its Critics* (New Haven and London: Yale University Press, 1989), ch. 9.
9. It is not implausible to claim, however, that for the leaders of the national movement a part of the self could be abstracted from the substantive commitment flowing from one's traditions and customs, from family and community. In short, a domain existed where a person could be legitimately viewed simply as an individual rather than a member of this or that particular community. Significantly, in this domain a person's unequal status within a particular community also had no relevance. The process of individualization went hand in hand with the process of equalization. Once this idea of political equality—equality in the public domain—grew in importance, universal adult franchise was only a small step away.
10. B. Shiva Rao, *The Framing of the Constitution: Select Documents*, vol. I (New Delhi: Indian Institute of Public Administration, 1967), p. 21.

11. Ibid.
12. On this aspect of nationalism, see Charles Taylor, 'Nationalism and Modernity', in Ronald Beiner (ed.), *Theorizing Nationalism* (Albany: State University of New York Press, 1999), pp. 219–46.
13. Liah Greenfield, in 'Introduction', in *Nationalism: Five Roads to Modernity* (Cambridge and London: Harvard University Press, 1992).
14. Ibid., p. 10.
15. Shiva Rao, *The Framing of the Indian Constitution*, vol. I, pp. 5–14.
16. Ibid., p. 59.
17. Ibid., pp. 86–92.
18. On this, see, for example, *The Constituent Assembly Debates*, vol. 8, 16 May–16 June 1949, (New Delhi: Lok Sabha Secretariat, 1999), p. 326.
19. However, an attempt was made in the seminar to compensate for this by looking at the provisions for Maoris in the Constitution of New Zealand. In his presentation, Andrew Sharp deftly analysed the complex and the shifting manner in which Maoris have been treated within the framework of New Zealand's Constitution. Sharp argues that the problems faced by Maoris are due to a large extent because of the absence of a principled reconciliation between the philosophical basis of the Maoris' interpretation of the history of their relationship with the English settlers. The experience of the Adivasis of India is obviously not identical to that of the Maoris in New Zealand but there is a lesson to be drawn from Sharp's account in that the modernist constitutional worldview may differ sharply from the Adivasi understandings in different parts of India on how their own society and politics must be organized. Even so it cannot be denied that the Indian Constitution partially addresses this problem by provisions in Article 371A. To maintain focus on the Indian Constitution, we have had to unfortunately omit Sharp's paper as well as Rainer Baubock's on federalism. Both very generously offered to withdraw their papers for the sake of the thematic integrity of the volume.
20. K.M. Pannikar, *In Defence of Liberalism* (Bombay: Asia Publishing House, 1962).
21. Ibid.
22. In all fairness, this is recognized by Khilnani. He acknowledges that 'Reservations had been intended to be a temporary expedient to a less just society', in Sunil Khilnani, *The Idea of India* (London: Hamish Hamilton, 1997), p. 37. But my point is that he fails to see it as reflecting liberal principles.
23. In the paper presented at the conference, Rainer Baubock provided a more general theoretical justification for asymmetric federalism and although he does not refer explicitly to India, many of his substantive points have a direct bearing on Indian federalism.
24. On this discussion, see *The Constituent Assembly Debates*, Lok Sabha Secretariat, New Delhi, 1999.
25. Thomas Blom Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (New Delhi: Oxford University Press, 2001); Sudipta Kaviraj, 'The Imaginary Institution in India', in Partha Chatterjee and Gyanendra

- Pandey (eds), *Subaltern Studies*, vol. 7 (New Delhi: Oxford University Press, 1992); Sunil Khilnani, *The Idea of India* (London: Hamish Hilton, 1997).
26. Thomas Blom Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (New Delhi: Oxford University Press, 2001), p. 141.
 27. For a discussion of these issues, see Cecil Fabre, *Social Rights Under the Constitution* (Oxford: Oxford University Press, 1999).
 28. In this respect, it is instructive to look at the report of the Venkatachaliah Commission set up in February 2000 to review the working of the Constitution. From our point of view, it is noteworthy that the commission suggested the expansion of existing rights. For example, it recommended that the Right to Freedom of Expression incorporate the Right to Freedom of Press and that the Right to Life and Liberty include the Right to Compensation in case of unfair deprivation of liberty. It also seeks to include the Right against Torture and recommends further that education be made a Fundamental Right (an amendment which has already been subsequently made).

Section I

Oxford Handbooks Online

Indian Constitutionalism: crisis, unity, and history

Uday Mehta

The Oxford Handbook of the Indian Constitution

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Abstract and Keywords

This chapter examines the background conditions, or ideas, that informed the Indian Constituent Assembly (1946–49) as it reflected on the country's future identity, and how that identity has been shaped by the Constitution. Constitutions, including the Indian Constitution, have been associated with concrete events that are saturated in terms of context and are often interpreted as the product of a historical process. This article begins with an overview of how constitutions respond to imperatives in relation to the logic of historical causation. It then considers the ways in which crisis and anarchy inform constitutional founding moments, along with social issues that have pervaded the Constituent Assembly debates and the Constitution. The chapter also discusses the significance of national unity/disunity and the idea of the future for the Constitution and the vision of country it put in place.

Keywords: anarchy, crisis, historical causation, identity, India, Indian Constituent Assembly, Indian Constitution, national unity, social issues

. . . neither morals, nor riches, nor discipline of armies, nor all these together will do without a constitution.

John Adams¹

India is bound to be sovereign, it is bound to be independent, and it is bound to be a republic.

Jawaharlal Nehru²

I. Introduction

MODERN democratic constitutions are the form, or more precisely, the prior shape, the stipulated mould, to which political power, and its various structures, have to conform. Constitutional founding moments express that inescapable circularity in which they are authorised by the people, but which, by the structures that constitutions put in place, reconstitute the people as subjects. Constitutions identify people as the ultimate source of power, and yet they also transfer that power; simultaneously making them subjects of power and limiting the way in which people can participate in its exercise. In the process they often express a deep implicit distrust of people, while also giving them a collective identity and a sense of agency. Constitutions give to modern politics its supervening identity, and in turn they circumscribe what would count as legitimate forms of political and collective behaviour. They supply the distinctive structure, order, and boundaries, and in particular the specific mode by which power expresses itself. But they also designate (p. 39) other forms of existence as illegitimate, improper, and extra-constitutional. In this sense, they ostracise by marking out the boundaries between constitutional form and the social remnants that exceed it. Because constitutions have acquired the legitimacy of being an almost mandatory form of collective self-expression, it is difficult to recover a sense of the plenitude from which they assumed this singular standing. It is especially difficult to recover a sense in which collective identity was not, or need not be, associated with the constitutionalising of power.

This chapter considers from a rather abstract standpoint the background conditions, understood mainly as ideas, which informed the Indian Constituent Assembly (1946–49) as it reflected on the future identity of the country and the role of the Constitution in forging that identity. Such a perspective, given its abstractness and focus on ideas, requires justification because, in a familiar rendering, constitutions, including the Indian one, are identified with concrete events that are contextually saturated. They are typically taken to be the product of a historical process, rich with decisive events, forceful personalities, collective struggles, and constitutional antecedents. All of this is true of the Indian case, where the nationalist movement, legislative documents like the 1935 Government of India Act, the Cabinet Mission Statement of 1946, along with towering personalities like Ambedkar and Nehru, decisively shaped the content of the final Constitution. As living documents, constitutions, perhaps more than any other instrument of the State, are in a constant process of producing their own ongoing textual references, closely associated with other constitutional and legislative antecedents. My focus, instead, is on broad ideas such as the pressing urgency of political identity, the basic centrality of unity, the reliance on the professed permanence of crisis, and the role of the social, and the idea of the future. All these ideas, in my view, had a defining significance

for the Constitution and the vision of country it put in place. Yet one might understandably argue, especially in light of issues such as fundamental rights, the directive principles, separation of powers, federalism, or more broadly, the specifics of institutional design—which are the pointed concern of the text of the Constitution, and which now have a rich history of case law and legislative intent—that the perspective offered here hovers too far above the text of the Constitution and the relevant context. This may be true. My justification for my orientation relies on two considerations. First, the study of the Indian Constitution in terms of its constitutional antecedents, the evolution of doctrine, its relationship to political and legislative context, and the analysis of case law has already been done by expert scholars such as Granville Austin, HM Seervai, and many others.³ The fact that such a field of study is now clearly demarcated speaks of its self-assurance, which in turn allows reflection on the Constitution to cordon itself off from the broader intellectual tradition of which it was once an emergent part. Self-confidence often expresses itself in self-enclosure and self-reference. This relates to the second reason I offer for my orientation. Despite the truly impressive and growing self-assurance of this body of literature, there has been a relative neglect of ideas, often of a distant provenance, which in many ways were the philosophical reservoir that nourished constitutional thought. The evidence of this influence on the (p. 40) Constitution is often obscured. It hides in many ways in the binding of the text. These ideas often belong to a moment when the very distinctiveness between philosophical, religious, political, and constitutional thought was deeply embattled and entangled, and where each was subject to the other's distinct and shared urgencies. In focusing on these ideas, I hope to present not just the logic that is internal to them, but also to point to the way in which they opened and delimited the constitutional vision of India during the process of its initial and self-conscious articulation.

II. Constitutional Imperatives

Every constitution has a complex and distinctive provenance. Each is the product of specific struggles, opportunities, and social contexts. These conditions mark constitutions, as they would any event that emerges from the rich vortex of history. But, in another sense, constitutions, at least modern ones, respond to imperatives, which though they have a history—in this case a modern history—in a crucial manner also transcend the logic of historical causation. These imperatives are embedded in narratives of destruction and creation, of generating power and constraining its exercise, of creating unity out of plurality and limiting plurality in the name of unity. They function as though they were natural conditions, which impose an almost primal necessity on constitutions: a necessity which is putatively not driven by the logic of history, but by a meta historical

narrative that refers to a broader set of conditions that are deemed to underlie it—conditions that have assumed an almost metaphysical status. The imperatives refer to existential conditions, which occasion a distinctly political response; not merely in the familiar sense in which politics answers to the vagaries of extant conditions, but in a more architectonic and mythic sense in which it professes to redress a predicament that traverses all conditions.

It is commonplace to think of constitutions as seeking to establish fundamental norms of justice, legality, and the forms and offices of governance. This is, of course, true. In its original articulation the idea comes from Aristotle.⁴ Alexander Hamilton, in expressing the first axiom of modern constitutions, famously declaimed that they were a mechanism to ensure that ‘the streams of national power ought to flow immediately from that pure original fountain of all legitimate authority’, namely the consent of the people.⁵ At one level, constitutions are literally the articulation of a plan that establishes the major political institutions of a society: parliament, the executive, the judicial framework, the superior law that constrains ordinary law, the mode and extent of judicial review, the manner in which power is apportioned in different branches of government, the stipulations of the franchise, the rights that citizens have and with respect to whom they may be exercised, along with a variety of other norms that make up the political template of the state. In this sense, (p. 41) constitutions are rightly thought of as ‘the rules of the game’ that give expression to a vision of a society in the process of its coming into being.⁶

But this familiar rendering of what constitutions are and do misses a narrative consensus that precedes the framing of constitutions, and which constitutions, as it were, merely reflect. It is a consensus about the State and its identity, and about a specifically political redress to a modern predicament.⁷ At the risk of some exaggeration, one might say that European constitutional history since the seventeenth century was articulated around the nuances of this consensus, which was forged on the wreckage of theological disputes and a displacement of inner convictions, along with a vision of social evisceration that could no longer hold society together, and the corresponding and singular redress offered by the power of the State and the unity of the nation. It is this consensus that stands behind and motivates much of modern constitutionalism. One should not be surprised by these distant influences. History almost always yields more than its starting point.

Understanding the imperatives that drive modern constitutionalism is important because they make clear that notwithstanding the epic sense in which constitutions are associated with an act of a people’s sovereign choice, in other ways they are the products of a prevenient logic and destiny in which what is chosen is already, as it were, substantially given. The epic and the sovereign are thus also acts of ritual repetition, where a professed break with history also enfolds it into a pre-existing narrative of necessity. It is perhaps a banal and self-evident feature of that narrative, but one that bears repeating,

especially in a context where typically there are other claims to authority, namely that constitutions put into place principles that are structured around the idea of ruling and being ruled.

The stakes of this recursive process were more pronounced in post-colonial societies that came to political self-consciousness in the latter part of the twentieth century. Notwithstanding the idealism of the nationalist struggle, the conclusion of that process was invariably constrained by a preformed and limited template of possible identities. In expressing their grievances against empires, the formerly subject societies had stridently vouched for their own difference and their own glowing nationhood hallowed in distinct hues in a crowded field of extant social norms and practices. But in articulating themselves as political entities, a task specific to constitutionalism and nationalism, they were perforce destined to affirm their existence through acts of sovereign repetition; in a borrowed vocabulary with its own distinctive and implicit traumas and its own reliance on a tool box of familiar concepts in which, to recall Hamilton, the power of the state was the principal font and purpose.

Post-colonial constitutionalism, in many ways, emerges from this dual and awkward pressure of, on the one hand, having to give expression to a distinctive national emotion; and on the other, discovering that the familiar form of constitutionalism is already alloyed to an ancient imperative script, of distant sectarian battles, which were linked in terms of (p. 42) redress with a particular conception of power and its relation to the nation. Hence in its political articulation the nation, almost unwittingly, finds itself to be a 'fragment' of a larger discursive constellation with a prescribed political destiny.⁸ The fact that the first three words of the American and the Indian Constitutions are the same only hints at the deeper sense in which the former serves as one of the templates for the latter, not least by making both constitutions the product of 'the people's' collective action. The Constitution prescribes for the nation its primary mode of existence, and in doing so folds it into a narrative in which its distinctiveness is qualified, not least because its many untidy edges are fit into a stipulated mould. It bears repetition that the project of the nation, which notwithstanding the euphoria of 'Independence', in many ways was to constitute a 'we, the people', under conditions where that national identity was still deeply contested, is for the Constitution, already taken as a settled fact. In the case of the Indian constitutional founding this was doubly the case. Not only was the Constituent Assembly authorised by an existing government, the interim government, along with the Cabinet Mission statement of May 1946, but also the deliberations on the future Constitution were significantly constrained by the Government of India Act of 1935.⁹ Nehru's declamation at the head of this chapter conveys a sense in which that destiny was chosen, but also already prescribed. There are implicit in this settlement the meanings of other important terms such as power, authority, consent, rights, and federalism. Yet the dialectic of the contestation regarding a national identity and a

constitutional vision in which it is a fact is never ultimately stable or fully settled. It permeates everyday life, if nothing else as a reminder that even the imperatives that wrap themselves in the garb of meta-historical necessity are not immune from an essential experimentalism that marks history and public life.

III. A Narrative of Crisis and Anarchy

The most salient and, in many ways, determinative existential contention that informs constitutional founding moments is that the extant conditions of a society are deemed to be deeply disturbed by an intractable crisis, which renders society anarchical and exposes human life to severe exigencies, and at the limit, to unnatural forms of suffering and death. In its constitutional significance, the contention is not really dependent on a historical claim about the present actually being marked by anarchy, even though most often a factual claim is made to buttress the philosophical argument.¹⁰ The claims of anarchy and acute disorder function as meta-historical postulates that put into motion a series of implications. The importance of (p. 43) this foundational contention and its status for constitutionalism lies in that it points to a gap that needs to be filled, and the untenability of the extant framework of society as offering the appropriate binding material to fill the gap. This thus motivates, with pressing urgency, the need for a State and its cognate, the citizen. In its most powerful and elaborate philosophical articulation the idea is, of course, associated with Thomas Hobbes, who famously deployed the fact, and even more consequentially, the idea, of civil war and anarchy as the generative postulate of modern politics and the rationale of the modern unified State. It was civil war and its anarchical implications, along with the impossibility of its resolution in religious terms that had motivated it, that necessitated a new idiom of power, which displaced the language of conscience (the inner realm) with one whose mandate was the peace and security of the outer body, of both the individual and of the unified State. Hobbes was substantially indifferent to the content of the religious beliefs that had spurred the English Civil War. What was essential was their displacement as the grounds for public obedience. What mattered in terms of the structure of the State was the status of being a citizen, and one could only be a citizen by being the subject of a sovereign. Hobbes was similarly less concerned with the specific substance of laws; rather, in serving as warrants for peace they had to express the will of a sovereign power. One of Hobbes's many enduring contributions to the broad logic of constitutionalism is in having made the State reliant, at least implicitly, on a narrative of anarchy and civil war. Many constitutions, including the Indian one, in their founding self-conceptions paid deep homage to this narrative and philosophical resource.

The invocation of crisis, strife, impending disunity, sectarian divisions, and the prospect of mayhem are ubiquitous in the reflections of the Indian Constituent Assembly Debates that precede the Constitution. The British imperial authorities had themselves for long grounded the legitimacy of their rule as the sole basis for avoiding chaos and mitigating the sectarian crisis which would result from their departure.¹¹ Especially in the early speeches of the Constituent Assembly, where a broader context is being imagined, the invocation of crisis constitutes a haunting background to the deliberations. A few examples make this clear. They are meant to capture the ambient mood of the deliberations and a conceptual orientation—one that is closely linked to the constitutional vision and the urgencies that motivate that vision. Rajendra Prasad, for example, speaks of the context as recalling other such assemblies; it is, as he says, a context of ‘... strife and bloodshed ... conducted amidst quarrels and fights’.¹² Nehru, in one of his early perorations, refers to the freedom struggle as the ‘valley of the shadow’: ‘we have gone through [it] ... We are used to it and if necessity arises we shall go through it again.’¹³ Purushottam Das Tandon, while referring to separate electorates, recalls the bloody American Civil War and accuses the British of having created the ‘... possibility of civil war in our country ...’ and again ‘it is quite possible that civil war may occur ...’¹⁴ Sri Krishna Sinha speaks of strife and the spirit of rebellion as making possible and underlying the very existence of the Constituent Assembly.¹⁵ In much the same (p. 44) spirit, MR Jayakar says ‘... frankly there is danger ahead, danger of frustration, danger of discord and division ...’¹⁶ Ambedkar recalls and quotes from Burke’s famous speech *On Conciliation with America* precisely because he thinks that the situations in the two assemblies, Britain in the late eighteenth century and India in the context of the Constituent Assembly, are analogous. They are both riven by the belief in the expedience force, but Ambedkar, quoting Burke, continues, ‘... the use of force alone is but temporary. It may subdue for a moment; but it does not remove the necessity of subduing again; and a nation is not governed, which is perpetually to be conquered.’¹⁷ Finally, returning to Rajendra Prasad from a later point in the debates, we may note his description of the extant context of India as being one in which ‘there is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language difference, provincial differences and so forth.’¹⁸

The background to these apprehensions about civil war and anarchy is a concern with the Muslim question, issues of caste, and pervasive inequality and destitution—hence broadly the social question. Following Independence and especially following the outbreak of hostilities in 1948, there was the additional and recurrent, and as it turned out the semi-permanent, invocation of the threat of war with Pakistan. In their combined effect they produced a generalised anxiety, not altogether dissimilar to Hobbes’ assessment of England in the mid-seventeenth century. It was a picture of a society fraught with the danger of subjective enthusiasms, religious difference, and social and economic divisions.

The collective image it produces is of a society in which unity had to be crafted through a new settlement. It is, of course, undeniable that the entire period of the Constituent Assembly, and the early years of the republic, were shadowed by real crises, especially after the failure of the Cabinet Mission, the outrageous expediency of Mountbatten's plans for the transfer of power, the refusal of the Muslim League's representatives to join the deliberations, the horror of partition, and the assassination of Mahatma Gandhi. The concern with war, the prospect of disunity, the anguishing worries about social and other forms of destitution typically mark the birth of nations and so it is not surprising that they should be forcefully expressed. Still, it is not these facts alone that adequately capture the importance of this recurrent trope in the Constituent Assembly debates and elsewhere. The facts, while true, are, after all, selective.¹⁹

The idea of crisis is also implicit in another resonant aspect of constitutional founding moments. They typically feature sharp contrasts in much the way Hobbes had starkly distinguished the commonwealth through the morbid imagery with which he described the state of nature. Here words often need the support of images. In the founding of constitutions this is conspicuously the case. They are often spoken as constituting a drama and they typically rely on dramatic images and metaphors to service their monumental purposes. (p. 45) They are conceived and projected through the iconography of darkness and light, night and dawn, past and future, subjugation and rebirth, chaos and order, and despair and hope. These metaphors extend across contexts that include those marked by an obvious revolution and widespread social upheaval, such as the French Revolution, to those where the constitutional founding occurred in a settled field of extant practice, such as in the Indian case. The fact that this stylised vocabulary and iconography, ritualised and, despite being burdened by clichéd overuse, has serviced such a vast range of examples, provokes an obvious question: what spurs such disparate moments to be so reliant on the sharpness of stark contrast and what are the stakes in these profuse distinctions?

The answer to this question touches on something deeper than the mere aesthetics of constitutions and the moments linked with their conception and adumbration. Initially, and above all else, constitutions need to clear the ground for a future set of experiences. The contrasts that are implicit in the metaphors they trade in are linked with distinctive narratives and constitutional visions and ultimately linked with the contested nature of modern politics. Such narratives dislodge rival modes of imaging collective life, institutional arrangements, and norms of governance. They displace and replace memories and practices, and are thus freighted with issues relating to culture and embedded forms of social existence. The starkness of the contrasts that the founding of constitutions rely on, and deploy, are the metaphorical and textual precursors to the grand and expansive project of remoulding of experience and giving it a distinctly political and national cast.

But, as with so many dramatic gestures, there is an anxiety and nervousness implicit in them—in part concealed, in part revealed—often by the sheer audacity of their proclamations. ‘We, the people’, that collective pronoun that putatively authorises so many constitutions, including the Indian one, does so from an uncertain and proleptic position. It knows itself to be only an artefact of the very thing it professes to be creating, and hence, as it were, an embryo professing the fullness of its own maturity. Similarly the nation on whose behalf the constitution speaks and whose identity it claims to secure is not yet unified as a nation in the appropriate sense; the State and the government that the constitution authorises are not yet stable entities; the offices and authorities it articulates are provisional place holders imbued only with high expectations; the principles that it articulates are abstract, and not yet backed by precedent or interpretive clarity; and the history that it professes to demarcate itself from still crowds in on the present. The dramatic masks what is provisional and promissory.

It is therefore not surprising that, in the grand ritual scenes that mark the founding of constitutions and the assemblies that issue them, there are also less noted theatrics that suggest the urgent need to secure the validation and recognition of others. It is all part of the complex process by which that which is new and imbued with intentions is draped in the appearance of validating and established authority. In the case of the Indian Constituent Assembly this happened immediately. Within what must have been the first minute following the convening of the Constituent Assembly in the Constitution Hall on 9 December 1946 the Chairman, Sachchidananda Sinha, read out to the assembly three messages of acknowledgement and felicitation from the Acting Secretary of State for the United States, Dean Acheson, the Foreign Minister of China, Wang Shih Chieh, and from the Australian government. This resulted in the first expressions of cheers and applause in the Constituent Assembly.

The moment of celebratory grandiosity, national self-assertion, and distinctiveness also required a particular kind of applause, which could only be secured through the echo and recognition of others. No doubt nationalism had its particularistic and culturally specific (p. 46) aspects, but at least among its more thoughtful advocates, figures such as Nehru, Ambedkar, and Fanon, nationalism also always articulated an idea whose transformative political and spiritual energies were thoroughly universal. The claim of independence, not unlike that of imperial authority and imperial subjection, had to be vindicated by a referent beyond itself. This and much else the national State shared with the Empire.

It seems fitting to that general moment that Nehru, speaking as a profoundly thoughtful participant and observer, and again while drawing on a host of sharp metaphoric contrasts, should have said, ‘standing on this sword’s edge of the present between this mighty past and the mightier future, I tremble a little and feel overwhelmed by this mighty task ... I do not know but I do feel that there is some strange magic in this

moment of transition from the old to the new, something of that magic which one sees when night turns to day.’²⁰ Perhaps Nehru trembled because there was the knowledge that the night would assuredly return, that the past was not quite past, that the emergent rested substantially on noble intentions and prophecy, and that the project of national self-creation, notwithstanding all the professions of self-certainty and destiny, required the emollient of a magical elixir.

How is one to make sense at an abstract level, rather than at a merely contextual level, of such insistently grave perorations? Why does the nation, as it comes to self-consciousness, not just in India but elsewhere too, swaddle itself in such mournful garb and dire apprehensions of strife and conflict?²¹ More is at stake here, and an abstract perspective tells us something beyond what can be gleaned from the historical and contextual orientation.

IV. The Narrative of Unity

As an existential contention the narrative of anarchy, civil war, and stark contrast is closely linked with the need for unity with an unequivocal centre of sovereign power. In the modern era nobody articulated the rippling stakes of this more forcefully than Hobbes. The ultimate purpose of the social contract for Hobbes was to articulate the multitude into a singular entity—‘This done, the multitude so united in one person is called a *Commonwealth*.’²² Such unity had to be buttressed by the narrative of anarchy and crisis as its counterpoint. The narrative in effect served to delegitimise all alternative claims to authority as satisfying the first virtue of a political order, namely peace and security; and equally, it made that narrative a permanent feature of the political order’s continued legitimacy. The very idea of sovereignty as the source of the political identity had to be undergirded by a constant reminder of their intimacy and proximity to their antithesis, namely anarchy, chaos, and death. The significance of this postulate, and its status as a quasi-metaphysical imperative, can be seen in the fact that no set of historical or extant conditions exempts a society from the implications of its implicit threat. Peace and security required the mediation of the State. (p. 47) They could not be left to the contingent resolutions offered by other social options. As the post-9/11 world has made vivid, the concern with security operates as a kind of permanent backdrop for every future eventuality, neutralising culture, society, or ethics from having an alternative claim to their redress.

Whatever the social, ethnic, cultural, geographical, or other forms of diversity and unity that might characterise a collection of individuals, they must, in addition, be forged into ‘a people’ with a distinctive political self-conception or collective identity. A central

feature of that political identity—even if it involves a shared and founding allegiance to certain ‘inalienable rights’ and abstract normative principles as the American act of ‘separation’ did—is a sense of awareness that they constitute ‘one body’ with a shared vulnerability. The forging of a distinct political identity, even in a text such as the American Declaration of Independence in which the appeal to normative principles was so conspicuous, explicitly stipulated the need ‘to provide new guards for their future security’ and to ‘have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do’.²³ The Declaration did not just indicate a desire to defect from George III’s Empire; it was a document that professed the formation of something separate, singular, and unified—bound together in part by a shared insecurity along with the means to contend with that predicament. Hobbes signals the significance of this metamorphosis of individuals into ‘one body’ by invoking the gravity of the biblical term ‘Covenant’, thereby associating the formation of the Commonwealth with a new communion and a radically transformed ontological condition. Locke, though his language was less dramatic, was equally explicit—‘it is easy to discern, who are, and who are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to ...’²⁴ In brief, the unity and the diversity of the social, be it the bonds of family, religious orders, professional guilds, territorial, and functional forms of association such as towns and villages, none of these can serve as a substitute for the unity of the political.

Both Hobbes and Locke anticipate a history in which the formation of modern political societies was linked, as both cause and effect, with nationalism and its cognate patriotism and the thought that each member was communally linked with every other member; and that the nature of this link was especially poignant because the issue of the security, defence, and preservation of the corporate body of the people was always at risk. One might say, in this tradition, security, self-preservation, and political unity are literally obsessions in that no amount of attending to them fully assuages the anxiety they represent. Even with thinkers like Rousseau and Kant, who endorsed a federative ideal, there was no relaxing on the importance of patriotism, notwithstanding the civic accent they placed on it. Related to this idea was the emphasis which political societies placed on territorial and other kinds of boundaries, which were to be rigid and not porous. Hegel was summarising the broad orientation of modern political thought and practice when he wrote: ‘Individuality is awareness of one’s existence as a unit in sharp distinction from others. It manifests itself here in the state as a relation to other states, each of which is autonomous *vis-a-vis* the others.’²⁵ (p. 48) And finally the idea points to the thought that in political society there must be a central source of power, even if that power is limited or checked by contesting divisions and established norms for the transfer of power.

From a constitutional perspective nations have to articulate themselves as singular political entities. It points to the crucial significance of the singular collective pronoun,

‘We, the people’, as authorising the constitutional project. In terms of constitutional salience, unity is understood not as a social or civilisational category, but rather as something that refers to a political form. Unity, as Carl Schmitt pointed out, was the essential and permanent precondition and aspiration of the modern form of the state.²⁶

In many ways, the generative crucible of modern constitutions and modern politics turns on the metaphor and the idea of destruction and creation. As a coupling it is the font of that particular disposition by which power—in particular political power—becomes, or at least projects itself as, the singular and redemptive energy of a society. This is especially conspicuous in the case of foundational moments, but also is so often evident in more routinised politics, which, increasingly, invoke the dramaturgy of a revolutionary pretext. Many of the major themes of modern politics—the concern with power, the unity of the State and the nation, social justice, and national recognition—rely on contrasts of which destruction and creation are the starkest expressions.

The idea that political power emerges from the site of destruction or that it should need such an image for its self-generation is revealing of the nature of political power itself. At a broad level it points to the fact that power has a strained, if not antithetical, relationship to the past. In constituting itself through an act of clearing it is markedly different from social authority, which as Weber emphasised, typically relied on continuity as its mode of self-authorisation and legitimacy. This is a theme that informs the Indian Constituent Assembly, though often with ironic touches. The assembly, as is well known, was full of speeches and references to India’s glorious and multifarious pasts. One can recall Nehru’s many invocations of India’s five thousand years of history and traditions (which revealingly he often characterises through the metaphor of weight, thereby also suggesting burden), or Dr Radhakrishnan’s frequent references to India’s ancient republican traditions, or the countless other occasions in the assembly when the civilisational lustre of India was mentioned, usually with a triumphal pride. And yet—and this is the irony—the dominant temper of mind in the assembly was revolutionary, in which the challenge was to build a new society on the ruins of the old. It was this thought that guided the Assembly from its start to its conclusion, and for which the State and political power was deemed to be the necessary instrument. The metaphor of building, of creating something new, runs through the Constituent Assembly’s deliberations. It is striking that even some of the native princes in the Constituent Assembly concurred with this sentiment. When, for example, Nehru in the resolution regarding ‘Aims and Objects’ invokes, with commendation, the American, French, and Russian Revolutions it is because, as he says, they ‘gave rise to a new type of State’.²⁷ For that new State to have the stature and power requisite for the crafting of a new society, the past had to, quite literally, be past. It could survive only as something on which the State could do its work, as though it were an inherited one-dimensional coda, but not as a living (p. 49) force that infused the present. This is how Nehru, for example, typically conceptualises the

relationship of the past and the State. In the *Discovery of India*, at one point Nehru paints two images of India: the first is dotted with innumerable villages, towns, and cities teeming with the masses; the second image is of the snow-capped Himalayas and the valleys in Kashmir 'covered' as he says 'with new flowers and a brook bubbling and gurgling through it'.²⁸ And then, in a remarkably self-conscious admission of the romantic and revolutionary's preference for blank slates and unpopulated places, for geography over history, he says: 'We make and preserve the pictures of our choice, and so I have chosen this mountain background rather than the more normal picture of a hot, subtropical country.'²⁹ One way of conceptualising the enduring challenge of the Indian State is to say that it has always attempted to stop the past from tearing the soul of the nation apart, with power as its principal instrument in this therapeutic endeavour.

V. History and the Future

A decisive axis on which constitutions wager their authority is temporal. They typically pit the past and the future against each other. They deploy the text of the constitution as though it were a dam, by which the flow of the past could be held back or redirected and the elevation of the future repositioned at another plane. This is what is required for clearing the ground for a new mode of thinking and organising the administration of power. A crucial feature of that mode of thought, for which constitutions supply an essential tool, is that they must, from the outset, be oriented towards the future. Constitutions must sanction a mode of imagining and acting which, through its abstractness, can anticipate a future set of intentions and hence a capacious field for the exercise of power. Power in this sense always has an anticipatory mode of address. James Wilson, speaking at the Philadelphia Convention, put the matter with succinct clarity: 'We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the present.'³⁰

Nehru spoke in a similar vein in his famous inaugural address on the night of 14 August 1947. He was preparing the nation for an experiment in a temporal abstraction. The only register in which the nation could be spoken of was the future and the vision associated with it. It was a moment when, as he said, 'we step out from the old to the new, when an age ends' and when 'the future beckons to us'.³¹ The fact that the Constitution was to realise a beckoning from the future is understandable; but it was equally, and more vexingly, burdened with the challenge of bringing an age to an end and drawing a curtain on the past. Such pronouncements are linked, through drama and metaphor, with softening the conundrum that attaches to all constitutional founding moments—that is, of supplying a foundation to that which purports to be a foundation. Notwithstanding the

warrant of history, legislative precedent, and, in the Indian case, the hugely significant fact of (p. 50) becoming an independent nation, it is only the future that could stand as the foundation of the Constitution. Ultimately, constitutions wager on being able to create in the future the conditions through which justice, morality, order, and a regime of giving and accepting reasons become real and serve as norms.

In the Indian and more broadly post-colonial context, the relationship of power to history is fraught with imperial associations. In the nineteenth century, every major expression of European political thought had made history the evidentiary ground of political and even moral development. In Hegel, Marx, and JS Mill, notwithstanding their differing accounts of historical development, history was the register through which alone a society's political condition and political future could be assessed. Hegel's articulation of the state as the embodiment of a concrete ethical rationality represented the realisation of a journey of Reason that originated in the distant recesses of the East. Marx's vision of a proletarian future had its explanatory and political credence in overcoming the contrarian forces that fetter and spur historical movement. Mill's ideal of a liberalism that secured the conditions for the flourishing of individuality again explicitly rests on having reached a point of civilisational progress '... when mankind have become capable of being improved by free and equal discussion'.³²

These arguments had a specifically imperial inflection. In Mill, who was by far the most influential liberal advocate of the Empire, the argument went broadly along the following lines: political institutions such as a representative democracy are dependent on societies having reached a historical maturation, or, in the language of the times, a particular level of civilisation. But such civilisational maturation was differentially achieved. That is, progress in history itself occurs differentially. Hence, those societies in which the higher accomplishments of civilisation had not occurred plainly did not satisfy the conditions for a representative government. Under such conditions, liberalism, in the form of the Empire, serviced the deficiencies of the past for societies that had been stunted through history. This, in brief, was the liberal justification of the Empire. Its normative force rested squarely on a claim about history. It is what Dipesh Chakrabarty has called the 'waiting room' version of history.³³ The idea was that societies, such as India, had to wait until they were present in contemporary time or what amounts to the same timing in contemporary history. They had to wait because their history made it clear that they were not 'as yet' ready for political self-governance. The denial of an autonomous political realm was the debt paid by the present on behalf of a deficient and recalcitrant past.

The nationalist response to this historically anchored waiting room model was to agree with the idea and the logic of argument but to disagree with the particulars of its application. Here, as elsewhere, Gandhi is the exception because his conception of civilisation and its cognate progress were never historically driven. When Gandhi speaks

of civilisation, it is invariably as an ethical relationship that an individual or community has with itself, with others, and with its deities.³⁴ Whatever else this does, it cuts through any reliance on history as the register from which alone progress can be read, evaluated, and directed. But the (p. 51) more typical nationalist response, including among the social reformers of the nineteenth century, was to concur with the claim that progress was historical, but to demur on the point that India was not 'as yet' ready. The nationalist claim instead was that India was in fact ready, that it had paid its debt on behalf of a 'backward' past through two centuries of tutelage. Its claim to political autonomy was simply the other side of the claim that it was present in contemporary time and thus freed from the residual vestiges of historical time.

VI. The Social Question

But what did it mean to be freed from history? It did not mean that India was not affected or influenced by its past, or that the problems of poverty, caste, and numerous other social and economic woes were without a historical dimension. That would have been rank stupidity, and the framers of the Constitution and the members of the Constituent Assembly were not fools. Instead, the historical aspect of these problems is taken as part of their social scientific and political nature, but not as an inheritance that limited the potential of political power. All historical issues get automatically translated into the language of politics and in that translation they lose any temporal dimension of the past. History is brought to a threshold where, to recall Nehru's famous words, 'an age ends'.³⁵ The instrument through which this temporal sequestration is effected is political power. History becomes a social and contemporary fact on which politics does its work, by which I mean that history gets translated into a medium where it is available for political modification. To put the point perhaps overly starkly, the challenge of caste injustice becomes analogous to that of the building of industry or large dams. They are all challenges in which the State draws and leans on the guiding primacy of science and social science. This conception of the political is nothing if not presentist; it loses an element of temporality that one associates with notions such as inheritance. It is anchored in the amplitude of choice; everything becomes an issue of choosing by reference to the larger purposes of the nation, because the conception of politics that it belongs to is supremely about choosing and realising those purposes.

It is in this context that the concern with social issues, which is such a conspicuous feature of the Constituent Assembly debates and the Constitution, becomes relevant for two reasons. First, issues such as mass poverty and illiteracy and near-ubiquitous destitution belong to the realm of necessity because they put human beings under the

pressing dictates of their bodies. To the extent that political power concerns itself with this dimension of human life (and under modern conditions it has to), it too becomes subject to a necessity. It can only represent freedom as something prospective. Its immediate ambit is dictated by the intensity of 'mere life'. And with regard to this ambit, political power can have no limiting bounds. Under such conditions a simple logic transforms power from a traditional concern with establishing the conditions for freedom to a concern with life and its necessities. The power of the State is thus always underwritten by an elemental imperative to sustain life—the corporeal life of the citizen and the unitary and corporate life of the nation. Neither the fundamental rights which belong to citizens—with regard to which the Indian (p. 52) Constitution was famously expansive—nor the rights of the States and the communities that make up the federation has a warrant that is independent of the larger purposes of the nation. As Part III of the Constitution makes clear, the very enunciation of fundamental rights was immediately conjoined with the textual clarification of the ways in which such rights did not limit the power of the State in realising a broader national and political vision. Ambedkar's statement to the Constituent Assembly on 4 November 1948, made the subsidiary priority of fundamental rights perfectly explicit, '... fundamental rights are the gifts of the law. Because fundamental rights are the gift of the State it does not follow that the State cannot qualify them.'³⁶

The second aspect of the social, which explains its prominence, relates to its fundamental diversity in the Indian context. The diversity of India, of its religions, languages, castes, mores, and 'minor' traditions had been the leitmotif of colonial and nationalist ethnography and historiography dating back to Sir William Jones, Edmund Burke, James Mill, Sir Henry Maine, JR Seeley, and numerous others from the late eighteenth century onwards. It referred to a fact which variously supported the view of India's cultural and civilisational richness, her history of confederation, her *Sabhas*, *Samitis*, and *Panchayats* and the traditions of decentralised accountability; but this very diversity was taken to be in many of these narratives as the ground for India's political backwardness, her lack of national coherence, her easy resort to internecine conflict, and her fundamentally anti-modern orientation. Nationalists had, of course, also weighed in on these debates, whose stakes they knew pertained not just to their anti-imperial claims, but also to the period that was to follow. India, as both Gandhi and Nehru concurred, lived in her villages and her villages, in being worlds unto themselves, tended to live in a benign isolation from the rest of the world. For Gandhi, village India furnished the basic social integuments for resisting the lure of a vicarious existence—a feature which most troubled him about modernity. For Nehru, as a general matter, villages entrenched practices that were archaic, anti-rational, and sectarian in their prejudices. They represented everything to which his vision of the democratic nation offered a redemptive redress.

The constitutional vision, which in the main sidelined Gandhi's views, saw in the social diversity of India a profound challenge. It was variously coded as a resistance to the professed unity of the nation and as supporting the sectarian, inegalitarian, and pre-modern norms that sustained and promoted the social. But perhaps most importantly, the social, with its essential diversity, represented a resistance to the political vision which the Constitution attempted to put in place. Dr Rajendra Prasad's words to the Constituent Assembly make this amply clear. They have all the familiar contrasts and binaries. On one side stands the Constitution, the unified nation, the men of honest character and integrity, the interests of the country, the ability to control and guide it; and on the other side, the diverse languages, castes, communal differences, prejudices, and the 'various elements of life' with their 'fissiparous tendency':

After all, a constitution like a machine is a lifeless thing. It acquires life because of men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language (p. 53) difference, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences.³⁷

This is a casting of India in the very terms that Hobbes had viewed English history in the seventeenth century in his study of the English Civil War. The social domain was divisive, the political, unifying. The constitutional vision was meant to eviscerate or, at a minimum, trump these social and fissiparous tendencies by fixing them in a unified political frame. In fact, for Ambedkar, even the idea of India's being a federation was troubling because that term suggested the existence of parts or States that had, as in the American case, come to an 'agreement' to form a federation. For Ambedkar, the constitutional vision was one in which the 'Union' was not at the mercy of any such agreement with its constituent parts:

The federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single *imperium* derived from a single source.³⁸

Not surprisingly the text of the Constitution never uses the terms 'federal' or 'federation'.

For Nehru, Prasad, and others, the social diversity of India was a real, if awkward, fact, which simultaneously provoked pride in India's civilisational fecundity and plurality, and a fear in its centrifugal potential. With Ambedkar, the diversity—to the extent that it was

even acknowledged—existed solely as an administrative ‘convenience’ on the way to realising an expressly political vision. For Ambedkar, the social did not even represent what Prasad called the ‘elements of life’, because the presumption in favour of a unitary political perspective was total. It is a perspective that is revealingly (and certainly wishfully) described as appropriate to ‘a single people living under a single *imperium* derived from a single source’. Hobbes would have marvelled with envy at such propitious foundations—if only they had been true.

A corollary of this political emphasis was that individuals, not withstanding their rights, were understood primarily as citizens—that is, as members of a predetermined, even if only prospective, political community—and not as agents of their private material or commercial interests. The imperative for unity was so acute that something as potentially fissiparous as *homo economicus* could only be allowed an existence in the shadowy penumbra outside of the national ethos.

VII. Conclusion

The underlying argument of this chapter is that the themes of crisis, impending disunity, and the prospect of anarchy all worked to produce a collective self-understanding in which a concern with national unity was deeply, indeed constitutionally, braided with the sanction and the amplification of political power. It is this widely shared conviction, one which (p. 54) I identified in its intellectual origin as Hobbesian, which I believe is the conceptual thread that ties the constitutionalism of the late 1940s with the Nehru Report of 1928 and Government of India Act of 1935, along with contemporary democratic politics and judicial activism. The only argument that challenges it comes from Gandhi and those of his ilk, who do not share the assumption of impending anarchy or crisis, and when they do are prepared to embrace its implications. The Left-Right spectrum on public policies always complements the dominant self-understanding with its belief in the primacy of political power, most often by simply refusing to offer any arguments against it and by treating it as a self-evident norm of national independence, pragmatism, and national idealism. There is in this a submerged conviction and consensus, and a correspondingly elevated faith in the State. It produces a powerful absolutism on behalf of the State, one that is, strangely—given Gandhi’s presence and stature—unmarked by contact with an opposing way of life and point of view.

One can make this point by invoking what might seem like a distant reference to Locke, though of course in many ways Locke is not so distant; his and even more so Hobbes’ spirit hovers over the Constituent Assembly like a ghostly interlocutor, not unlike the presence of Montesquieu in the Constitutional Assembly in Philadelphia. There were

always two aspects to Locke's liberal arguments. The first was an implicit defence of the State as the only organ that could legitimately coerce individuals, who were deemed to be free and hence in principle relieved of social ascriptions, such as class, place, church, and guild; and who, as citizens, had a more elevated claim that linked them to the State. The second aspect of Locke's argument, which was more explicit and celebrated in the Anglo-American tradition, was a claim that limited the powers of the State by tying it to various norms of authorisation. Louis Hartz, in his classic book *The Liberal Tradition in America*, offered a famous reading in which because the familiar European feudal and social distinctions, such as class, place, church, and guild, had not taken root in America, the second of Locke's claims came to be viewed as the whole of his argument.³⁹ American liberalism, at least in its official or credal version, came to be understood as all about the limitations on the power of the State. It was anchored in a deep distrust of power—of which a distrust of the absolutist prince was just a single instance. The dominant impulse of this constitutionalism was thus to limit political power, to be suspicious of it, and to constrain its reach.

In the Indian case something of the reverse is true. It is the defence of the State as the ultimate backstop against anarchy, strife, crisis, and acute destitution that makes it the guarantor of national purposefulness and supplies the ground for its having a priority in our collective self-understanding. But for this to be possible the ground has to be cleared of recalcitrant historical debris. The State, of course, does not operate on a blank slate. It arrives on a scene freighted, as the colonial State was, with all manner of historical and social encumbrances. The Constitution was a way of conceptualising the problems of a new nation in the present and for the future, as a political project of profound and permanent urgency.

Notes:

(1) Cited from Hannah Arendt, *On Revolution* (Penguin Classics 1977) 133.

(2) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 62, 13 December 1946.

(3) See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966); Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press 1999); HM Seervai, *Constitutional Law of India: A Critical Commentary*, vols 1–3 (4th edn, Universal Law Publishing 1991–96).

(4) 'A constitution [is] an organization of the offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed.' Aristotle, *Politics*,

tr Ernest Baker (Oxford University Press 1946) 28–32. See also Charles H McIlwain, *Constitutionalism—Ancient and Modern* (Cornell University Press 1940).

(5) Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed Jacob E Cooke (Wesleyan University Press 1961) 146.

(6) Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) xii. Joseph Raz makes this point in terms of the distinction between ‘thin’ and ‘thick’ constitutional understandings. See Joseph Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Larry Alexander (ed) *Constitutionalism* (Cambridge University Press 1998) 153.

(7) I mean this claim in a broad sense. It is not meant to deny that the consensus about the state may itself be backed by a moral consensus. In fact, since the account I am offering at a very general level has a Hobbesian inflection, it is worth pointing out that for Hobbes the rationality of the state is itself underwritten by its coincidence with a moral rationality.

(8) The idea of new nations as fragments of a European political imagination draws on the thought of Louis Hartz. See Louis Hartz, *The Founding of New Societies* (Harcourt, Brace & World 1964).

(9) Writing in early 1947, Sir BN Rau reminded the Constituent Assembly: ‘It is pertinent to observe that we are still governed by the “transitional provisions” in Part XIII of the Government of India Act of 1935 ...’ BN Rau, *India’s Constitution in the Making* (Orient Longman 1960) 2.

(10) Thus, for example, Hobbes, who offered the most influential philosophical and abstract argument for the meta-historical priority of anarchy in grounding the necessity of the State, also supported that argument as being ‘occasioned by the disorders of the present times’. Thomas Hobbes, *Leviathan* (first published 1651, Hackett 1994) 496.

(11) Faisal Devji gives an extremely thoughtful account of both the British thinking on this matter and Gandhi’s heretical embrace of the prospect of anarchy in Faisal Devji, *The Impossible India* (Harvard University Press 2012), ch 6.

(12) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 50, 11 December 1946.

(13) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 64, 13 December 1946.

(14) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 68–69, 13 December 1946.

(15) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 87–90, 16 December 1946.

(16) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 81, 16 December 1946.

(17) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 103, 17 December 1946.

(18) *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1955) 993, 26 November 1949.

(19) Devji (n 11), 153, quotes a letter by Lord Linlithgow to Lord Wavell with the following sentence: 'We could not for the peace of the world allow chaos in India.' Here, as elsewhere, Gandhi expressed a dissenting view, which was of a piece with his reluctant support of constitutionalism and the need for unity expressed around the medium of the state and political power. In 1942, during the Quit India movement, he made clear to the British that the time had come for them to leave India, even if that meant leaving the country to God and anarchy.

(20) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 64, 13 December 1946.

(21) As another example, the *Federalist* papers are replete with similar apprehensions. One of the most frequent complaints made by the proponents of the American Constitution against the Articles of Confederation was precisely that the latter would expose the republic to anarchy, chaos, and civil war.

(22) Hobbes (n 10) 109.

(23) Declaration of Independence 1776.

(24) John Locke, *Two Treatises of Government*, ed Peter Laslett (2nd edn, Cambridge University Press 1967) 367.

(25) Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, tr TM Knox (Clarendon Press 1945) 208.

(26) See Carl Schmitt on political unity: Carl Schmitt, *Roman Catholicism and Political Form* (Greenwood Press 1996); Carl Schmitt, *Political Theology II* (Polity Press 1970) 71–72.

(27) *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 61, 13 December 1946.

(28) Jawaharlal Nehru, *The Discovery of India* (Penguin 2004) 56.

(29) Nehru (n 28).

(30) Max Farrand (ed) *The Record of the Federal Convention*, vol 2 (Yale University Press 1911) 125.

(31) *Constituent Assembly Debates*, vol 5 (Lok Sabha Secretariat 1955) 4, 14 August 1947.

(32) John Stuart Mill, *On Liberty*, eds David Bromwich and George Kateb (Yale University Press 2003) 81.

(33) Dipesh Chakrabarty, *Provincializing Europe* (Princeton University Press 2009) 8.

(34) For Gandhi's views on civilisation and history, see MK Gandhi, *Hind Swaraj* (Cambridge University Press 1997).

(35) *Constituent Assembly Debates*, vol 5 (Lok Sabha Secretariat 1955) 4, 14 August 1947.

(36) *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1955) 40, 4 November 1948.

(37) *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1955) 984–85, 26 November 1949.

(38) *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1955) 42, 4 November 1948.

(39) Louis Hartz, *The Liberal Tradition in America* (2nd edn, Mariner Books 1991).

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**Course packet IV: non-nationalist readings of the
Indian Constitution**

1. Arvind Elangovan, "The Making of the Indian Constitution: A Case for a Non-nationalist Approach," *History Compass* 12:1 (2014)
2. Aditya Nigam, "A Text without Author: Locating Constituent Assembly as Event," *Economic and Political Weekly* 39:21 (2004)
3. Indian National Congress, "Karachi Resolution – 1931 (extract)"
4. Kama Maclean, "The Fundamental Rights Resolution: Nationalism, Internationalism, and Cosmopolitanism in an Interwar Moment," *Comparative Studies of South Asia, Africa and the Middle East* 37:2 (2017)
5. Indivar Kamtekar, "The Fables of Nationalism," *India International Centre Quarterly* 26:3 (1999)
6. Ranajit Guha, "On Some Aspects of the Historiography of Colonial India," *Subaltern Studies I* (1982)

The Making of the Indian Constitution: A Case for a Non-nationalist Approach

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Abstract

The writing of the Indian constitution has often been celebrated for its momentousness, as it came at the end of a long period of anticolonial struggle. However, very little has been written on the making of the constitution. Often, the event of drafting the constitution is written-off as part of a logical end to the British Empire in India or as part of a fulfilling of the promise made by India's anticolonial leaders. However, this has led to a severe impoverishment of the field of Indian constitutional history. In this essay, I suggest that we could benefit so much more by considering the long, complicated, and fraught history of constitution making separately from the process of the making of independent India. By separating nation-making from constitution-making, the field of constitutional and political history can only be a richer and more informative resource to understand the complex postcolonial developments in India.

“Despite the centrality of the Constitution to our social and political life, it has been ill-served by our historical imagination. In a very mundane sense, with a handful of exceptions, there is no serious or deep historiography associated with our Constitution, one that can put it in proper historical and philosophical perspective.”

Pratap Bhanu Mehta¹

Mehta's telling observation on the status of the existing historiography of the Indian constitution deserves critical attention. In this historiographical essay, I suggest that one reason for this significant lack in the historical and philosophical perspective is because, for long, the history of the Indian constitution has been perceived conterminously with the history of Indian nationalism with the result that constitution making has always been considered as a logical, if not a twin accompaniment to the larger historical process of decolonization and the inauguration of the Indian nation-state in 1947. At least three historical factors contribute to such a perception, namely, the timing of the making of the constitution, the personalities involved in the framing of the constitution, and the scope and content of the constitution. The process of constitution making that began a few months prior to decolonization in August 1947, which, continued until 1950, coincided with the process of decolonization that left an imprint of continuity from the colonial to the postcolonial state. Further, the main political party that emerged to lead the anticolonial struggle (the Indian National Congress) and several of its leading stalwarts, such as, Jawaharlal Nehru (later, to be India's first Prime Minister), Vallabhbhai Patel, Maulana Abdul Kalam Azad, Rajendra Prasad, and others were directly involved in the making of the constitution. Finally, the framers of the Indian constitution borrowed heavily from the last colonial constitutional Act of 1935, wherein they retained the basic colonial administrative and governmental structures for independent India. India's constitution, adopted in 1950, had a centralized parliamentary system of government, restricted autonomy for the provinces, an independent judiciary, a bill of rights with restrictions, universal adult franchise, and a set of guidelines,

called directive principles for the state to strive towards greater social and economic equality for its citizens. Much of this ideology and structure of the constitution could be traced back to Congress's demands made during the anti-colonial struggle and the form of British colonial administration. Moreover, as a formidable political gesture, members of the constituent assembly, after debating and drafting the constitution for over three years, passed the final draft of the constitution unanimously, buttressing the claims that the story of the Indian constitution was, in the final analysis, the successful culmination of the story of Indian nationalism.

However, pivoting around these three factors – timing, personalities, and content – detracts from focusing on the long, multi-pronged, and ‘conflictual’ path traversed in the process of the making of the constitution. The narrative of constitution as a result of successful nationalism, for instance is suspect if we consider, for example, the fact that Bhim Rao Ambedkar (1891–1956), the Chairman of the drafting committee of the Constitution and a preeminent leader of the historically ‘downtrodden’ caste groups, publicly distanced himself from the constitutional document that he helped draft, in 1953, just three years after the adoption of the constitution.² Or, a closer examination of the constitutional amendments in the first two decades after 1950 confirms the notion that the so-called ‘consensual’ arrangement had to be consistently amended to reflect the rapidly changing norms of India's socio-political and economic developments.³ In order to explore the causes of these actions, and many others, I submit, it is necessary to shift our attention from viewing the constitution as a product of consensus underwritten by nationalism, to viewing the document as a product of series of conflicts – ones that were both resolved and unresolved, as well as ones that challenged any imposition of nationalism. For, the causes for Ambedkar's public disavowal of the constitution and reasons for many amendments, to cite only two examples, necessarily predate the making of the constitution between 1946 and 1950. Such a historical perspective, then, would better help us understand the legacy of constitutionalism in postcolonial India. In what follows, I critically trace the historiography of the making of the Indian constitution, as a movement from a language of consensus to that of conflict. In conclusion, I point to areas of research in this direction that will enhance our understanding of the long and conflicted history of the making of the Indian constitution.

Indian Constitution as a form of Indian Nationalism

In what has become a classic and foundational work on the making of the Indian constitution, the political scientist, Granville Austin characterized the motivation and tasks of the members of the constituent assembly in these evocative words, “In the Assembly Indians were for the first time in a century and a half responsible for their own governance. They were at last free to shape their own destiny, to pursue their long-proclaimed aims and aspirations, and to create the national institutions that would facilitate the fulfillment of these aims. These tasks the members approached with remarkable idealism and a strength of purpose born of the struggle for independence.”⁴ Austin's work researched extensively over a decade and published after 16 years of the formal adoption of the constitution was striking for its original research based on unprecedented access not only to the original and unpublished documents of the constituent assembly but also to the private papers of several members of the constituent assembly.

Based on such extensive archival work, Austin argued that the members of the constituent assembly were driven by a need to achieve social revolution through the constitution. For Austin, the decision by the members of the constituent assembly to incorporate universal adult franchise, inclusion of a set of fundamental rights and directive principles for the state, enshrining mechanisms to balance the power between the various branches of the state as well as between the centre and the provinces, were part of an effort to induce social changes

in an arguably unequal society.⁵ In making this argument, Austin repeatedly foregrounded how the members of the assembly having come from different socio-economic, political, and philosophical persuasions were nevertheless united in the interest of the nation and the ideals of social justice. In other words, for Austin, the Indian constitution was nothing short of a salutary tribute to the success of Indian nationalism.

Austin's work still remains the most influential in the field of Indian constitutional history, for its detailed analysis of the process of the making of the constitution. Scholars, working contemporaneously and later, have rarely been able to match up to Austin's intricate study. Most significantly, for a long period, a body of scholars shared Austin's fundamental perception of viewing the Indian constitution as an extension of Indian nationalism, with the notable exception of Upendra Baxi, whose criticisms of Austin, I note shortly. For instance, writing contemporaneously as Austin, in the Indian city of Allahabad, Uma Kant Tiwary began his work on the history of the Indian constitution by writing, "The history of India's struggle for freedom is the history of the gradual realisation of self-rule through representative institutions...The Indians ..., took the ideas of nationalism and of constitutionalism from the west, defied British imperialism, and framed a new constitution which established in India a full responsible government."⁶ Indeed, Austin's influence is remarkable given that there were no significant works that were produced in the subsequent decades that challenged his fundamental thesis of viewing the Indian constitution as a product of nationalism.

Before proceeding with criticisms of Austin's view, it would be helpful to note Sarbani Sen's book on the Indian constitution, whose arguments departs from Austin in some respects but overall subscribes to Austin's theses of nationalist consensus. Sen contended that the moment of constitution making represented a transformative break, one that embodied a tradition of political practice of revolutionary actions of everyday Indians. Sen wrote, "...the Indian Constituent Assembly, in my view, ... serves as an embodiment of the past revolutionary endeavour of the Indian people against colonial rule. It was not a statutory construction legitimated by an act of the British Parliament. Its procedures symbolically embodied some of the prior forms of popular political engagement against British rule, and its debates were about the issues that had preoccupied the revolutionary generation as they sought to develop a consensus on the organizing principles of the new polity."⁷ For Sen, then, the making of the constitution represented a moment where the members of the assembly having had deep roots in prior political engagement with British institutions of power were able to successfully translate that experience to reflect popular sovereignty. In other words, for Sen, the story of writing the Indian constitution was not simply a product of enlightened leaders coming together at an abrupt moment (such as argued by Austin) but rather as one, which had deep roots in the Indian leaders' engagement with the British sovereign through the exercise of popular politics. Constitution making, then, was a translation of the idioms of popular politics to institutionalized mechanisms of balancing power in order to ensure a just outcome for all involved.

Interestingly, like Austin, Sen also views the process of constitution making as both a culmination and an expression of nationalism. In her description of the constituent assembly, she says, "The exercise of popular sovereign power through the Assembly to create a new political order, represented both an exercise in rational discourse and an assertion of sovereign will to create a new political identity and principles of government."⁸ Further, commenting on the proceedings of the Assembly, Sen remarked, "The Assembly debates allowed a valid testing and legitimation of proposals in the name of the people and established a bridge between the rhetoric of the colonial struggle and the institutionalization of major premises."⁹ Indeed, in privileging the constituent assembly and paying particular attention to the debates

that occurred within its premises, like Austin, Sen also views constitution making as a process that had a single minded destination in the minds of its members guided by destiny. In such a view again, nationalist driven consensus plays a determining role in characterizing the making of the constitution.

De-coupling Nationalism and the Making of the Constitution

Austin's influence and Sen's work, however, come as a surprise given that a profound shift was occurring in the early 1980s in Indian historiography, which began to critically evaluate claims of benevolent imperial legacies and uncritical celebrations of nationalism, with the birth of the subaltern studies collective.¹⁰ Scholars of the collective critically interrogated the role of the subaltern classes, such as the peasants, factory workers, practitioners of indigenous medicine, women, and other groups that had been historically marginalized in the grander narratives of the making of the Indian nation. Together, the collective raised important questions about the formation of the nation-state and sought to separate the experiential histories of the people from the institutional narratives provided by the nation-state, particularly, the constitution. Several scholars have since carried forward this idea of attempting to de-link the history of constitution making from a history of nationalism and thereby challenging the conflation of constitutionalism with nationalism. This is not to suggest that these scholars were part of the collective but rather their projects at times synchronized with the aims of the collective.

Prior to the arrival of the subaltern studies collective and certainly sympathetic to the project later, Upendra Baxi, in his acerbic critique of Austin, laid down some of the ways in which the latter's text on the constitution was deeply problematic. In his long essay, "The Little Done, The Vast Undone", Baxi probed Austin's argument about the making of the Indian constitution, which was centered around a benevolent 'oligarchy' of the Congress leadership, the celebratory tone of nationalism pervading the analysis, an emphasis on the final act of consensus, and the drafting process that was infused with the task of a social revolution. Disagreeing with these fundamental characterizations of the constitution, Baxi argued that such an analysis takes a very simplistic view of politics, as if it was divorced from the perpetuation of interests, which is at the heart of political conflict. Baxi observed that much of Austin's claim about constitutional principles, such as fundamental rights and directive principles having anti-colonial and Indian roots is quite suspect, as it fails to take into account the complex social matrix of Indian practices that would belie such simple generalizations. Finally, Baxi suggested that a deeper inquiry into Indian society and the process of constitution making might perhaps reveal a story that moves beyond consensus. Indeed, consensus could well mask the complex structure that underlined decision making, particularly in the context of the making of the constitution.¹¹

Baxi's voluminous writings on the Indian constitution, particularly in analyzing various court judgments, and on the issues of Human Rights, have contributed immensely towards a nuanced understanding of constitutionalism, one that takes into account political differences rather than emphasizing political consensus. One finds a similar approach taken by Aditya Nigam in his analysis of the debates in the constituent assembly.¹² In challenging the notion that there was a "pre-conceived" idea of a nation that was uncovered in the constituent assembly, he suggested that the debates in the assembly, if anything points to the fact that there were 'no particular set of values' that guided the framers of the constitution that would help in determining a single authorial voice.¹³ By taking into account the history of the making of the constituent assembly, the diverse ways in which the members approached questions of the constitution such as fundamental rights, and by critically positing

the pervasive nature of homogenizing nationalism that characterized many of the Congress leaders' statements, Nigam highlighted the idea that constitution making often had its roots in the socio-historical milieu, perhaps, much more than the constituent assembly alone. For Nigam, this polyphonic nature of constitution making underlines the hegemonic nature of the Indian postcolonial state, which literally willed away differences. Nigam's critique, I argue, indicates that one could fruitfully separate the task of nation-making (which many of the members of the assembly were attempting) by minimizing and if possible, eliminating differences, from the task of constitution making, which by definition, required to elicit rules and first-order principles to govern a society, replete with differences. In this sense, Nigam's critique is a step forward towards a critical reexamination of viewing the constitution as strictly a product of nationalism.

The idea of displacing nationalism from a history of the making of the Indian constitution receives a sustained and sophisticated treatment in Mithi Mukherjee's work, *India in the Shadows of Empire*. In narrating a longer history of the Indian constitution, Mukherjee expands the focus from the constituent assembly to the larger canvas of legal and juridical traditions that the British Empire engendered in India. The logic of colonialism, Mukherjee argues entailed the twin forces of violent subjugation of the colonized as well as developing a legal framework to govern the subject populations. The distinctiveness of such a legal framework rested in the fact that it was based on "a supranational deterritorialized discourse of justice under natural law."¹⁴ Focusing on the latter, Mukherjee suggests that this idea of justice, as equity as well as liberty, framed not only the greater part of colonial rule but also inspired the anticolonial movements led by the Indian National Congress in the 19th and 20th centuries. In particular, at the time of framing the constitution, Congress leaders motivated by the idea of justice as equity, ensured that the principle of justice provided the guiding framework within which principles of freedom, equality, religion, and social amelioration were pursued.¹⁵ Strikingly, in making this argument, Mukherjee decisively shifts the attention away from the people and instead directs attention towards the state as the main focus of the framers of the constitution. Mukherjee does not credit nationalism for the framing of the constitution. Instead, by locating a longer history of engagement with the idea of justice, Mukherjee treads a productive path in understanding Indian constitutional history.

Mukherjee's work coincided with a growing interest among scholars on the history of the constitution in the recent years. These scholars have explored multi-faceted aspects of the history of constitution making in India, bringing to bear on their analysis, the inextricably complicated nature of Indian constitutional history. While these works are many, a representative sample can be found in a special issue of the journal, *Seminar*, which brought together contributions from a wide array of scholars, devoted to exploring some of the issues associated with the making of the constitution and its life in postcolonial India that was published in November 2010.¹⁶ For the sake of brevity, I will focus on contributions from Pratap Mehta, Uday Mehta, and Rohit De. In his essay titled, "What is Constitutional Morality", Pratap Mehta, with whom we began this essay, makes a strong case for exploring the processes that went into the making of the constitution. Mehta writes that the core of a 'constitutional revolution' had to be "an association sustained by a commonality of ends, or unanimity over substantive objectives (except at perhaps a very high level of generality)." Further, he notes that, "A constitution thus was not a relationship between concrete persons, but rather a relationship between abstract *personae* bound together by abstract rules." Writing as a political theorist and more specifically in this article, exploring Ambedkar's understanding of constitutional morality, Mehta makes a compelling case for questioning the process of constitution making. If the framers of the constitution were aware of the uniquely historical

moment that they were part of (and there is ample evidence in the literature to suggest they were), then Mehta suggests that we need a deeper historical inquiry to explore the making of the constitution rather than simple generalizations.

Uday Mehta, in his essay, “The Social Question and the Absolutism of Politics”, points to an interesting irony that dominated the moment of constitution making. Mehta argues that precisely at the moment of decolonization, the idea of ‘freedom’ that dominated the anti-colonial discourse became subject to the idea of nation making. In other words, immediately after independence and through the making of the constitution, the framers were more concerned with issues such as national unity, social upliftment, and international recognition among the world of nations. While these issues were important and needed to be addressed, yet it also meant that the idea of freedom became subject to these larger socio-political imperatives, which informs the making of the constitution. Unlike Austin then who viewed the list of fundamental rights in the constitution as an expression of liberalism that accompanied the task of social revolution that the framers intended, Mehta’s interesting argument suggests that there is a need to question the relationship between freedom and the constitution at the time of the framing of the document.

In a similar vein, Rohit De, in his essay “Beyond the Social Contract”, complicates the neat dichotomy often posited between the constitution and the people by asking the question, ‘how did the people view the constitution?’ De notes that the people, especially the non-elite groups, of the new republic often challenged new rules that restricted their individual rights and businesses and won their cases based on the new constitution. De argues that contrary to the idea that the ‘people’ remained outside the conversation on the constitution, the ‘people’ actually became a part of the conversation through constitutional litigation. In exploring how the ‘people’ engaged with the constitution, De’s essay poignantly points to unmaking the idea that the framing of the constitution was an intrinsically elite province to the exclusion of the people. In this sense, a history of the Indian constitution needs to take into account how the people themselves viewed the constitution in the years leading up to and during the process of constitution making.

The contributions by Baxi, Nigam, Mukherjee, Pratap Mehta, Uday Mehta, and, De highlight a unique critical perspective that is necessary to move beyond viewing the history of the Indian constitution as a history of nationalism alone. Thus, Baxi’s sociological critique of Austin, Nigam’s emphasis on politics, Mukherjee’s focus on an expansive history, Pratap Mehta’s philosophical excavation, Uday Mehta’s theoretical insight on the moment of constitution making, and De’s account of a social history of the life of the constitution indicate the different ways in which the question of constitution making can be approached. Again, to reiterate, works by these scholars while important are still only representative of a larger group of scholars who have been recently working on the Indian constitution. Indeed, the emphasis in this essay has mostly been only on the *making* as opposed to the *functioning* of the Indian constitution. However, it is hoped that rethinking the foundational moment would lead to a better understanding of the functioning of the constitution in the postcolonial period as well. Having taken into account the dominant framework of nationalism as informing the making of the constitution and departures from this framework, in the remainder of this essay, I will highlight two instances culled from primary documents that demonstrates the inevitable and visible fractures in the process of framing the constitution, to further make the case for thinking about constitution making in a non-nationalist paradigm. These examples relate to the question of the inclusion of the Muslim League in the constituent assembly and about ideas of fundamental rights that were eventually incorporated in the constitution.

The Muslim League Question

As Nigam notes, one of the significant absences in the first meeting of the Constituent Assembly on December 9, 1946 was that of the members of the Muslim League. Following the British Cabinet Mission proposals, indirect elections were held for representatives from the various provinces of British India. The Muslim League having considerable strength refused to participate in the proceedings of the constituent assembly citing a principled disagreement on the question of the place of the minorities, especially the Muslims in the future constitution of India. In the light of this boycott by the League, an important question arose on whether the constituent assembly could nevertheless function as a legitimate representative body of the Indian people. At this point, there is a little known exchange of views that occurred between the versatile and accomplished civil servant and at the time serving as the constitutional advisor, Sir Benegal Narsing Rau (1887–1953) and the veteran Congress politician, Kanaiyalal Maneklal Munshi (1887–1971). Rau wrote a cautionary note to Jawaharlal Nehru citing a precedent in England. According to the precedent, Rau suggested that the meeting of a “body” (such as the constituent assembly) without several select components of the body (such as the members of the Muslim League) would be rendered invalid due to the absence of these select bodies. Rau pointing to the conditions of the Cabinet Mission plan and observed, “It will be remembered that under the Cabinet Mission’s plan the Union constitution is to be settled only after the several Sections have met and settled the Provincial constitutions and the Group constitutions if any.” Therefore, Rau concluded, “If two of the three Sections cannot meet at all, the settling of the Union constitution will be indefinitely delayed.”¹⁷ In this sense, Rau averred that the absence of the members of the Muslim League could entail an adverse impact on the rest of the constitution making process and further the League would be within its rights to approach the Court in London to invalidate the assembly’s proceedings.

Munshi responded to Rau’s cautionary note by highlighting the larger moment of constitution making, one that made Rau’s anxiety about the absence of the members of the Muslim League irrelevant.¹⁸ Munshi wrote, “The Constituent Assembly, ..., is clearly a representative of the population of India as a whole, and not of a conference of representative of certain groups.” Munshi argued that though the members of the constituent assembly were elected as representatives of certain religious groups, this fact alone did not mean that the members were also not simultaneously representatives of the whole nation. In this sense, Munshi continued, “The Constituent Assembly is, therefore, not a body of delegates representing different communities, but an organ of the sovereign people, which by virtue of its being elected by the sovereign people, inherits a part of that sovereign power so far as constitution-making is concerned. The idea that such an Assembly is a meeting ground of delegates representing different groups come to negotiate between themselves, negatives the very concept of Constituent Assembly.”¹⁹

Munshi’s passionate response to Rau’s legalistic argument raises interesting questions about the history and moment of constitution making in the decade of the 1940s. Rau’s note was part of a longer history of the position of legal jurisprudence in conducting the affairs of the empire. In this history, partly examined by Mithi Mukherjee, law emerges as an arbiter not only between the metropole and the colony but also between contending political groups in the colony. Indeed, Rau’s note points towards the tension prone process of framing a constitution in a society deeply divided, such as that of India’s in the 1940s. Munshi’s reply illuminatingly captures the imperative of constitution making despite deep differences. The task of framing the constitution had to occur in spite of the threat of a significant portion of the country threatening to stay away and to break away from the nation. From such a

perspective, the question of law and legal jurisprudence had to be reexamined from the point of view of such compelling political context. If anything then, this little discussed exchange between Rau and Munshi, I suggest contains a deeper history of entanglement between law and society that needs to be further explored.

Fundamental Differences over Fundamental Rights – B. R. Ambedkar and K. M. Munshi

In elaborating on the inclusion of fundamental rights in the Indian constitution, Austin remarked that, “although there was some disagreement on techniques, there was little on principles.”²⁰ However, even a cursory glance at the process of debating the fundamental rights in the committees indicates that the differences between members were not only on ‘techniques’ but also deeply on principles. A classic example of these differences can be seen in the drafts of fundamental rights written by Ambedkar and Munshi. Ambedkar keen to protect the interests of the scheduled castes (members of the ‘lower’ and downtrodden castes) wrote as a preamble that the constitution would be committed to “remove social, political and economic inequality by providing better opportunities to the submerged classes” and “to make it possible for every subject to enjoy freedom from want and *freedom from fear*.”²¹ [Emphasis added]. In foregrounding the rights of these marginalized groups and by qualifying freedom to include ‘freedom from fear,’ Ambedkar sought to institutionalize the mechanism of eliminating caste-based discrimination from Indian society.

Munshi, on the other hand, drafted a list of fundamental rights, which was strikingly liberal, normative, decontextualized, and free of the particular concerns that were the hallmark of the other drafts written by leaders including Ambedkar. In Munshi’s draft, the subject of these rights, the unmarked individual, enjoyed freedoms of liberty and equality. Interestingly, the draft that was used to later qualify the fundamental rights in the constituent assembly was that of Munshi’s and not Ambedkar’s. The intent in contrasting Munshi’s and Ambedkar’s approach to fundamental rights is not to weigh in favor of one over the other. Rather, both these contrasting approaches represented the two ends of the political spectrum that confronted each other in the constituent assembly. The resulting ‘compromise’ then must be seen as a question of how much was ‘lost’ in the process of framing these rights rather than viewing this process, in Austin’s words, as “accommodation” of political differences. Again, the point here is not to reduce these arguably complex figures such as Ambedkar and Munshi to predetermined ideological positions but rather to read through their differences, a lost history of a hard fought struggle to define the subjectivity of citizenship, in the light of India’s conflicted social and political history, at the time of the making of the constitution.

Conclusion

In this historiographical essay, I have traced a broad trajectory of studying the making of the Indian constitution and made an argument for adopting a non-nationalist approach to understand the history of the Indian constitution. To qualify, non-nationalist in this essay means both critically examining the ‘nationalist’ impositions of studying the constitution by paying attention to differences and other minority narratives of the making of the constitution as well as considering the non-nationalist forces, such as global influences on the making of the constitution. Though the nationalist narrative is powerful, as evidenced in the influence that Austin’s work continues to command among generations of scholars, yet this influential narrative tempts one to conclude that the socio-economic and political problems of postcolonial India lie in the nature of politics that has been pursued since independence and not at the moment of constitution making. To read the *fall* of postcolonial India as a function of politics is thus to completely extricate the framers of the constitution from

compulsions of politics, a point elaborately made by Upendra Baxi in his critique of Austin. A non-nationalist approach then is useful to alter our understanding of the moment of decolonization and constitution making as one that was as fraught in the 1940s as it is in contemporary India. To be aware of these conflicts and differences would then illuminate a better understanding of constitutionalism in postcolonial India as well.

A second reason why a non-nationalist approach is useful, especially in terms of minority histories of constitution making, is because we become privy to lost histories, which helps us to critically evaluate the cost of the paths that were not taken at such a momentous period in Indian history. The little known debates between members of the assembly, the role of the almost invisible civil servants, and the suggestions and proposals from the public that were received and ignored contain nuggets and sometimes an entire way of thinking that remains hidden from the dominant narrative of the Indian constitution. Hence, there is an urgent need to adopt a non-nationalist framework to study the history of the making of the constitution.

Finally, in terms of future research, the field is literally wide open. The two instances of debates around the absence of the members of the Muslim League and the nature of individual subjectivity at the heart of the question of fundamental rights are merely representations of a bevy of questions that surrounds the fascinating aspect of the making of the Indian constitution. Questions arise about both the immediate context as well as the long-term historical influences affecting the making of the constitution. In the short term, questions such as the political negotiations following the proclamation of the Cabinet Mission proposals, the role of the drafting committee and the various subcommittees in the constituent assembly, political and ideological differences between members of the constituent assembly, the relationship between the constituent assembly and the interim central legislature (which performed the role of the parliament before the first general elections could be held in 1951), the role of the constituent assembly secretariat, the reception of the constitutional drafts among the general population, and the draft constitutions written by interested individuals and groups to mention only a few are compelling questions to which a simple answer of 'nationalist consensus' drastically undermines the complex and rich history that infused constitution making in India. Similarly, the long-term historical questions such as the relationship between constitutional reforms and Indian politics, the global legal influences that informed several framers of the constitution, the role of the civil service, especially the Reforms Office that was established to 'translate' constitutional reforms from Britain to India, the impact of the end of the Second World War, and the years leading up to the beginning of the cold war on the Indian constitution are worthwhile questions that again does not get satisfactorily addressed by a simple nationalist paradigm. Therefore, I suggest that it is only by conceptually separating the history of the nation from a history of the making of its constitution that we could begin to address Pratap Mehta's justifiable lament about the poor state of historical and philosophical imagination about India's constitution.

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Short Biography

I am interested in political and intellectual histories of colonial experiences and their imprint in the making of postcolonial states and societies. For my PhD, completed at the University

of Chicago, I looked at the life and career of a little known colonial civil servant, Sir Benegal Narsing Rau (1887–1953) and his enduring impact on late colonial and early postcolonial constitutional and political developments. I suggest that examining little known historical figures like Rau enriches our understanding of the complex developments that preceded the making of independent India, a narrative that is too often either consigned to the benevolent legacy of imperialism or as a product of hypernationalism. I am currently working on converting my thesis into a book.

Notes

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¹ Mehta, “What is Constitutional Morality?”

² Keer, *Dr. Ambedkar*, p. 449.

³ For a complete list of amendments, see indiacode.nic.in/coiweb/coifiles/amendment.htm

⁴ Austin, *The Indian Constitution*, p. xvi.

⁵ Ibid.

⁶ Tiwary, *The Making of the Indian Constitution*, p. 1.

⁷ Sen, *Popular Sovereignty and Democratic Transformations*, p. 27.

⁸ Ibid. p. 90.

⁹ Ibid. p. 91.

¹⁰ For a critical selection of writings on subaltern studies, see Chaturvedi, *Mapping Subaltern Studies and the Postcolonial*.

¹¹ Baxi, “The Little Done, The Vast Undone” pp. 323–430.

¹² Nigam, “A Text Without Author”, pp. 2107–2113.

¹³ Ibid. p. 2112.

¹⁴ Mukherjee, *India in the Shadows of Empire*, p. xvi.

¹⁵ Ibid. p. 186.

¹⁶ For the contributions of Pratap Mehta, Uday Mehta, and Rohit De, see *Seminar*, No. 615.

¹⁷ Rao, *Framing of India's Constitution*, Vol. I, pp. 389–390.

¹⁸ Ibid. pp. 390–392.

¹⁹ Ibid. p. 392.

²⁰ Austin, *The Indian Constitution*, p. 63.

²¹ Rao, *Framing of India's Constitution*, Vol. II, p. 84.

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A Text without Author

Locating Constituent Assembly as Event

Constitutions are rarely about change; they are codes that legitimise the new dispensation that arises out of historical conflicts and struggles. They provide a quasi-permanent shape to the new regime. In this sense, constitutions are already in existence even before they come to be formally written. The Indian Constitution too can be looked at in a similar light if it is 'disclosed' from the authorised location that brought it into existence, i.e., the constituent assembly. This paper looks at the constituent assembly as an 'event' in the hope of understanding how different currents and polyphonic voices came together in the forming of the conjuncture within which the assembly took shape – as demanded by the imperatives of a common territory, tradition and history.

ADITYA NIGAM

Perhaps the fault lies with the composition of the Drafting Committee, among the members of which no one, with the sole exception of Sriyut Munshi, has taken an active part in the struggle for our country's freedom. None of them is capable of entering into the spirit of our struggle, the spirit that animated us; they cannot comprehend with their hearts – I am not talking of the head, it is comparatively easy to understand with the head – the turmoiled birth of our nation after years of travail and tribulation

– H V Kamath, *Constituent Assembly Debates*, Vol 7, p 219.

Now Sir, we have inherited a tradition. People always keep on saying to me: oh, you are the maker of the Constitution. My answer is I was a hack. What I was asked to do, I did much against my will. – B R Ambedkar, participating in the Rajya Sabha debates in the early fifties.

– *Proceedings of the Council of States*, September 2, 1953, columns 864-80 and September 3, 1953, cols 997-1003.¹

In a sense, all constitutions can be said to be texts without authors – or at any rate texts with many authors, such that no singular authorial voice can be attributed to them. Constitutions are written, or one may say, they write themselves, normally in the course of major upheavals and transformations in the lives of societies. Be it the American Civil War or the French Revolution, the Russian Revolution or the Chinese, the Indian nationalist struggle or the innumerable other national liberation struggles around the world, constitution-making represents, in some sense a crystallisation and codification of the aspirations that have dominated these movements. Yet, constitutions are rarely about change; they are codes that are meant to legitimise the new dispensation that emerges from the historical conflicts and struggles that bring them forth. They seek to provide a quasi-permanent shape to the new regime ushered in by these struggles. Against the old power they establish and institute the power of the new. They are therefore, already there in a sense, even before they are formally written – and we know that they need not ever be written.

However, the Indian Constitution can be said to be a text without author in a more profound sense. This can be understood by dislocating the document from the authorised location within which it is supposedly produced, namely the constituent assembly

(CA). It is no doubt important to understand the serious debates that went on in the constituent assembly which provide an important window into the nationalist struggle itself and into the concerns that animated the framers of the Constitution. Yet, it seems to me that by exclusively focusing on what went on inside the constituent assembly, we might be missing out on some of the more interesting and critical developments that went into the constitution of the assembly itself. Locating the constituent assembly as an event, on the other hand, affords us the possibility of looking at the ways in which the different currents and different voices came together in the forming of the conjuncture within which the assembly took the shape it did. By 'event', I mean two things: first, that it is an occurrence that institutes a break in the logic of the situation that existed till then and secondly, that this occurrence itself is produced by the coming together of different logics into a kind of unity that then governs, for some time the actions of different players. In a sense, the meaning of 'event' here is close to what Marc Auge, for instance says, drawing on Francois Furet's discussion of the French Revolution. Auge says that "the event or occurrence has always been a problem to those historians who wished to submerge it in the grand sweep of history, who saw it as a pure pleonasm between a before and an after conceived as the development of that before". What Furet's discussion of the revolution says, he points out is that, from the day the revolution breaks out, the revolutionary event "institutes a new modality of historic action, one that is not inscribed in the inventory of the situation".² Alternatively, we might refer to Bakhtin's discussions of Dostoevsky's novels where he counterposes the idea of the polyphonic novel, marked by a "plurality of independent and unmerged voices", to the logic of the event. What unfolds in Dostoevsky's works, says Bakhtin, is "not a multitude of characters and fates in a single and objective world, illuminated by a single authorial consciousness; rather a plurality of consciousnesses with equal rights and each with its own world" which "combine but are not merged in the unity of the event".³ In other words, what I read in this description of the polyphonic novel and its dissimilarity with the idea of an 'event' is that the latter, in Bakhtin's view, requires a certain merging of the different worlds, of the "different

consciousnesses with equal rights”, such that they inaugurate a new, unitary logic. And such a merger does not leave the ‘different consciousnesses’ untouched, for they must now become part of a common, larger logic that is not their own. I see a resonance here with the phenomenon of nationalism. In one sense, ever since the advent of nationalism, these different consciousnesses were subject to conditions not entirely within their control. Often, they were forced to act in specific ways because of such conditions. We might, for example, see the activities of Ambedkar or the Muslim League (ML), around the Round Table Conference, as in some way dictated by such extraneous logic. However, it is still possible to see in the period preceding the formation of the CA, a certain ‘polyphony’ insofar as these different voices/consciousnesses have not yet been forced to merge their being within a larger entity. That begins to happen around the time of the formation of the constituent assembly. Thereafter, all of them had to become a part of a common national territory, tradition and history.⁴ The political logic that this inaugurates, as we will see, is such that it forces all the actors in the drama to make their choices in particular ways – and those who cannot must decide to part ways.

The Backdrop

It is tempting to read a liberal intent in the Indian Constitution, given the fact that so much of the phraseology and the terms used, are manifestly liberal in appearance. However, if we read the text of the Constitution and the CA debates, in the context of their specific historicity, we can see a very different set of meanings emerge.

It may be useful to begin by underlining the three great absences that haunted the constituent assembly, as it began its first session amidst tremendous uncertainty: the Muslim League, the representatives of the so-called Indian states and the ‘Father of the Nation’, Mahatma Gandhi. The absence of the Muslim League members was of course, an absence that was commented upon by the first speaker S Radhakrishnan who spoke to greet the new chairman, Rajendra Prasad. Rajendra Prasad himself referred to the abstention with considerable sense of responsibility: “Our brethren of the Muslim League are not with us and their absence increases our responsibility”. He went on to observe that “(w)e shall have to think at each step what they would have done if they were here” and that “if unfortunately their seats were to remain unoccupied, it will be our duty to frame a constitution which will leave no room for complaint from anybody”. But the Muslim League was not the only absence. The prime minister-in-waiting, Jawaharlal Nehru began his speech, moving the ‘Aims and Objectives’ resolution, haunted by the absence of the ML and the states’ representatives and, above all, of Mahatma Gandhi who was away on his trek for communal amity in Bengal.⁵ As the preparations for transfer of power began, the new nation-to-be appeared at the very moment of its birth, a threatened entity. It was in such a precarious situation that the constituent assembly began its work and needless to say, it marked the direction and substance of its proceedings throughout.

Also worth registering at the outset, is the logic of the process that saw, in the penultimate year of the nationalist struggle, the ironic reversal of fate between Gandhi, the acknowledged ‘Father of the Nation’, now outcaste and Ambedkar, the representative of the nation’s outcastes, now in his final hour of glory as one of the key architects of the Constitution. There is, as a matter of fact, a double irony, here in this reversal of fate. For Ambedkar was elected to the assembly with the support of the Muslim League, as a member from the Bengal legislative assembly, which had an ML ministry in office in these fateful years. This was the period when the ML and Ambedkar’s Scheduled Castes Federation (SCF)

were in alliance, and the situation was fast moving into a different plane where it would be governed by the logic of state and nation-building. The imperatives of state and nation-building were lodged in a very different temporality, marked by an urgency of the here-and-now, and were to determine the course of all future events: there was no time here for the Gandhian project of communal amity or for his periodic withdrawals into the realm of social reforms, marked by the temporality of the everyday.

One might, in fact, argue against the grain of much accepted Marxist common sense, that this Gandhian tendency of withdrawal was itself lodged within a deeper understanding of the processes of intercommunity relations. It has often been argued that these withdrawals were attempts at reigning in mass movement whenever they seemed to transgress the limits of the permissible, from the standpoint of the bourgeoisie. It seems to me that this completely misses the point of the Gandhian logic. Gandhi, in my opinion, worked with an understanding that was fundamentally at variance with the dominant understanding of his colleagues and comrades in the Indian National Congress (INC), that saw the nation state as the precondition of the forging of a homogeneous national culture. This was an understanding that was most clearly articulated, with some variations, by Nehru and Patel, but more generally shared by the other leaders of the INC. Gandhi, on the other hand, simply reversed this logic. To him amiable relations between different communities, particularly Hindus and Muslims, were the precondition of India’s freedom. And this bond could only be forged outside the domain of the state and its nation-building project. Reading Gandhi’s life itself as a text, one might suggest that his wariness of rushing headlong towards the goal of ‘complete independence’, was born out of his fear that the logic of the nation state would tear the different communities off from their temporality of the everyday and insert them into time of the political – one where the slow work of forging amiable intercommunity relations would have to be given up. To Gandhi, it seemed quite clear that ‘truth lay outside the nation state’ and more, outside history. Drawing on Tolstoy’s adage that ‘happy families have no history’, Gandhi on occasion argued that history only recorded conflicts and struggles.⁶ Truth, on the other hand, lay in universal love and non-violence: love that lies unspoken and unspectacular, in the everyday practices of popular existence. It is to this realm that one had to periodically come back to nurture the love that was being lost in the mutual injuries that communities inflicted on each other once they entered the realm of the political. There is no doubt that there is a utopic quality to the way in which Gandhi saw the future of India and I will suggest that it is this utopic vision that was responsible for his rapid marginalisation. For, once the ‘kingdom of freedom’ was at hand and the logic of the nation state completely colonised the domains of the everyday, there was no room left for Gandhi. Nehru writes in his autobiography that they often joked that ‘after swaraj’ ‘Gandhi’s fads’ ‘must not be encouraged’.⁷ 1946 and the logic of the nation state saw to it that Gandhi – and his fads – was taken care of. Towards the end of July 1946 (July 21), Gandhi wrote to Patel in despair “a great many things seem to slipping out of the hands of the Congress”.⁸ He was referring to the postal strike in Bombay, the communal riots in Ahmedabad, and the general distrust of the Congress, among the “Harijans and Muslims”. However, more than anything else, I think, this despair reflected Gandhi’s own sense of marginality, rather than that of the Congress as a whole, which was preparing to take power in the near future.

Road to Power

Writing of the difficulties faced in the business of taking power, Nehru wrote to his Congress colleagues:

The Indian states offered some difficulties... It has been suggested that the door should be left open for them to enter the Constituent

Assembly... *We should rely on the compulsion of events* which is bound to be considerable, and... a large number would join, if the British government's attitude was clear and they could get no help from it... I felt sure that *the creation of the Constituent Assembly would give rise to such power in India that no one would be able to withstand it*.⁹

In writing of this 'compulsion of events' and the irresistible power that the very constitution of the CA would generate, Nehru was actually pointing to the unfolding logic of the new temporality of power, which would force people to choose. It is noteworthy that what he says of the Indian states, applies equally to the ML and the Muslims more generally; it applies also to Ambedkar and his SCF. Equally importantly, it applies to Gandhi too. He too, would have to choose and history would show that he chose wrongly from the standpoint of the new dispensation of power. It had to therefore lead to his rapid marginalisation in these penultimate years of colonial subjugation. Gandhi, it needs to be remembered, had scripted one important chapter of the constitution-to-be through his moral blackmail – his fast-unto-death – after the announcement of the Communal Award. The Poona Pact arrived at, at the end of his fast, took away forever the possibility of separate electorates from the dalits and thus laid the foundations of the 'liberal constitution'. A joint electorate would thenceforth become an article of faith for the writers and commentators of the Indian Constitution. As a matter of fact, when Lord Wavell called the Simla conference in June-July 1946, this was the basis of his discussions. Scheduled caste leaders were not invited to the conference; nor were they granted separate representation. And none but Gandhi could have accomplished this feat, for no one had the moral stature to do so. Yet, we might do well to remember that Gandhi's move in 1932 was dictated by his own, utterly misplaced, logic of communitarian well-being that was then, fourteen years later, incorporated into the logic of the nation state. His decision in 1932 was governed less by the logic of electoral politics and the nation-state-to-be and more by the desire to maintain the 'unity of Hindu society' which he saw as the basis of Hindu-Muslim unity and a future India that would represent his cherished 'unity-in-diversity'. However, the Gandhi of 1946 was consistent with the Gandhi of 1932, when he made the 'wrong choice' of opting out of the logic of power – for in both situations, his actions were governed by the logic of community being and not those of state.

In this context, it might be useful, to recall the actual development of events preceding the formation of the constituent assembly and the transfer of power. As the Cabinet Mission announced its May 16 plan for a three-tiered federation, Gandhi reacted with a fair degree of resignation. He told Louis Fischer that "my instinct rebels against my reason" and therefore he had advised his colleagues to "follow their own reason".¹⁰ His resignation was alarmingly inward looking: "If India is destined to go through a blood-bath, it will do so".¹¹ In the meanwhile, Nehru's will to power was playing itself out to the fullest. Two days after his election as Congress president, on July 10, he made the fateful statement to the press that "the Congress had made no commitment to the Cabinet Mission or the viceroy concerning the constituent assembly".¹² While the overt thrust of this statement was directed at British power, Nehru was clearly targeting the ML and Jinnah, whom he was now forcing to choose under the 'compulsion of events'. And sure enough, this move was read as a "signal of the possibility that there would be 'no grouping', since the majority of the elected members in the CA would be Congress members".¹³ Nine days later, Ambedkar was elected to the constituent assembly as an independent candidate supported by the ML, from Bengal. An alliance between the ML and the SCF was being forged. The threat of a Hindu upper caste rule being instituted in the name of swaraj was now as real as

ever – at least to the two biggest minorities. From late August onwards, this alliance took the shape of ML leaders addressing SCF protest meetings against the Cabinet Mission decision to deprive them of separate representation.¹⁴ On July 29, the ML Council unanimously voted to empower Jinnah to "resort to direct action to achieve Pakistan".

But for the Congress and the nationalists, the problem was the ML-SCF alliance. If the Muslim League and the Muslims were to be singled out as the anti-national forces that were bent upon partition, then this alliance had to be broken. More than anything else, it was a question of the legitimacy of nationalism's claims to represent the nation that were at the root of their discomfort. It is therefore, around this time that leaders like Sardar Patel proposed to "negotiate with Ambedkar out of fear of the League" (these words are Gandhi's).¹⁵ Patel had in fact, been requesting Gandhi to meet Ambedkar in order to negotiate with him. Gandhi's answer was matter of fact: "I have said that I will see Bhimrao if he comes to Poona or Sewagram". Clearly, unlike Patel, he did not see the need to make any move on this count on his own. When Patel pressed on the need to win over Ambedkar, Gandhi wrote:

I see a risk in coming to any sort of understanding with him, for he has told me in so many words that for him there is no distinction between truth and untruth, or between violence and nonviolence. He follows one single principle, viz, to adopt any means which will serve his purpose. One has to be very careful indeed when dealing with a man who can become Christian, Muslims or Sikh and then be reconverted according to his convenience... To my mind it is all a snare.¹⁶

Gandhi's refusal of the logic of power had now taken another perverse turn. Probably, he still had the confidence that he would win over the dalits, despite Ambedkar, by returning to his favoured site of everyday existence. He simply refused to bow before the urgency of the situation. But for the likes of Patel, it was crucial that the SCF alliance with the ML be broken. To do that he was prepared to give Ambedkar a place of honour in the new dispensation. In the event, he would even forsake Gandhi, his teacher and leader. He would do this, and Nehru would later, in April 1948, appoint Ambedkar his law minister, not for the sake of the untouchables, but in keeping with the logic of power. In between, as events rapidly played themselves out, Ambedkar lost his seat in the CA due to partition, and the Congress made the important gesture of nominating him as Congress candidate from the Bombay legislative council. While the Congress was under some compulsions in making these overtures to Ambedkar, the latter too had to choose his moves in a rapidly changing and uncertain situation. There were clearly pressures on him too. Once it became clear that the partition was now inevitable, he had to choose to make the best of a bad deal. Ambedkar's statement given in the epigraph to this essay should be read in that light.

This then was the context in which the CA began drafting the new Constitution. This was the situation in which the programme of forging the new Indian nation was undertaken. But the CA did not begin writing on a clean slate. If Gandhi had already written one crucial chapter for it, so had the last three and a half decades of intense struggle within the incipient nation/s since the Morley-Minto Reforms of 1909. These reforms, implemented through the Indian Councils Act 1909, that had for the first time provided separate representation to the Muslims, have been routinely represented in nationalist historiography as having "sowed the seeds of separatism".¹⁷

Right from Nehru – undoubtedly the most secular of the nationalists – to people like KM Munshi and Patel, all nationalist leaders have shared this reading of 'Muslim separatism'.¹⁸ This is an issue that I shall return to later. For the present, it is relevant to note that though the complex processes of the quest for selfhood in the late colonial period were irrevocably shaped by

the activities of the colonial state and its census operations, it is only by denying any agency to the other subordinate social groups and communities that nationalism could represent other assertions of selfhood as 'creations of colonial divide and rule policies'. Nationalism's reading in this respect is relatively straightforward and unaware of the extent to which its own self-understandings were shaped by colonial knowledge. Whatever be the case, once certain notions of selfhood were in place, acute contestations among them, particularly for political representation, mark the entire course of the anticolonial struggle. In fact, I would argue that the whole history of the anticolonial struggle can be read as an intricate process of the writing of the Constitution. The various landmarks of the freedom struggle, starting with struggle against the initiatives of the colonial government, like the Morley-Minto reforms, the Montague-Chelmsford report and the Government of India Act 1919, to the proceedings of the Simon Commission and the Round Table Conferences are episodes in the writing of the text that emerged, with significant embellishments of course, from the constituent assembly. It has been widely acknowledged, even in the CA debates, that the final draft of the Constitution, owed not a little to the Government of India Act of 1935. Nationalism, represented by the Congress, did not always find itself at ease with the way in which these developments took shape. Nationalist initiatives were thus marked from their founding moment itself with a deep split within, represented by various assertions of selfhood by various subordinate social groups and communities. It is through a continuous play and tension between these different impulses that we see the different positions of the Constitution formulated.

Modernising Agenda of the Postcolonial Elite

By the time the CA assembled for its fourth session on July 14, 1947, Pakistan had been, in principle, formed. Twenty-two Muslim League members signed the register to take their place in the Assembly. K M Munshi, while moving the motion on the Report of Order of Business Committee, declared that now that the British parliament was about to adopt the resolution "setting India free", 'we' could go ahead with the agenda of Constitution-making in absolute freedom. "The plan of May 16", he said, "had one motive – to maintain the unity of the country at all costs. A strong central government was sacrificed by the May 16 plan at the altar of preserving unity which many of us, after close examination, found to be an attenuated unity..."¹⁹ Munshi went on to thank god that now, "we have no sections and groups to go into, no elaborate procedure...no double majority clause, nor more provinces with residuary powers, no opting out, no revision after ten years...We have now a homogeneous country, though our frontiers have shrunk..."²⁰ Munshi's relief of course, was not shared by everyone. M Ananthasayanam Ayyangar expressed surprise that "my friend Mr Munshi, who stood for Akhand Hindustan" is now 'supporting this solution'. He went on to add that he personally thought that the May 16 solution was the best and was "sorry that solution has been given up".²¹ However, on a close reading of the CA debates, it seems that Munshi's represented the dominant sentiment. There was a feeling that now that all the constraints are out of the way, federalism can also be given the go-bye and a centralised state can now go about its modernising agenda in real earnest.

One can get a sense of this from the major conflict around clause 12 of the Principles of a Model Provincial Constitution. This clause said: "The governor's ministers shall be chosen and summoned by him and shall hold office during his pleasure". Amendments were moved to this clause by Aziz Ahmed Khan, Begum Aijaz Rasul and others and supported by practically all ML members, defending the elective principle, proportional

representation, and calling for a term of the ministry that would be coterminous with that of the assembly. This amendment was opposed by practically all non-Muslim members.²² A similar scene was enacted in relation to the amendment moved by Mahboob Ali Baig Sahib Bahadur, regarding the constitution of the council of ministers at the centre. His amendment too, called for a council of ministers, elected by both houses of parliament and on the basis of proportional representation, based on a single transferable vote. This innocuous, and one might say democratic amendment, was moved by Mahboob Ali Baig amidst heckling from nationalists like Algu Rai Shastri, Mahavir Tyagi, and Pandit Thakur Dass Bhargava. While Shastri accused him of propounding a "narrow minded party-politics view",²³ Tyagi went on to remind the house that the country had had to face partition because of a mixed bag cabinet and that Baig's insistence on a proportionately represented cabinet was in effect a demand to revive the portent of partition.²⁴ Baig had to in fact state repeatedly that he should not be misunderstood because he is a Muslim.²⁵ This kind of heckling occurs repeatedly in the course of the proceedings of the constituent assembly and we might see from the ways in which questions are formulated by respective members, that often the words themselves appear quite innocent. I will return to this question later in the paper. For the time being I am concerned with something quite different.

There appears to be, in the dominant majority of the CA members, a desire for a centralised state. This appears both in relation to the question of residuary powers for the provinces/states, as well as in relation to the composition of cabinets – in the provinces as well as in the centre. In the case of the provinces, this is expressed in the attempts to keep the council of ministers under the governor's thumb, and therefore under central control. It is also significant that Nehru, while moving the Aims and Objects Resolution, spends some time explaining the absence of the word 'democratic' in the resolution. "It is possible", he says, "that a republic may not be democratic, but the whole of our past is witness to the fact that we stand for democratic institutions". He went on to add that 'we' were aiming at nothing less than a democracy but that the shape that it would take was uncertain.²⁶ This roundabout way of explaining the absence of the word 'democracy', reveals clearly, that it was not an inadvertent error but a well thought out decision. Why we may ask?

One of the fears was of course, expressed in Tyagi's speech about the possible consequences of a "mixed-bag cabinet". However, another great fear of the nationalist mind becomes evident here. With 570 states out of the purview of the emergent nation state's jurisdiction, with the 'unresolved' Muslim question hanging fire, and with the host of other issues that they might have had to deal with, the Constitution had to be framed in such a way that kept all options open for the future. It seems that the impulse towards centralisation here was not simply born out of a drive towards an authoritarian state. On the contrary, it seems to me that Nehru was being quite truthful in suggesting that the new ruling elite wanted some form of democracy. Granville Austin, one of the most serious scholars of the Indian Constitution also concurs when he argues that "the belief in parliamentary government seemed in fact to be nearly universal". In support of this contention, Austin says that the draft constitutions published by groups of the left, centre and the right – those of the Marxist M N Roy, of the Socialist Party and of the communal Hindu Mahasabha – were also all parliamentary, centralised constitutions.²⁷ In fact, Austin goes further to suggest that "nearly everyone in the assembly was Fabian and Laski-ite enough to believe that 'socialism is everyday politics for social regeneration' and that 'democratic constitutions are...inseparably associated with the drive towards economic equality'".²⁸ I would argue, therefore, that the desire for a centralised state expressed

by majority of the nationalists, was not so much a 'communal' one to keep the ML out of power, as the glimpse into the debate above might suggest; that on the contrary, it was a desire for a modern and homogeneous nation state that moved them into taking such a position. This is also evident in the nationalism's representation of itself as the modernising force, continuously at odds with the 'backward' and 'separatist' minorities, acting at the behest of the colonial rulers. K M Munshi's relief at the formation of Pakistan is in fact, symptomatic of a wider feeling shared by the nationalist elite that now, with all obstructions – notably the ML – out of the way, the task of building a homogeneous nation could be seriously addressed. The theme of building a modern India, where no differences on account of religion and caste would be recognised, is a recurrent one in the debates in the CA.

Yet, it needs to be underlined, that this desire for a homogeneous, modern nation state, was not always democratic. Its liberal language and justifications very often performed another function in nationalist discourse. I have argued elsewhere that the resort to certain liberal notions of abstract, unmarked citizenship, for instance, worked against the interests of the minorities because they drove the community to the realm of the unspeakable. Any articulation of community based discrimination was deemed illegitimate in this framework.²⁹ It might be worthwhile to return briefly here to the problem of the innocence of the words, in the language in which matters are articulated in the CA – but more generally in nationalist discourse. Scholars have often referred to Govind Ballabh Pant's celebrated diatribe against 'community' – upholding the sovereignty of the individual citizen, as an indication of the liberal impulses behind constitution-making in India.³⁰ In this oft-quoted passage, Pant says:

I cannot however refrain from referring to a morbid tendency which has gripped this country for the last many years. The individual citizen who is really the backbone of the state, the cardinal centre of all social activity, and whose happiness and satisfaction should be the goal of every social mechanism, has been lost here in that indiscriminate body known as the community. We have forgotten that a citizen exists as such. There is the unwholesome, and to some extent degrading habit of thinking always in terms of communities and never in terms of citizens.³¹

Impeccably liberal in its advocacy of the individual citizen's direct relationship to the state – unmediated by any community markers, we might say. Yet, this passage would make a very different kind of sense within the structure of nationalist discourse. How such an advocacy of the erasure of community markers functions within that discourse is evident from the following episode in the CA. Z H Lari, Muslim member from the United Provinces, moved an amendment to the draft constitution, proposing the inclusion of an additional clause to the effect that any section of the citizens of India, residing in any part of the country and having a distinct language and script, shall be entitled to education in the mother tongue. Lari invoked the Motilal Nehru committee report and a recent resolution of the GoI, published in the Gazette to support his contention. Lari then went on to argue that students from Urdu speaking families should be imparted education in Urdu. As it happens, Lari's six-year old son had been told by his teacher that he should use Hindi and Hindi alone to do his mathematics. Lari claimed that on making inquiries he found that a similar situation prevailed in most schools.³² The same Pandit Govind Ballabh Pant, in his response to Lari stated: "(T)here is no particular language attached to the followers of any particular religion, [therefore] the question of language with reference to or vis-a-vis any minority, does not arise at all. No language is the language of the Hindus and no language is the language of the Muslims", he went on to add amidst cheers from like-minded members in the house.³³

He went on to add that the 'boys' are taught in their mother tongues in primary schools and that "the mother tongue of Hindus and Muslims and all boys (sic) is more or less the same. There is no difference whatsoever." And then, once again, amidst cheers, he went on to add: "Those who in the olden (sic) days, were obsessed by the idea of separatism have not been able to shed it off even now and the ghost of 'two nations' seems to be lingering somewhere, even within the precincts of this very august chamber".³⁴ In nationalist discourse, the emphasis on the individual, then was not really a straightforward expression of the liberal ethos, we might be compelled to acknowledge. The demand for the erasure of community markers, the placing of the individual citizen at the centre, in Pant's mind – as in nationalist discourse more generally – represents then, the desire for a homogeneous national culture. In asserting this, however, I am not asserting that Pant's or the nationalists' advocacy of the liberal creed was hypocritical. What I am suggesting is that to them the only way the liberal dream of the abstract citizen could be achieved was through erasure of difference and the production of a homogeneous national culture. To be sure, this discourse was not averse to acknowledging the contribution of Islam to composite Indian culture – but it did require, in the manner of the only models of nationalism it sought to emulate, the erasure of separate existence of 'religious' communities. The new nation state would be the agent that would, through its network of educational institutions, produce that culture.

Partha Chatterjee has argued that through the anticolonial struggle, the nationalist elite had been resisting the reformist-modernist intervention of the colonial state in the 'inner' spiritual/cultural affairs of the nation, not because it was opposed to reforms but because it considered that realm its own sovereign realm. He has persuasively suggested that for this reason, while it continued to oppose all such colonial initiatives, its desire for internal reform accumulated over time and exploded in the immediate postcolonial period, through a host of legislations that sought to introduce major changes within the Hindu community. He also suggests that much of this intervention of the independent nation state in the affairs of the community became possible precisely because of the formation of Pakistan and the migration of large sections of the Muslim elite there. With regard to the Muslim community that remained here, the situation was now pretty much the same as it had been with the Hindu community in the colonial period – even though during the periods of ML ministries, there had been similar interventions of reform within them.³⁵ Our reading of the CA debates seems to affirm Chatterjee's understanding about internal reform, at least in the majority community. Much of the resistance of the nationalist elite to the idea of minority or community rights seems to be directly related to this desire for a new homogeneous, modern nation. Yet, it was the very logic of events that constituted the CA, the manner in which alliances were shaped and reshaped during this period, that made it impossible for the new Constitution to avoid the question of minority rights altogether.

It is also interesting here to note that the debate on minority rights generated a lot of heat in the CA, even before the Muslim members joined the proceedings. The debate here was primarily with the Christian members of the assembly. In the course of the debate, K M Munshi moved that one part of that clause (clause 18) be referred back to the advisory committee, while Mohanlal Saksena and Mahavir Tyagi wanted the entire clause to be referred back to it. No reasons were however, given for this proposal. An inkling to the machinations going on behind the scenes is of course, provided by an astute observation by Ambedkar. He pointed out that the only reason one can sense, is that the rights of minorities would be decided after seeing what the Pakistan assembly decided. He argued forcefully against such

relativity of rights. Minority rights, he held, should be absolute.³⁶ So far as the dominant leadership of the new nation state was concerned, it was perfectly possible for them to enact legislations for the abolition of untouchability and leave the matter at that. They – and here I include the more right-wing Hindu Mahasabhaite leaders – undoubtedly considered the practice of untouchability to be the bane of Hindu society. The entire logic of nationalism was predicated upon the decades of introspection about the internal divisions and weaknesses of Hindu society that had made it prey to repeated external invasions. It had therefore, internalised the idea that at least the worst features of caste society must go. What they did not consider was that for somebody like Ambedkar, the mere abolition of untouchability was not enough. What was required was the political recognition of the demands of the dalits, their demands for separate representation. In the case of the Muslims, however, the case was different. Speech after speech in the CA emphasised that now that we are making a new beginning, now that the new nation is about to be born, the idea of separate recognition of communities in politics must be given up. And this repeated assertion was often backed up by not-so-subtle threats.

The reason I narrate this drama inside the CA in some detail is precisely to highlight that the CA was actually functioning within a certain code, the language of which was forged largely outside the precincts of the assembly itself. Within this code, words changed their meanings and performed very different functions. The narration also shows that the CA was not exactly a Habermasian terrain of rational-critical discourse and members of the minorities, particularly the Muslims, were under tremendous pressure to act according to these codes. Their repeated heckling and booing, accompanied by the continuous insinuation that they were still nursing their separatist desires and that every thing that they suggested was to be attributed to their continued allegiance to the two nation theory, is evidence enough of this attitude. Reading the CA debates therefore, in their very literal meanings can be quite misleading. There is certainly no doubt that there are strong liberal elements in the provisions of the Constitution and the debates themselves reveal much of these concerns. What is not so evident is the way in which what was speakable and what not, was shaped in an altogether different arena.

A question that one might then legitimately ask here is whether this means that the leaders of the Indian republic were being dishonest? Was there no ethical ground on which they based their positions? Did they act merely out of considerations of the logic of power? Did they act purely out of self-interest? I think this will be a misleading conclusion to draw from the above discussion. In the first place, such a poser assumes a certain dichotomy or antagonism between ethical action and self-interest which does not always hold. In fact, it is possible to argue that even the most anti-democratic, fascistic political programmes are usually grounded in some ethical vision of the future, like the 'regeneration of the German nation', which are seen as the precondition for the attainment of yet larger goals. What the discussion above shows, in my view, is that there are conflicting ethical visions in continuous tension and contestation, throughout the nationalist movement and in the CA. When mainstream nationalism advocates a strong centralised state along with an insistence on the value of individual citizenship, it does so out of a vision of a particular kind of modern nation state where, eventually, individual citizenship will be the sole relevant criterion regulating the state's dealings with its people. It possibly genuinely believes that markers of community need to be erased for a truly democratic future to be realised. On the other hand, when representatives of the Muslim minority strike a different posture, they do so out of the belief that, being discriminated against as a community, all its problems cannot be articulated in the language of individual rights – as the exchange between

Lari and Pant so graphically illustrates – and given that they have lost the possibility of separate political representation, they will need separate safeguards. The best that is possible in that case, is a federal structure where all powers are not concentrated in one centre. It is also interesting that Ambedkar, who generally shared the nationalist position on the need for a strong, centralised state, did so for entirely different reasons. To him such a state was necessary in order to be able to ensure compliance of society with regard to the rights of dalits. Nevertheless, he is not prepared to go along with the nationalists on the question of minority rights and takes a fairly uncompromising position on the issue. In other words, what we see here is that there is no transcendental ethical ground on which justifications of specific measures in the constitution can be based, such that they will be acceptable to all. What is important, it seems to me, is that both the specific provisions as well as the ethical justifications for them become meaningful within the specific life-contexts and from the locations of different players. It is from these locations that justifications are either advanced or contested. In other words, the ethical visions involved are themselves situated visions.

The Nation and Its Fragments?

In concluding this discussion, I would like to suggest that much of the scholarship that seeks to concentrate its sight on the inside of the CA, as a window to the philosophy of the Indian Constitution, proceeds with a kind of unstated assumption of a nation already in existence whose representatives, after deliberations wrote the Constitution. Even when we take note of the diverse currents and the diverse sections and groups, there is somewhere an underlying assumption of the prior existence of the nation. Such for instance, is also the assumption underlying the introductory note by Rajeev Bhargava outlining the conference's (Seminar on 'Political Philosophy of the Indian Constitution', Goa, August 2001) concerns. So when it talks of uncovering the "structure of ideals embedded in the Indian Constitution", it assumes a kind of unitary structure that is arranged according to some particular logic. That is why it is possible for it to ask: "When the framers of the constitution chose to guide Indian society and polity by a particular set of values rather than others, they could not have done without a set of reasons, many of which remain implicit, unarticulated". My submission here will be that even a cursory reading of the CA debates suggests that there was no such thing as "a particular set of values" that was given preference over others, precisely because their was no single authorial voice there as assumed in the expression "the framers of the constitution chose...". There is in the statement an assumption of a singular will which "chose" one, rather than another, set of values and with a kind of coherent justificatory framework.

My general problem with this way of posing the problem of the political theory of the Indian Constitution can thus be stated in the following manner: First, the assumption of a single will underlying the Constitution, can be understood in either of the two ways. One way would be to posit a prior community of interests upon which a 'general will' as it were, arises. This is a problematic assumption to make as we have seen, given that there were such vastly different interests at play here. Another way of understanding it is to argue, for instance that even though there were fundamental differences of opinion between different players, they were all basically reasonable people operating within a generally Habermasian terrain of rational-critical discourse, coming up in the end, with a consensual 'single will'. This means that their disagreements were fundamentally intellectual in nature and, as such, they were prepared to convince and be convinced by the others. In other words, there is an implicit positing here of a kind of 'disengaged subject' – freed of all

existential and community attachments. Only on such an assumption can we really posit an ethical subject that is devoid of interests, passion and power. A notion of an embedded subject, on the other hand, will require us to consider the fundamental relationship between thought/consciousness/ethical vision, on the one hand and social being on the other. It will require us to recognise that for such an embedded subject, existential and community attachments are constitutive of ethical being – and therefore of all intellectual positions that such a subject might hold. It is from this standpoint that the self-understandings of different communities become crucial to our discussion of the constitution-making process for they reveal such embedded subjects, broadly speaking. Their articulations of their own notions of the future are inextricably linked to their position in terms of power and subordination, and voiced in terms of cultural autonomy and difference.

Therefore, if we consider the fact that the different communities that assert their selfhood throughout the anti-colonial struggle in ways that significantly diverge from the nationalists', do so often in direct liaison with colonial rule; if we consider that even at the time of Independence, 570 Indian states, comprising one-fourth of the population of the nation-to-be are almost totally outside the process of nation formation, then we might need to understand the process of the formation of the Constitution itself very differently. It might be more realistic and productive to see the constituent assembly itself as the site where different currents and diverse groups come together, under the compulsion of the logic of power, to hammer out a negotiated settlement – a settlement that aspires to nationhood no doubt, but which remains nevertheless, an articulated totality whose very being is always threatened by the very fragility of the settlement. In other words, I am suggesting that we see 'Indian society' not as a given pre-existing totality, that is evolving according to some evolutionary logic, into a nation, but rather as different entities, having different histories, come together into an articulated whole. The terrain on which these different histories, therefore different temporalities of the everyday, come together is the accelerated temporality of the Indian state. It is here that, in the harmonisation of different temporalities, through what Althusser describes as torsion, displacement and fusion of different times, emerges the nation state. As Poulantzas has suggested, it is on the terrain of the state that the different pasts of different social groups are fused into a whole and the nation acquires its past – moving then to a common future, a common destiny. It is the state that constitutes the 'national tradition' "by making it the moment of a becoming designated by itself..." for the modern nation state, he argues, "also involves eradication of the traditions, histories and memories of dominated nations". He suggests that "the state establishes the modern nation by eliminating other national pasts and turning them into variations of their own history".³⁷ My reading of the constituent assembly as event and the Indian Constitution as an outcome of negotiations that brought forth the 'Indian nation' seems to affirm this relationship – the CA being the intellectual core of the emerging state. **EPW**

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Notes

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1 I thank Ajay Dandekar for bringing this reference to my notice.

2 Marc Auge (1995) *Non-places: Introduction to an Anthropology of*

- Supermodernity*, Verso, London and New York, p 27.
- 3 Mikhail Bakhtin (1984) *Problems of Dostoevsky's Poetics*, Manchester University Press, UK, p 6.
- 4 I will discuss this point at greater length in the last section.
- 5 See *Constituent Assembly Debates* (henceforth, CAD) Official Report, Reprinted by the Lok Sabha Secretariat, New Delhi, Vols I-13. For this part see, Vol 1.
- 6 In *Hind Swaraj*, Gandhi records his critique of history: "History, as we know it, is a record of the wars of the world, and so there is a proverb among Englishmen that a nation which has no history, that is, no wars, is a happy nation." [M K Gandhi (1997), *Hind Swaraj and Other Writings*, Anthony J Parel (ed), Cambridge University Press and Foundation Books, New Delhi, p 89.] And again: "History is really a record of every interruption of the working of the force of love or of the soul" (Ibid:90). He of course, continues to speak in the name of 'the nation', which he does not directly critique. For instance: "Hundreds of nations live in peace. History does not and cannot take note of this fact." But to Gandhi, this 'nation' has a kind of universal existence outside of the state and statehood. This is not the place for a detailed discussion of this issue but it can be shown that to him the idea of a nation is quite distinct from that of the state and of nation as generally understood.
- 7 Jawaharlal Nehru (1998), *An Autobiography*, JLN Memorial Fund and Oxford University Press, p 73.
- 8 *Mahatma Gandhi, Collected Works* (1982, henceforth, CWMG), Vol LXXXV, The Publications Division, Ministry of Information and Broadcasting, Government of India, p 35.
- 9 Stanley Wolpert (1996), *Nehru – A Tryst With Destiny*, Oxford University Press, New York, p 240, emphasis added.
- 10 CWMG, Vol LXXXV, p 17.
- 11 Ibid.
- 12 Wolpert, op cit, p 370.
- 13 Ibid, p 370.
- 14 See Ramnarayan Singh Rawat (2001) 'Partition Politics and Achhut Identity: A Study of the Scheduled Castes Federation and Dalit Politics in UP, 1946-48' in Suvir Kaul (ed 2001), *The Partitions of Memory – The Afterlife of the Division of India*, Permanent Black, Delhi, pp 119-23.
- 15 CWMG, Vol LXXXV, p 102.
- 16 Ibid, p 102.
- 17 D D Basu (1998), *Introduction to the Constitution of India*, Prentice-Hall of India Pvt Ltd, New Delhi, p 5.
- 18 *Constituent Assembly Debates*, Vol 3, See especially, the interventions of Rajendra Prasad and Purushottamdas Tandon.
- 19 CAD, Vol 4, p 546
- 20 Ibid, p 546.
- 21 Ibid, p 551.
- 22 Ibid, pp 628-48.
- 23 CAD, Vol 7, p 1142.
- 24 Ibid, p 1150.
- 25 Ibid.
- 26 CAD, Vol 1, p 62.
- 27 Granville Austin (1966), *The Indian Constitution – Cornerstone of a Nation*, Clarendon Press, Oxford, p 40.
- 28 Ibid, p 41.
- 29 Aditya Nigam (2000), 'Secularism, Modernity, Nation: An Epistemology of the Dalit Critique', *Economic and Political Weekly*, Vol 35, No 48, November 25.
- 30 Gurpreet Mahajan (1998), *Identities and Rights – Aspects of Liberal Democracy in India*, Oxford University Press, Delhi, p 82.
- 31 CAD, Vol 2, p 332, emphasis added.
- 32 CAD, Vol 7, pp 901-02.
- 33 Ibid, p 914.
- 34 Ibid, p 915.
- 35 This rendering of Chatterjee's summarises his arguments in the following three texts: Chatterjee (1994 a) 'Secularism and Toleration', *Economic and Political Weekly*, Vol XXIX, No 28, July 9; (1994 b) *Nation and its Fragments*, Oxford University Press, Delhi; Partha Chatterjee (ed 1998a), *Wages of Freedom – Fifty Years of the Nation-State*, 'Introduction', Oxford University Press, Delhi.
- 36 CAD, Vol 3, p 507.
- 37 See Nicos Poulantzas (1978), *State, Power, Socialism*, New Left Books, London, especially pages 112-13. Of course, Poulantzas' discussion of nations suffers from some of the residues of orthodox Marxism that see nations and nationalisms as 'objective entities' embodied in certain kinds of cultural communities. However that is a separate matter and does not concern us here.

hindrance in a peaceful atmosphere and the will of the Burmese people may prevail.

14. INDIANS IN SOUTH AND EAST AFRICA

The Congress views with alarm the trend of events in South Africa and East Africa regarding the position of Indian settlers in those countries. The contemplated legislation in South Africa is in contravention of promises and in some respects constitutes an attack even on legal rights. This Congress appeals to the governments concerned to mete out to the Indian settlers the same measure of justice as they would claim for their nationals in a free India. This Congress tenders its thanks to Deenabandhu Andrews and Pandit Hridaynath Kunzru for their selfless labours on behalf of the settlers overseas.

15. FUNDAMENTAL RIGHTS AND ECONOMIC PROGRAMME

This Congress is of opinion that to enable the masses to appreciate what "Swaraj," as conceived by the Congress, will mean to them, it is desirable to state the position of the Congress in a manner easily understood by them. In order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions. The Congress, therefore, declares that any constitution which may be agreed to on its behalf should provide, or enable the Swaraj Government to provide, for the following:

1. Fundamental rights of the people, including:

- (i) freedom of association and combination;
- (ii) freedom of speech and of the press;
- (iii) Freedom of conscience and the free profession and practice of religion, subject to public order and morality;
- (iv) protection of the culture, language, and scripts of the minorities;
- (v) Equal rights and obligations of all citizens, without any bar on account of sex;
- (vi) no disability to attach to any citizen by reason of his or her religion, caste or creed or sex in

regard to public employment, office of power or honour, and in the exercise of any trade or calling;

(vii) equal rights to all citizens in regard to public roads, wells, schools and other places of public resort;

(viii) right to keep and bear arms in accordance with regulations and reservations made in that behalf;

(ix) No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law.

2. Religious neutrality on the part of the state.

3. Adult suffrage.

4. Free primary education.

5. A living wage for industrial workers, limited hours of labour, healthy conditions of work, protection against the economic consequences of old age, sickness and unemployment.

6. Labour to be freed from serfdom or conditions bordering on serfdom.

7. Protection of woman workers, and, specially adequate provisions for leave during maternity period.

8. Prohibition against employment of children of school-going age in factories.

9. Right of labour to form unions to protect their interests with suitable machinery for settlement of disputes by arbitration.

10. Substantial reduction in agricultural rent or revenue paid by the peasantry and in case of uneconomic holdings exemption from rent for such period as may be necessary, relief being given to small zamindars wherever necessary by reason of such reduction.

11. Imposition of a progressive income tax on agricultural incomes above a fixed minimum.

12. A graduated inheritance tax.

13. Military expenditure to be reduced by at least one half of the present scale.

14. Expenditure and salaries in civil departments to be largely reduced. No servant of the state, other than specially employed experts and the like, to be paid above a certain fixed figure which should not ordinarily exceed Rs. 500 per month.

15. Protection of indigenous cloth by exclusion of foreign cloth and foreign yarn from the country.

16. Total prohibition of intoxicating drinks and drugs.

17. No duty on salt manufactured in India.

18. Control over exchange and currency policy so as to help Indian industries and bring relief to the masses.

19. Control by the state of key industries and ownership of mineral resources.

20. Control of usury—direct or indirect.

It shall be open to the A. I. C. C. to revise, amend or add to the foregoing so far as such revision, amendment or addition is not inconsistent with the policy and principles thereof.

16. CHANGES IN CONSTITUTION

(a) In place of "two general secretaries and two treasurers" in line 1 and 2 of Art. XXIII substitute "not more than three general secretaries and not more than two treasurers."

(b) First clause of Art. XXIV shall read as follows:

"The Working Committee of the Congress, which shall be the executive authority responsible to the All India Congress Committee in all matters, shall consist of fifteen members of whom the President, the General Secretary or Secretaries and the Treasurer or Treasurers shall be ex-officio members. The remaining members shall be elected by the All India Congress Committee at its first meeting after the annual session of the Congress."

17. OFFICE-BEARERS

The following shall be the general secretaries for the next year: Syts. Jawaharlal Nehru, Jairamdas Doulatram and

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- (vi) no disability to attach to any citizen by reason of his or her religion, caste or creed or sex in

regard to public employment, office of power or honour, and in the exercise of any trade or calling;

(vii) equal rights to all citizens in regard to public roads, wells, schools and other places of public resort;

(viii) right to keep and bear arms in accordance with regulations and reservations made in that behalf;

(ix) No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law.

2. Religious neutrality on the part of the state.

3. Adult suffrage.

4. Free primary education.

5. A living wage for industrial workers, limited hours of labour, healthy conditions of work, protection against the economic consequences of old age, sickness and unemployment.

6. Labour to be freed from serfdom or conditions bordering on serfdom.

7. Protection of woman workers, and, specially adequate provisions for leave during maternity period.

8. Prohibition against employment of children of school-going age in factories.

9. Right of labour to form unions to protect their interests with suitable machinery for settlement of disputes by arbitration.

10. Substantial reduction in agricultural rent or revenue paid by the peasantry and in case of uneconomic holdings exemption from rent for such period as may be necessary, relief being given to small zamindars wherever necessary by reason of such reduction.

11. Imposition of a progressive income tax on agricultural incomes above a fixed minimum.

12. A graduated inheritance tax.

13. Military expenditure to be reduced by at least one half of the present scale.

14. Expenditure and salaries in civil departments to be largely reduced. No servant of the state, other than specially employed experts and the like, to be paid above a certain fixed figure which should not ordinarily exceed Rs. 500 per month.

15. Protection of indigenous cloth by exclusion of foreign cloth and foreign yarn from the country.

16. Total prohibition of intoxicating drinks and drugs.

17. No duty on salt manufactured in India.

18. Control over exchange and currency policy so as to help Indian industries and bring relief to the masses.

19. Control by the state of key industries and ownership of mineral resources.

20. Control of usury—direct or indirect.

It shall be open to the A. I. C. C. to revise, amend or add to the foregoing so far as such revision, amendment or addition is not inconsistent with the policy and principles thereof.

16. CHANGES IN CONSTITUTION

(a) In place of "two general secretaries and two treasurers" in line 1 and 2 of Art. XXIII substitute "not more than three general secretaries and not more than two treasurers."

(b) First clause of Art. XXIV shall read as follows:

"The Working Committee of the Congress, which shall be the executive authority responsible to the All India Congress Committee in all matters, shall consist of fifteen members of whom the President, the General Secretary or Secretaries and the Treasurer or Treasurers shall be ex-officio members. The remaining members shall be elected by the All India Congress Committee at its first meeting after the annual session of the Congress."

17. OFFICE-BEARERS

The following shall be the general secretaries for the next year: Syts. Jawaharlal Nehru, Jairamdas Doulatram and

The Fundamental Rights Resolution:
Nationalism, Internationalism and Cosmopolitanism in an Interwar Moment

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Abstract

This paper responds to the analytical threads offered by Partha Chatterjee's 'Nationalism, Internationalism and Cosmopolitanism: Some observations from Indian History', by focusing closely on the dynamics leading to the passing of the Fundamental Rights resolution by the Indian National Congress at Karachi in 1931. A key moment in anti-colonial thought, the resolution was many things: an uneasy fusion of ideologies to assuage a range of divergent political interests; a manoeuvre to prevent another split of the nationalist movement into radical and moderate factions; a gesture toward performing statehood; and a multi-authored but significant imagining of what an independent India might look like. An ostensibly nationalist document, the resolution – elements of which remain in the statement of rights in the Indian Constitution – demonstrates the influence of leftist internationalism and liberal cosmopolitan concerns in utopian interwar imaginings.

Keywords: Fundamental Rights, Karachi Congress, M.K. Gandhi, Jawaharlal Nehru, M.N. Roy

In his broad-ranging paper, Partha Chatterjee explores the entanglement of nationalist, internationalist and cosmopolitan thinking in India in the early twentieth century. I want to add to his discussion of these influences by focussing on a moment in the interwar period, in which a leftist internationalism was woven into a set of nationalist discourses that sought to appropriate and displace colonial liberalism. That moment is the passing of the Fundamental Rights Resolution by the Indian National Congress at its annual session, held in late March, 1931 at Karachi. The Fundamental Rights Resolution remains a significant document, for it laid out some of the directive principles that were later incorporated into the Constitution in post-colonial India.¹ While many of these remain elusive in contemporary India, they form the touchstone from which rights can be demanded from the nation-state. Given Chatterjee's own focus on the global discourse of rights, first via the limited liberal discourses of empire, and later with the development of universal human rights as a cosmopolitan solution to a new world order, this focus seems appropriate.

Very little scholarship has addressed the meaning and significance of the Fundamental Rights Resolution; when it is briefly acknowledged, it is generally passed over in favour of discussion of the more enduring Indian Constitution. Pertinent to the present discussion is an intervention from Arvind Elangovan, who argues for a need to relax the frameworks that have read the Indian Constitution as 'strictly a product of nationalism', and from Javed Majeed, who has recently drawn out the constitution's cosmopolitan influences.² In addition to highlighting Chatterjee's provocation, then, the present discussion provides historical depth and ideological texture to the imagination of rights in a colonial context.

By demonstrating the mutual imbrication of internationalism and cosmopolitanism in the formation of a nationalist imaginary in the twentieth-century, Chatterjee's thinkpiece highlights the destabilisation of nationalist frameworks in recent South Asian historiography. His intervention advances a trend in South Asian studies toward a more complex understanding of nationalist activity, which acknowledges diverse ideological influences and drivers of political thought in the early twentieth century, demonstrating the dynamics between an organised activism that was explicitly

¹ Habib, 'The Envisioning of a Nation', 26.

² Elangovan, 'The Making of the Indian Constitution', 5; Majeed, "'A Nation on the Move'", 237-253.

nationalist, and an anti-colonial, revolutionary politics that imagined a post-nation state order. Studies written in the decades after decolonisation tended to conflate a range of political activities that challenged the colonial state under the rubric of nationalism, suggesting that the normalisation of the nation-state system between the wars has made other futures difficult to think.

The recent turn towards intellectual, diasporic and transnational histories in South Asian Studies has no doubt contributed to this shift towards anti-colonialism over nationalism, as has a renewed interest in biography.³ These trends have collectively complicated neat trajectories of political thought, which has in turn opened up spaces for re-examining the messy entanglements of ideologies which informed nationalist imaginations. These historiographical developments, along with the relaxing of institutional or political constraints on access to source materials, are beginning to challenge long-held orthodoxies and reverse the tendency to read all political activity as essentially nationalist.

The passing of the Fundamental Rights Resolution in 1931 highlights many of these dynamics; in particular, the degree to which the left in India has been marginalised by a hagiographical nationalism. This is perhaps a product of post-colonial teleologies funded by Congress governments; but it is also an outcome of the diversity of and divisions within the left in India. The development of Marxist thought in India was closely impacted by a combination of political and ideological pressures from the Government and from the communist movement, as Chatterjee describes in his discussion of the various conspiracy cases (specifically, in Cawnpore and Meerut); the diktats of the Comintern (to work in a united front with, or to oppose bourgeois nationalist parties such as the Indian National Congress); and the fissures that followed in the wake of Stalinisation (which impacted the careers of key Indian activists, including M. N. Roy). And yet the imprint of Marxism on nationalist thinking was substantial, given the Comintern's second period strategy to influence or capture nationalist organisations, which in India endured well beyond the transition to third period policies (1928-1935), which declared a withdrawal from cooperation with nationalists.⁴

³ Chaturvedi, 'Writing History in the Borderlands', 313.

⁴ Seth, *Marxist Theory and Nationalist Politics*, 133.

The Fundamental Rights Resolution presents a case in point; as a visionary tract, which locates economic rights as a key element of substantive rights, its authorship has been generally credited to M. K. Gandhi and/or Jawaharlal Nehru. The document appears in the official government-published compilations of the *Collected Works Mahatma Gandhi* (where the editors concede that it was ‘presumably written by Gandhi’) and the *Selected Works of Jawaharlal Nehru* (in which the editor notes it was ‘drafted by Jawaharlal with changes by Mahatma Gandhi’).⁵ While both men were clearly prominent in editing the document and pushing it through the committees of Congress to its final state, their indebtedness to the left has been less clear; or alternatively, Jawaharlal is presumed to represent the nascent socialist wing within the Congress, a manoeuvre which substantially flattens the diversity of Indian left. In his autobiography, Nehru was defensive about the authorship of the resolution, denying rumours that the maverick communist M. N. Roy ‘drew up this resolution, or the greater part of it, and thrust it down upon me at Karachi’.⁶ Nehru’s disclaimer aside, the Fundamental Rights Resolution can be read as a palimpsest originating from M. N. Roy, who by 1931, was isolated from Moscow, labelled a traitor and stripped of the title ‘comrade’ following Stalin’s bolshevisation of the Communist Party.⁷ Roy’s expulsion by the third international in 1929, as well as his fluctuating relationship with mainstream nationalism in India over the course of his long career renders him somewhat elusive to political definition.⁸

The passing of the Fundamental Rights Resolution in 1931 represented an important moment for the Congress, the broad movement credited with leading the anticolonial struggle in British India, because it heralded a compromise among a range of ideologies – liberal, nationalist and socialist – that were reflected in the resolution.⁹ These three have obvious resonances with Chatterjee’s triad. The Resolution comprised a twenty-point statement of aspirations, with a liberal discourse of rights set out in its beginning, pledging a range of freedoms and equality to all citizens, across caste, religion and gender. It laid out a socialist agenda, mainly stating the need

⁵ *Collected Works of Mahatma Gandhi [CWMG]*, Vol. 45, 370; and *Selected Works of Jawaharlal Nehru [SWJN]*, Vol. 4, 511.

⁶ Nehru, *Toward Freedom*, 197.

⁷ Manjapra, *M. N. Roy*, 86-88.

⁸ Huacuja Alonso, ‘M. N. Roy in Revolutionary Mexico’.

⁹ ‘The Resolution on Fundamental Rights and Economic Changes’, March 31, 1931. *Collected Works of Mahatma Gandhi [CWMG]*, 45, 372.

for regulating labour conditions, abolishing serfdom and child labour, but also asserting the state's control of large industries; as well as a suite of classically nationalist elements. Some of these demands reflected a longstanding economic nationalism, hearkening back to the late nineteenth century speeches and writings of Dadabhai Naoroji (reductions in military spending and in government salaries); others were recognisably Gandhian in substance: total prohibition, abolition of the salt tax, and protective duties on foreign cloth (remnants of his eleven-point program, issued in 1930). The introduction of tariffs on cloth and a section exhorting national control over exchange and currency policies were intended to provide some comfort to Indian capital, although this was offset by pledges to nationalise 'key industries and mineral resources'. A final clause, advocating controls on usury, was intended to cap the profits of moneylenders and banks.

It is tempting to become swayed by the progressive nature of the resolution, but it was in fact an uneasy coalition of liberal, nationalist and socialist ideologies, representing Gandhi's attempt to mollify Nehru and the emerging Left within the Congress, preventing a split in the nationalist movement at a critical juncture.¹⁰ In the interwar years, Gandhi struggled to unify the Congress – a movement rather than a coherent party – and by the late 1920s, a discernible Left within began to challenge its conservative-liberal-moderate leadership. Ideological differences in terms of the agreed means and ends of the independence struggle came to the fore: was India to aspire to dominion status, or complete independence (*purna swaraj*), and was either achievable along nonviolent lines?¹¹

By late 1929, at the annual session at Lahore presided over by Nehru, the Congress establishment had given in to the irrepressible demand for *purna swaraj*, although by early 1930, Gandhi had effectively dovetailed anticolonial energies into the civil disobedience movement. The Karachi Congress met at a time when Gandhi called a 'truce' with the British government to negotiate a pact with the Viceroy, Lord Irwin, in February 1931. The primary agenda for the Karachi Congress was to ratify the Gandhi-Irwin Pact, which was greatly criticised by nationalists for its compromising nature. Civil disobedience had channelled considerable resentment towards the colonial government, and tens of thousands of Congress volunteers had made great

¹⁰ I have discussed this briefly in Maclean, *A Revolutionary History*, 228-9.

¹¹ Maclean, 'Revolution and Revelation', 681-2.

sacrifices, facing violence, being arrested, and enduring the deprivations of prison. Gandhi's suspension of the movement to negotiate with the Viceroy was seen by many as a betrayal of the struggle. Nehru was at the forefront of those critics of the Mahatma.¹²

Sings of discontent with the Pact were so widespread that British intelligence predicted that the Congress would split once more into moderate and extremist wings.¹³ Gandhi was placed under further strain when the Government executed three revolutionaries who had achieved great popularity, and whose commutation had been presumed given as a goodwill gesture.¹⁴ Gandhi pressed ahead, declaring that he would go into retirement if the Pact were not ratified by the Congress.¹⁵ The Government was visibly nervous at the prospect of having to deal with a radical breakaway faction beyond Gandhi's control.¹⁶ Gandhi must have been shaken by the negative reception that he and the Pact received. On March 16, when he arrived in Bombay, his train was 'stormed' by a band of angry activists wielding red flags, demanding the Congress flag be lowered, then he was heckled by workers at a cotton mill.¹⁷

At the same time that Gandhi was negotiating with the Viceroy, the left in India was animated by a manifesto, almost certainly written by Roy, published as a supplement to *The Masses*, a newspaper published by the Roy Group, on February 12, 1931.¹⁸ This was a response to the First Round Table Conference's discussion in London of the formation of a constituent assembly, in which India's working classes were entirely unrepresented. This Manifesto reads as a fifteen-point revolutionary program, incorporating safeguards to ensure freedoms of the press, speech, assembly, of religion and worship; protection for minorities and equality for women. This balancing of revolutionary aspirations with liberal freedoms can be seen as a feature

¹² Nehru, *Autobiography*, 193.

¹³ Report of the Director, Intelligence Bureau, 19 March 1931. British Library, India Office Records [henceforth BL, IOR], L/PJ/12/390.

¹⁴ Maclean, *Revolutionary History*, 196.

¹⁵ Telegram from Home Department, Government of India, to Secretary of State for India, March 27, 1931. BL, IOR, L/PJ/7/80.

¹⁶ Report of the Director, Intelligence Bureau, March 19, 1931. BL, IOR, L/PJ/12/390, 38; Montmorency to Irwin, March 26, 1931. BL, Halifax Papers, MSS EUR C152/25.

¹⁷ R. E. Hawkins, 'Bulletin Twelve', March 16, 1931. Hawkins Papers, Centre for South Asian Studies [henceforth CSAS], Cambridge, 15.

¹⁸ 'Manifesto', Provisional Committee for organising the revolutionary party of the Indian Working Class, February 12, 1931. Hawkins Papers, CSAS, Cambridge.

of Roy's dissatisfaction of orthodox Marxism and its lack of space accorded to 'human freedom and ethical growth'.¹⁹ Roy had on many prior occasions sought to influence the Congress by issuing manifestoes prior to their annual meeting, enjoining a modified social and economic program, in an effort to provide it with a clear 'socio-political philosophy'.²⁰

Roy's manifesto, and the announcement of the Gandhi-Irwin Pact in early March 1931, heralding a Second Round Table Conference in London for drafting a constitution, prompted urgent discussion among India's Trade Unions. A R. Bakhale submitted a circular to the Trades Union Federation maintaining a similar set of rights, substituting a revolution for adult franchise, and clearer guidelines on labour regulation.²¹ By the end of March, Roy had worked up a more developed revolutionary program which was circulated at the Karachi Congress, advocating for the abolition of 'Native States and parasitic landlords', conferring all power to the 'oppressed and exploited masses' to deliver the peasantry from exploitation.²²

The Subjects Committee of the Congress, tasked with controlling the agenda of the session, was obliged to consider the Roy proposal, because 'nearly one hundred [Congress] delegates' had signed it.²³ According to *The Masses*, edited by Tayyib Shaikh, the Roy document was 'pigeonholed by the bureaucratic machine' of the Congress, and replaced by an 'improvised resolution containing the so-called Fundamental Rights'.²⁴ This improvised resolution, according to Kamaladevi Chattopadhyay, was prepared by Nalinakashi Sanyal, worked over by Yusuf Meherally, C.K. Narayanaswamy and one Vishwanath. This was then taken to Nehru to be put to Gandhi: 'it was understood that it should go as Panditji's draft and we would not be in the picture'.²⁵ This explains Nehru's sensitivity about the document's authorship. Nehru hastily wrote a preamble, and put it to Gandhi, who made

¹⁹ Bayly, *Recovering Liberties*, 316.

²⁰ Seth, *Marxist Theory and Nationalist Politics*, 88, 105; fn 29.

²¹ R. Bakhale, Indian Trades Union Federation Circular, March 10, 1931. N. M. Joshi Papers (facsimile), Zentrum Moderner Orient [henceforth ZMO], Berlin. Kruger Papers, Box 2, Number 6-3.

²² *The Masses*, April 15, 1931, 4.

²³ *Ibid.*, 2.

²⁴ *Ibid.*, 2.

²⁵ Kamaladevi Chattopadhyay, interviewed by Hari Dev Sharma and K. P. Rungachary, December 6, 1978. Nehru Museum and Memorial Library [henceforth NMML], Delhi. Oral History Transcript [OHT], Acc. 338, 83.

alterations of his own. The willingness of the leftist flank in Congress to strategically mask their intervention is interesting indeed, revealing some of the dynamics that would ultimately lead to the formation of the Congress Socialist Party in 1934.

The Resolution was important because it was – in part – intended to imagine the contours of an independent India. Chattopadhyay reflected: ‘We felt it was very necessary that when we were calling upon the people to wage this big struggle for freedom, they should be guaranteed the substance of it’.²⁶ Until 1931, an independent India had been repeatedly portrayed by Gandhi as *Rama Raj* (a golden age ushered in by the rule of Rama). As Chatterjee has written elsewhere, this ‘jarred’ with Jawaharlal’s secular modernism;²⁷ Rama Raj, as B. R. Ambedkar would point out, amounted to the oppression of dalits and women.²⁸ Yet Gandhi maintained that discourse even when introducing the resolution, explaining that it was intended to ‘indicate to the poor, inarticulate Indian the broad features of swaraj or Ramarajya’.²⁹

Colonial intelligence reports suggest that the resolution was drafted partly to address Nehru’s dismay at the Gandhi-Irwin Pact, but also at the level of investment of Indian capital in the Congress. Nehru had in 1927 visited Europe, where he travelled widely, visiting the USSR and taking part in the League Against Imperialism in Brussels, movements that helped him to arrive at a ‘special “blend” of Indian nationalism and internationalism’.³⁰ Nehru is quoted to have complained at Karachi that ‘Gandhi was continually surrounded by Indian Capitalists and that the conferment of power on such men [in an independent India] would be destructive’.³¹ A lengthy intelligence report by H. Williamson remarked that Gandhi was frequently in the presence of ‘rich men like [G.D.] Birla, Ambalal Sarabhai and Hirachand Walchand’ at the Karachi session, who were ‘anxious about the fundamental rights of the people’; Gandhi is said to have reassured them that they would inherit the economic privileges monopolised by Europeans in India. Concluding his report, Williamson dryly remarked: ‘to the businessmen he held out visions of great wealth and, at the request

²⁶ Chattopadhyay, OHT, 83.

²⁷ Chatterjee, *Nationalist Thought and the Colonial World*, 151.

²⁸ Ambedkar, *Annihilation of Caste*, 268-271.

²⁹ ‘Speech on Fundamental Rights, Karachi Congress’, March 31, 1931. *CWMG*, 45, 372.

³⁰ Louro, ‘India and the League Against Imperialism’, 24.

³¹ Telegram from Viceroy to Secretary of State for India, April 2, 1931. National Archives of India, New Delhi. Home Political, 136/1931.

of Jawahar Lal, he advertised a Utopia for the “teeming millions”. That the one promise appeared to conflict with the other did not seem to worry him at all.’³²

This conflict explains the sense of urgency in the passing of the resolution with relatively little discussion; requests for further debate were rejected;³³ Subhas Chandra Bose complained that the committee was stacked in Gandhi’s favour.³⁴ Members of the Subjects Committee raised objections that the resolution would alarm zamindars, with its clauses reducing rents, introducing a progressive tax on agricultural incomes and the imposition of an inheritance tax. Introducing the resolution, Gandhi specifically assured landowners and princes that it was not intended to destroy them, but to eliminate ‘all wrong and injustice’.³⁵ ‘The house was not prepared to adopt a resolution’, Williamson disparagingly wrote, ‘until Gandhi decided the matter by “adopting his favourite pose of sorrow”, when the resolution was put and carried by 91 votes to 50’.³⁶ Concerns about its precipitousness were assuaged with the provision that the All India Congress Committee [AICC] could revise the document, as long as its general principles were maintained. By August, Nehru had added another two aspirations: that the state would not confer titles, and that there would be no capital punishment.³⁷

Few were satisfied with the resolution. *The Masses* was scathing at the ‘sinister’ appropriation of Roy’s proposal.³⁸ Nationalist newspapers, such as the *Hindustan Times*, *Leader* and *Tribune*, were equally critical, arguing that its scattergun approach would weaken the Congress by alarming ‘landowners, civil servants, soldiers, Brahmins and many others’.³⁹ The AICC was inundated with demands from Trade Unions, Labour Organisations, Millowners, Chambers of Commerce, and a range of other interest groups who proposed amendments.⁴⁰ Notes on the resolution held in

³² H. Williamson, ‘Notes on the Session of the Congress held at Karachi in March and April, 1931’, National Archives of India, New Delhi. Home Political, 136/1931.

³³ ‘What Congress will strive for’, *Times of India*, April 1, 1931, 11.

³⁴ Bose, *Indian Struggle*, 202.

³⁵ ‘Speech on Fundamental Rights’, March 31, 1931. *CWMG*, 45, April 1931.

³⁶ H. Williamson, ‘Notes on the Session of the Congress held at Karachi in March and April, 1931’, National Archives of India, New Delhi. Home Political, 136/1931.

³⁷ ‘AICC Definition of Citizens’ Fundamental Rights’, *Times of India*, August 8, 1931, p. 17.

³⁸ *The Masses*, April 15, 1931, 2.

³⁹ Telegram from Government of India to Secretary of State, April 11, 1931. BL, IOR/PJ/7/80, p. 12.

⁴⁰ See the submissions in NMML, AICC Papers, File G-87, 1931. Facsimile held at ZMO, Kruger Box 4, 10-1; 12-2.

P.C. Joshi's papers complain about the vagueness of its preamble, and its failure to vow to enact or abrogate legislation to realise the rights enunciated.⁴¹ This indeed was a problem. Nehru would find himself reminding Gandhi, just two years later, of the contours of the document, writing that 'the problem of achieving freedom becomes one of revising vested interests in favour of the masses'.⁴² When it was passed, the resolution was designated the 'Resolution on Fundamental Rights and Economic Changes'. The subsidiary clause seems to have rapidly fallen into disuse, an uncomfortable challenge to established interests.

Chatterjee draws out the vital neglect, within liberal imperialism, of fraternity; a neglect that was inherited by elite-led nationalism. Sanjay Seth has pointed out that the poor were an abstract concept in early moderate nationalist discourse, obsessed as it was with colonially-induced poverty, as opposed to 'the poor', who represented a lack of development and modernity, a validation of the colonial diagnosis of Indian backwardness.⁴³ The Fundamental Rights Resolution enunciated a modern vision – in Jawaharlal's words, 'a step, a very short step, in a socialist direction' – to address the poverty of the masses, without an actual program of action.⁴⁴ Yet even Rajni Palme Dutt – an ideologue of the Communist Party of Great Britain, whose career was marked by a long engagement with India – would describe the Karachi compromise as 'a concession to Left Nationalism ... which marked a step forward for the Congress'.⁴⁵ The liberal strains within the document were arguably a nod to the cosmopolitan, reflecting a conscious engagement with statements of rights by modern states elsewhere; even as they were adapted for local conditions to accommodate caste, script and religious identities. Ultimately, the Resolution was Gandhi's attempt to bring together divergent interest groups at a crisis point of nationalist organisation, by performing the governmental practices of a nation-state within a liberal, nationalist and socialist framework, with all of the contradictions that this entailed.

What then explains the compulsions of the socialists in the Congress, who agreed to mask their intervention that Gandhi would accept it, and indeed of Nehru, who

⁴¹ 'The Resolution on Fundamental Rights', May 2, 1931. NMML, N. M. Joshi Papers, facsimile held at ZMO, Kruger Papers, Box 2, Number 6-3.

⁴² Nehru to Gandhi, September 13, 1933. *SWJN*, 5, 527.

⁴³ Seth, 'Re-writing Histories of Nationalism', 104.

⁴⁴ Nehru, *Toward Freedom*, 196.

⁴⁵ Dutt, *India To-Day*, 339.

protested, a little too much, at the inference that ‘a certain mysterious individual with communist affiliations drew up this resolution’, which he hastened to add ‘was not socialism at all, [indeed] a capitalist state could easily accept almost everything contained in the resolution’?⁴⁶ This would suggest, that while a retrospective reading of nationalism, internationalism and cosmopolitanism as homologous categories is fruitful in the current moment given the resurgence of ultra-nationalist, isolationist politics globally, there were strong forces at work in the interwar moment that occluded the very dynamic Chatterjee describes. A nationalist defensiveness about the derivativeness of anti-colonialism has only relatively recently been displaced by a celebration of the cosmopolitan, just as the accusation that communist internationalism amounted to conspiracy created intense pressures to disavow such influences.

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⁴⁶ Nehru, *Toward Freedom*, 197.

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The fables of nationalism

Words sometimes contain interpretations. The events of 1857 in India have been described by some writers as a Sepoy Mutiny, and by other writers as a War of Independence. The first description suggests a revolt confined to the army, while the second suggests a much larger mass uprising. The first description diminishes the events; the second magnifies them. Such a contest, over words and interpretations, carries over into the labels we use about the twentieth century. But when events are nearer to us, both emotionally and in time, our assumptions take longer to clarify.

The usual attempts to make sense of 1947 hinge on key words and phrases like 'Independence and Partition' and 'The Transfer of Power'. These key words fit into key concepts: on the one hand, the 'freedom struggle' or 'national movement', and on the other hand, 'decolonization'. Often, though not always, the word decolonization suggests a voluntary relinquishing of authority, while the words 'freedom struggle' unmistakably suggest a hard fought, bitterly resisted victory. Here again, now closer to our times, in the desire to magnify or to diminish events, we hear interpretations in combat.

Intertwined with these interpretations, are the ideologies of imperialism and Indian or Pakistani nationalism. They portray the dramatic events of the 1940s as the inevitable result of deliberate policies. The correct calculation of outcomes, and a sense of their necessity, can confer legitimacy on different actors—whether these actors are Indian, British, or Pakistani. So, in different locations and at different times, 15 August 1947 has been presented differently. It has

been portrayed as the outcome of Britain's policy of training Indians in modern government; or as the result of India's energetic fight for freedom; or as the vindication of the two-nation theory on which the Pakistan movement was based. Reflections on 1947 have followed three trenchant national trajectories.

Beginning from the recognition that the story of 1947 has been a contested story, this article traces how the story has been moulded in the discourse of modern India. It asks, in which direction the story has moved, which emphases and elisions this has entailed, and which factors have encouraged this movement. In other words, it discusses the manufacture of opinions—indeed of a tradition—central to the autobiography of modern India.

Emphases and evasions

Check this for yourself. Almost no student, despite high marks in Indian history at school and university, will be able to tell you, even very approximately, how many Britishers were actually to be found in India in the colonial period. He or she would have devoted a considerable amount of time to the study of British rule, would possess a store of other factual information, and may well be able to debate, quite intelligently, the character of colonial conquest. But ask this particular question, and you are likely to draw a blank.

The fault is not that of the student, because these statistics are omitted rather than highlighted in recent textbooks. What, then, are the figures? In 1939, the secretary of the European Group in the Indian Central Legislature referred to his constituency as 'a small handful'. At the outbreak of the second world war, when the total Indian population was about 350 million, the number of adult white males in India was just over 90,000: the total number of white men, women and children was about 160,000.¹ The British were classified as soldiers, non-officials, and officials. British soldiers, numbering about 60,000, constituted the single largest group. The non-official class, numbering about 20,000, consisted mainly of businessmen in Calcutta, Bombay, Madras and Kanpur, or men in tea estates and coffee plantations, as well as some individuals in professions like law and journalism. Officials numbered about 12,000 only. These included all the British members of the Indian Civil Service, the Indian Police, the railways, and the irrigation and engineering services. The most important group was thus numerically the smallest. On the basis of these figures, there were more than two thousand Indians to each Britisher in India.

These figures are seldom, if ever, mentioned in nationalist historiography. They are probably kept out of sight with good reason, for the numbers are embarrassingly small. The remarkable thing about the British in India was that there were so few of them. Even the Indian Civil Service, of which so much was heard, had only a thousand officers in all, half of whom were Indian. An analysis based on such figures can make imperialism look more like a midget than a monster. But in the nationalist view, the forces of justice and of good triumphed in India, despite the superior might of the foreign forces of evil. An Indian David killed a British Goliath. A fearsome adversary was overcome. Conveying this impression requires exaggerating the might of the foreign forces of evil. The story of 1947 has, in the last half century in India, moved towards precisely this exaggeration.

Concomitantly, history in modern India has preferred to forget another inference from the same set of figures. Reconciliations have occurred, and we are all nationalists now. But if we do not exaggerate British numbers, we must contend with Indian complicity. And it can be awkward to stress that British rule was made possible only by Indian collaboration. Writing about how British rule was fought produces sublime, heroic stories; describing how it was supported reveals rather more sordid ones. Yet those who supported the Raj included government personnel, princes, businessmen, landlords, and politicians of various hues. After 1947, members of these groups sometimes concocted nationalist pedigrees for themselves, to ensconce themselves more comfortably in independent India. Research and teaching in history connived in this, by describing the Raj in terms which stressed British repression rather than Indian collaboration.

Another trend has been to depict the story of the Congress and the Raj predominantly as one of all-out conflict. After 1947, nationalists projected themselves as clear-sighted, strong-willed, and consistent opponents of imperialism. In their version of events, their tactics and strategies varied, but their ends did not. They knew that British rule was their enemy, and worked gloriously, ceaselessly and implacably to defeat it.

This view glosses over some inconvenient facts. For example, the early sessions of the Congress were vocal in their professions of loyalty to Queen Victoria. Moderate nationalism did not question the British connection. Dadabhai Naoroji, one of its grand old men, called his

book 'Poverty and Un-British Rule in India'. For him—despite the criticisms he levelled—the word 'British' still had some positive connotations. But after independence, as Indian history has been retold, the positive contemporary assessments of British rule in India have been underplayed.

Similarly, the times when the nationalist leaders and the British officials held hands and worked together—as in the Provincial Congress Ministries functioning for two years between 1937 and 1939—get little mention, or are sought to be explained away. It is difficult to accept that, for a while, the nationalist leaders functioned successfully within, and as a part of, and worse still as the junior partner in a British-controlled colonial state apparatus. Therefore, as it is retold, history in India emphasizes the confrontation of nationalism with imperialism. It shies away from nationalism's negotiations (and even occasional coalitions) with the enemy. Before 1947, textbooks discussed in detail the Montagu-Chelmsford Reforms and the 1935 Government of India Act; now they discuss in detail Non-Cooperation, Civil Disobedience, and Quit India. Before 1947, the focus was on government initiatives; afterwards it has been on Congress mass movements.

There has also been an attempt to minimize the alien input into Indian nationalism. Nationalism is seen as if it sprang more from conditions within India than from ideas imported from Europe. Never mind that while Indian reality was formative for Indian politicians, so was British ideology. After all, Gandhi, Nehru and Patel were all partly the products of the study of law in London.

When Congress leaders are represented in modern India, it is as if their Indian dress is emphasized, and their English education minimized. Of course they themselves spoke less of their attachment to their school or university in England, and more of their attachment to the soil of India—Nehru provides a good example of this. As if following his lead, the clothing of Congress leaders is given more importance than their education. The "foreign hand", repeatedly invoked in public speeches in independent India, is meant to be detested and feared. Traces of its touch are best remembered privately.

There is another striking element in the portrayal of 1947 in modern India. This is to make it look as if the British were kicked out of the country. A full-page government advertisement in the *Times of India* on 9 August 1999 reads: 'Fifty-seven years ago people from all

over India woke up this day to hear two electrifying words. Quit India. On this day, Mahatma Gandhi the father of the nation asked a foreign ruler to quit our motherland. People lived for his words. People died for his words. And the foreign ruler was forced to leave.' Imperialism sought to depict the British departure as voluntary; nationalism sought to depict it as an eviction. As an actual eviction was impossible to demonstrate, the trend became to make it appear as if the British were virtually evicted from the country. In history text-books, children were told that the Congress Party, under the leadership of Gandhi, mobilized the people of India and thereby pushed the British out.

But could the national movement actually evict the British from India? The only all-out attempt to do so was made in August 1942. For it was with the 'Quit India' Movement, that the Indian National Congress made its most determined effort to throw the British out. The Quit India Movement, with the slogan 'Do or Die', was declared to be Indian nationalism's last battle. But the most strenuous effort of the Congress ended in abject failure. The British did not flee: instead they crushed the main force of the movement in about three weeks, and reasserted imperial authority. Although glorified later with much fanfare, the 1942 Quit India movement was a failure in terms of its own stated objective, and left the Congress leaders locked up in jail for the next three years. The timing of independence—1947, not 1942—requires and repays scrutiny. Indeed, if only independence had come in 1942 instead of 1947, the task of nationalist history would have been simpler, and its fables more convincing.

In 1947, in fact, the situation seemed much more complicated. This is starkly evident in crucial texts from that year. On 26 November 1947, introducing the first budget of independent India, the Finance Minister, Shanmukham Chetty, said: "...we have secured freedom from foreign yoke, mainly through the operation of world events, and partly through a unique act of enlightened self-abnegation on behalf of the erstwhile rulers of the country..."² His tone was totally different from that of later generations of politicians.

Another direction in which the story of 1947 has been moved is to make the year look like a completely fresh start. In the fables of nationalism, 1947 marks a totally new beginning. The nature of state power before that year is held to be completely different from the nature of state power after it. Formulations of this vary. For example: an alien state became indigenous; an exploitative state became a

welfare state; a regulatory state became a developmental one; a static state became dynamic; an unjust state was replaced by a just one. It is as if in 1947 a magic wand had been vigorously waved.

This exercise requires overlooking the obvious continuity in the personnel of the state. With the departure of British officials, the Indian members of the Indian Civil Service, the Indian Police, the railways and other civilian services—as well as the Indian officers of the armed forces—did extremely well. Next to the Congress leaders, government officers were, ironically enough, the group for whom the benefits of independence were quickest to materialize. Officials who had been trained to control Congress influence under British rule, now savoured plum postings—the fruits of Congress victory. Thus the erstwhile bureaucratic opponents of the Congress did better out of independence than its peasant supporters. The majority of higher posts, hitherto occupied by Europeans, suddenly became vacant; so did the posts occupied by those Muslim officials who left for Pakistan.

As vacancies had to be filled, "premature promotions" became the order of the day, according to a police officer in Madras who found himself "included in the general advancement".³ P.C. Lal, who eventually became the Chief of the Air Force, recalled that "When India became independent many of us found ourselves transformed from lowly workers in the field to staff officers interpreting policies, formulating plans and implementing and enforcing programmes".⁴ All over the country, Indian officials stepped into the shoes of their departing British seniors, and pronounced that their new boots were not too big, but fitted very well. It was a time of windfall promotions. The schoolboy dream of a double promotion, on which so many of these creatures of the competitive examination had been brought up, came true for them in adult life.

With delightful finesse, the very same personnel of the state, while continuing their old careers, now projected the state they continued to serve as a completely different enterprise. In addition to their other aptitudes, they displayed a skill in serving two masters. They revealed that they had been sympathizers of the Congress all along. They insisted that they had never switched sides: they had merely chosen another route to serve the nation. The Indian Civil Service self-image remained robust.

Superficially, a new world was called into being. Myriad efforts were made to give this impression. In 1950, India was declared a

sovereign democratic republic with a new constitution. In the years after 1947, reports with titles like 'India in the Eighth Year of Freedom' were published annually, as if a new calendar had been established. Roads in many cities were renamed: the road in Delhi named after Lord Curzon was thoughtfully turned into Kasturba Gandhi Marg.

On all sides, one could see the state's attempt to distance itself from the past. The national state was guilty of its colonial origins. Consequently, the government of independent India tried to show that it was built on the wreckage of colonialism, rather than on the foundations provided by the colonial state. In retrospect one of the most obvious (though unstated), projects of nationalism, and of the state, in independent India was the concealment of continuity.

There were varieties of things to conceal or forget. Among them was the fact that loyalty to British rule was valued in independent India. The officers of the Indian Civil Service, having served British rule, were retained in their posts, and promoted; the members of the Indian National Army were not even reinstated in their old jobs—most of them gained a few moments of glory, and lost their livelihood. It was not the Indian National Army, but the British Indian Army, which provided the armed forces of independent India. And while the constitution was hailed as the founding, original document of a new nation, much of that constitution borrowed heavily from the Government of India Act of 1935. So also, most of the legal structure of British India was retained in place.

There is yet another of the ironies of history here. The British had long maintained that they would hand over power to India once Indians were trained and fit for self-government. This was a claim the Indian leaders vociferously condemned, as patronizing and disingenuous. But after India became self-governing its leaders themselves sent young Indian probationers in the civil services to England for training, presumably to learn what they could not in India. British personnel were retained in key positions within India: in the decade after independence, the Indian Air Force and the Indian Navy were commanded by Britishers.

Context and content

As we have seen, the content of the story of 1947 changed in subsequent years. In India, the story moved in a definite direction. The might of the British enemy was magnified; Indian collaboration with British rule was minimized; an all-out struggle was postulated be-

tween uncompromising British and Indian opponents; the British were deemed to be evicted as a result of Indian nationalist strength; and the continuities between the colonial state and the government of independent India were sought to be concealed. What allowed and encouraged the story to move in this direction? In a sense, the answer is that a change in context permitted the change in content.

The outcome of the 1940s allowed the leaders of independent India to don the mantle of state power, to preen themselves, to ask the familiar question of the mirror on their wall, and to supply a delightfully satisfying answer themselves. There was no doubt in their minds that they were the fairest leaders of them all. Historians were instructed and encouraged to write accordingly. Few disobeyed this mandate. Most historians in India obediently exalted nationalism, praised its beauty, and often exaggerated its strength.

The complicity of knowledge and power is well known. In the third quarter of the twentieth century in India, the portrayal of Indian history reflected the change in dominant ideology, its shift from imperialism to nationalism. As the ideology of the state in India changed from imperialism to nationalism, the representation of 1947 moved accordingly. Inexorably, the propaganda of imperialism gave way to the propaganda of the nation state.

For the present to look better, it helps if the past looks worse. The mythology of nationalism walks hand in hand with the demonology of its other. In the case of India, the fables of nationalism replaced the fables of a defunct imperialism. An eminent anthropologist and historian, Bernard Cohn, has written a book titled *Colonialism and Its Forms of Knowledge*. Comparable studies are needed for nationalism and its forms of knowledge.

Another aspect of the change in context was generational. Over time, the status of 1947 altered, from an event within memory to an episode in text-book history. In India, the events of 1947 left a common imprint, easier to recognize than to define, on the lives of a generation. There was an outpouring of popular enthusiasm on the streets on 15 August 1947, which exceeded the euphoria of many religious festivals. To witness this was to be marked by it.

But while the story of 1947 had greater emotional meaning for the people who had vivid memories of events, it was, for the very same reason, as far as they were concerned, a less malleable story. Members of an older generation had too many moorings in the reality of the

times, to let their representation slide too far away into fantasy. They might have found it a more moving story: but their memories would not allow the story to move too far.

A standard textbook of Indian history, *An Advanced History of India* by R.C. Majumdar, H.C. Raychaudhuri, and Kalikinkar Datta, concluded by declaring: "15th August, 1947, which saw the end of the long-drawn National Struggle against British rule is a red-letter day in the history of India, and the date will ever remain engraved in the hearts of millions of her people".⁵ The authors forgot that times and audiences change. As time passed, a population of eyewitnesses began to give way to younger people who had to be told what had happened. Once a festival of the people, the 15th of August eventually became a ritual of the state. In due course, a date engraved in older hearts had to be imprinted on younger minds. Emotion had to be replaced by education.

As memories faded, and messages about 1947 were addressed more to children and less to adults, the story became more pliable. Versions of the past became more tractable with time, when the past was more distant, because they were addressed to a constituency without any dissonant memories to challenge them. The data needed to dispute an official version were less readily available. Imagination was less fettered by fact.

As the official version of 1947 travelled through the firm channel of formal education, its current gained speed and strength. Hitherto carried mainly through conversation, the 1947 story found its new medium in the more structured hectoring of the classroom. The most vivid anecdote must fail before the most vapid syllabus. Moreover, the school teacher's cane is an effective weapon in the armoury of nationalism.

Ideology and bias

The imperial sunsets over Delhi's Red Fort, and the Viceregal Palace on Raisina Hill, provide an instructive contrast. The Mughals slowly lost their hold over their territories: and the British later established themselves by their victories over their various enemies, battle by battle, and region by region. But when the British left, the entire territory and state apparatus was handed over at one stroke, in a single negotiated transaction, to the leaders of the Congress and the Muslim League. Even as the British seized power in reality, they held its Mughal umbrella aloft till 1857. Foreigners in a distant country, the

British initially projected their rule as an essentially Indian enterprise. But the Congress regime after 1947, with its pre-eminent leaders educated in London, even while employing the same Indian personnel as the British had, projected itself as totally different and distanced from British rule. This was because the awe and aura of Mughal rule had persisted even after it was dead, whereas British rule was discredited, and its myths eroded, before it died. But though different in complexion, both distortions were similar in purpose.

Frequently taking liberties with facts, the autobiographies of states tell us only what they would have us believe about their origins. Ancestry is a messy matter. Close scrutiny of origins—whether of families or nations—is a notoriously sensitive issue, often fascinating, but seldom conclusively reassuring. The pasts of states, like those of individuals, seldom correspond exactly to later presentations of them. The autobiographies of states represent, not the quest for truth, but a search for legitimacy.

On 14/15 August 1947 Jawaharlal Nehru, making his 'Tryst with Destiny' speech, declared: 'At the stroke of the midnight hour, as the world sleeps, India awakes to life and freedom.' The fable of 1947 is rather like Prime Minister Nehru's statement, stirring; beautiful, and yet not quite accurate (for of course, at the stroke of the midnight hour in India, the world does not sleep).

Over the years, the story of 1947 has been pasteurized to rid it of germs, and homogenized as well. Individuals speak with many voices; the state seeks to speak in a single, authoritative voice. The Indian nation has, officially, only one past. For some decades, this past has been enshrined in the history textbooks published by the National Council of Educational Research and Training.

A national viewpoint has, as we are repeatedly reminded, much to commend it. But there is in this process of standardization, I suggest, also an arrogance to deprecate, and a loss to mourn.

For the people who lived through the events of the 1940s, the meaning of the events depended on their experiences. Experiences are notoriously varied and contradictory. They varied in the 1940s with—among other things—region, social class, gender, ideology and political affiliation. For the villages of Bengal, the great famine dwarfed most other events of the 1940s. In north India, 1947 is still referred to as the year of 'partition' rather than independence; in South India, the reverse is the case. For businessmen in India, the 1940s were

a time of unprecedented war profits; for agricultural labourers, they were years of frightening starvation. For women abducted during the partition riots, and then claimed by the governments of India and Pakistan even when their families rejected them, the period was exceptionally traumatic, with little or nothing to celebrate. If the elation of many Congress politicians in 1947 was visible at one extreme, the grief of the victims of famine, rape and murder was discernible at the other. The past bequeaths to us a rich diversity of memory.

A single, exclusive national rendition smothers this diversity of memory. The message from the new Indian nation state to its people has been unambiguous. What is most important to the government of independent India must be most important to them. An event which altered the trajectory of the state, must, they have been told, have done the same to their lives, in which one chapter closed in 1947, and another began. Each year, 15 August is supposed to be a time to banish thoughts other than those evoked by the national anthem. Foregrounding the 15th of August means, in a sense, telling the people that the history of the state is their personal history. It means telling them what to know, and commanding them what to feel. Speaking for others, and telling them what to know, is an attribute of power.

The story of 1947 is, in both senses of the word, a moving one. The realities of 1947 were many and varied, and they have not been discussed here except tangentially, for our subject is not the contemporary character of these events, but their subsequent representation. Independent India has viewed 1947 through nationalist spectacles. The purpose of this article has been, by pointing out some of the ways in which the story has been seen, to draw our attention to the power of the lenses used. For in the study of history, an awareness of bias is a condition of truth. □

Notes:

1. The figures are from Oliver Stebbings, 'The European in the New India', *The Asiatic Review* (July 1939), pp.464-5.
2. Department of Economic Affairs, Ministry of Finance, 'Speeches of Union Finance Ministers 1947-48 to 1984-85, presenting Central Government Budgets' (Delhi, 1984), p.12.
3. Eric Stracey, *Odd Man In: My Years in the Indian Police* Delhi, 1981, p.49.
4. Lal, P.C., *My Years with the I.A.F.* Lancer, Delhi, 1987; (first edn 1986), pp.3-4.
5. R.C. Majumdar, H.C. Raychaudhuri and Kalikinkar Datta, *An Advanced History of India*, (third edition), MacMillan, Delhi, 1967, p.992.

We believe that we are not alone in our concern about such elitism and the need to combat it. Others too have been equally unhappy about the distortions and imbalances generated by this trend in academic work on South Asian questions. We therefore hope that other scholars will join us in this venture by publishing on their own or with us their researches on subaltern themes, their critique of elitism in their respective disciplines and generally by helping us with their advice on the contents of this and subsequent volumes of *Subaltern Studies*.

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Ranajit Guha

On Some Aspects of the Historiography of Colonial India¹

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1. The historiography of Indian nationalism has for a long time been dominated by elitism—colonialist elitism and bourgeois-nationalist elitism.² Both originated as the ideological product of British rule in India, but have survived the transfer of power and been assimilated to neo-colonialist and neo-nationalist forms of discourse in Britain and India respectively. Elitist historiography of the colonialist or neo-colonialist type counts British writers and institutions among its principal protagonists, but has its imitators in India and other countries too. Elitist historiography of the nationalist or neo-nationalist type is primarily an Indian practice but not without imitators in the ranks of liberal historians in Britain and elsewhere.

2. Both these varieties of elitism share the prejudice that the making of the Indian nation and the development of the consciousness—nationalism—which informed this process were exclusively or predominantly elite achievements. In the colonialist and neo-colonialist historiographies these achievements are credited to British colonial rulers, administrators, policies, institutions and culture; in the nationalist and neo-nationalist writings—to Indian elite personalities, institutions, activities and ideas.

3. The first of these two historiographies defines Indian nationalism primarily as a function of stimulus and response. Based on a

¹The author is grateful to all the other contributors to this volume as well as to Gautam Bhadra, Dipesh Chakrabarty and Raghavendra Chattopadhyay for their comments on an earlier version of this statement.

²For a definition of the terms 'elite', 'people', 'subaltern', etc. as used in these paragraphs the reader may kindly turn to the note printed at the end of this statement.

narrowly behaviouristic approach this represents nationalism as the sum of the activities and ideas by which the Indian elite responded to the institutions, opportunities, resources, etc. generated by colonialism. There are several versions of this historiography, but the central modality common to them is to describe Indian nationalism as a sort of 'learning process' through which the native elite became involved in politics by trying to negotiate the maze of institutions and the corresponding cultural complex introduced by the colonial authorities in order to govern the country. What made the elite go through this process was, according to this historiography, no lofty idealism addressed to the general good of the nation but simply the expectation of rewards in the form of a share in the wealth, power and prestige created by and associated with colonial rule; and it was the drive for such rewards with all its concomitant play of collaboration and competition between the ruling power and the native elite as well as between various elements among the latter themselves, which, we are told, was what constituted Indian nationalism.

4. The general orientation of the other kind of elitist historiography is to represent Indian nationalism as primarily an idealist venture in which the indigenous elite led the people from subjugation to freedom. There are several versions of this historiography which differ from each other in the degree of their emphasis on the role of individual leaders or elite organizations and institutions as the main or motivating force in this venture. However, the modality common to them all is to uphold Indian nationalism as a phenomenal expression of the goodness of the native elite with the antagonistic aspect of their relation to the colonial regime made, against all evidence, to look larger than its collaborationist aspect, their role as promoters of the cause of the people than that as exploiters and oppressors, their altruism and self-abnegation than their scramble for the modicum of power and privilege granted by the rulers in order to make sure of their support for the Raj. The history of Indian nationalism is thus written up as a sort of spiritual biography of the Indian elite.

5. Elitist historiography is of course not without its uses. It helps us to know more of the structure of the colonial state, the operation of its various organs in certain historical circumstances, the nature of the alignment of classes which sustained it; of some aspects of the ideology of the elite as the dominant ideology of the

period; of the contradictions between the two elites and the complexities of their mutual oppositions and coalitions; of the role of some of the more important British and Indian personalities and elite organizations. Above all it helps us to understand the ideological character of historiography itself.

6. What, however, historical writing of this kind cannot do is to explain Indian nationalism for us. For it fails to acknowledge, far less interpret, the contribution made by the people *on their own*, that is, independently of the elite to the making and development of this nationalism. In this particular respect the poverty of this historiography is demonstrated beyond doubt by its failure to understand and assess the mass articulation of this nationalism except, negatively, as a law and order problem, and positively, if at all, either as a response to the charisma of certain elite leaders or in the currently more fashionable terms of vertical mobilization by the manipulation of factions. The involvement of the Indian people in vast numbers, sometimes in hundreds of thousands or even millions, in nationalist activities and ideas is thus represented as a diversion from a supposedly 'real' political process, that is, the grinding away of the wheels of the state apparatus and of elite institutions geared to it, or it is simply credited, as an act of ideological appropriation, to the influence and initiative of the elite themselves. The bankruptcy of this historiography is clearly exposed when it is called upon to explain such phenomena as the anti-Rowlatt upsurge of 1919 and the Quit India movement of 1942—to name only two of numerous instances of popular initiative asserting itself in the course of nationalist campaigns in defiance or absence of elite control. How can such one-sided and blinkered historiography help us to understand the profound displacements, well below the surface of elite politics, which made Chauri-Chaura or the militant demonstrations of solidarity with the RIN mutineers possible?

7. This inadequacy of elitist historiography follows directly from the narrow and partial view of politics to which it is committed by virtue of its class outlook. In all writings of this kind the parameters of Indian politics are assumed to be or enunciated as exclusively or primarily those of the institutions introduced by the British for the government of the country and the corresponding sets of laws, policies, attitudes and other elements of the superstructure. Inevitably, therefore, a historiography hamstrung by

such a definition can do no more than to equate politics with the aggregation of activities and ideas of those who were directly involved in operating these institutions, that is, the colonial rulers and their *élèves* — the dominant groups in native society. To the extent that their mutual transactions were thought to be all there was to Indian nationalism, the domain of the latter is regarded as coincident with that of politics.

8. What clearly is left out of this un-historical historiography is the *politics of the people*. For parallel to the domain of elite politics there existed throughout the colonial period another domain of Indian politics in which the principal actors were not the dominant groups of the indigenous society or the colonial authorities but the subaltern classes and groups constituting the mass of the labouring population and the intermediate strata in town and country—that is, the people. This was an *autonomous* domain, for it neither originated from elite politics nor did its existence depend on the latter. It was traditional only in so far as its roots could be traced back to pre-colonial times, but it was by no means archaic in the sense of being outmoded. Far from being destroyed or rendered virtually ineffective, as was elite politics of the traditional type by the intrusion of colonialism, it continued to operate vigorously in spite of the latter, adjusting itself to the conditions prevailing under the Raj and in many respects developing entirely new strains in both form and content. As modern as indigenous elite politics, it was distinguished by its relatively greater depth in time as well as in structure.

9. One of the more important features of this politics related precisely to those aspects of mobilization which are so little explained by elitist historiography. Mobilization in the domain of elite politics was achieved vertically whereas in that of subaltern politics this was achieved horizontally. The instrumentation of the former was characterized by a relatively greater reliance on the colonial adaptations of British parliamentary institutions and the residua of semi-feudal political institutions of the pre-colonial period; that of the latter relied rather more on the traditional organization of kinship and territoriality or on class associations depending on the level of the consciousness of the people involved. Elite mobilization tended to be relatively more legalistic and constitutionalist in orientation, subaltern mobilization relatively more violent. The former was, on the whole, more cautious and

controlled, the latter more spontaneous. Popular mobilization in the colonial period was realized in its most comprehensive form in peasant uprisings. However, in many historic instances involving large masses of the working people and petty bourgeoisie in the urban areas too the figure of mobilization derived directly from the paradigm of peasant insurgency.

10. The ideology operative in this domain, taken as a whole, reflected the diversity of its social composition with the outlook of its leading elements dominating that of the others at any particular time and within any particular event. However, in spite of such diversity one of its invariant features was a notion of resistance to elite domination. This followed from the subalternity common to all the social constituents of this domain and as such distinguished it sharply from that of elite politics. This ideological element was of course not uniform in quality or density in all instances. In the best of cases it enhanced the concreteness, focus and tension of subaltern political action. However, there were occasions when its emphasis on sectional interests disequilibrated popular movements in such a way as to create economic diversions and sectarian splits, and generally to undermine horizontal alliances.

11. Yet another set of the distinctive features of this politics derived from the conditions of exploitation to which the subaltern classes were subjected in varying degrees as well as from its relation to the productive labour of the majority of its protagonists, that is, workers and peasants, and to the manual and intellectual labour respectively of the non-industrial urban poor and the lower sections of the petty bourgeoisie. The experience of exploitation and labour endowed this politics with many idioms, norms and values which put it in a category apart from elite politics.

12. These and other distinctive features (the list is by no means exhaustive) of the politics of the people did not of course appear always in the pure state described in the last three paragraphs. The impact of living contradictions modified them in the course of their actualization in history. However, with all such modifications they still helped to demarcate the domain of subaltern politics from that of elite politics. The co-existence of these two domains or streams, which can be sensed by intuition and proved by demonstration as well, was the index of an important historical truth, that is, the *failure of the Indian bourgeoisie to speak for the nation*. There were vast areas in the life and consciousness of the people

which were never integrated into their hegemony. The *structural dichotomy* that arose from this is a datum of Indian history of the colonial period, which no one who sets out to interpret it can ignore without falling into error.

13. Such dichotomy did not, however, mean that these two domains were hermetically sealed off from each other and there was no contact between them. On the contrary, there was a great deal of overlap arising precisely from the effort made from time to time by the more advanced elements among the indigenous elite, especially the bourgeoisie, to integrate them. Such effort when linked to struggles which had more or less clearly defined anti-imperialist objectives and were consistently waged, produced some splendid results. Linked, on other occasions, to movements which either had no firm anti-imperialist objectives at all or had lost them in the course of their development and deviated into legalist, constitutionalist or some other kind of compromise with the colonial government, they produced some spectacular retreats and nasty reversions in the form of sectarian strife. In either case the braiding together of the two strands of elite and subaltern politics led invariably to explosive situations indicating that the masses mobilized by the elite to fight for their own objectives managed to break away from their control and put the characteristic imprint of popular politics on campaigns initiated by the upper classes.

14. However, the initiatives which originated from the domain of subaltern politics were not, on their part, powerful enough to develop the nationalist movement into a full-fledged struggle for national liberation. The working class was still not sufficiently mature in the objective conditions of its social being and in its consciousness as a class-for-itself, nor was it firmly allied yet with the peasantry. As a result it could do nothing to take over and complete the mission which the bourgeoisie had failed to realize. The outcome of it all was that the numerous peasant uprisings of the period, some of them massive in scope and rich in anti-colonialist consciousness, waited in vain for a leadership to raise them above localism and generalize them into a nationwide anti-imperialist campaign. In the event, much of the sectional struggle of workers, peasants and the urban petty bourgeoisie either got entangled in economism or, wherever politicized, remained, for want of a revolutionary leadership, far too fragmented to form

effectively into anything like a national liberation movement.

15. It is the study of this *historic failure of the nation to come to its own*, a failure due to the inadequacy of the bourgeoisie as well as of the working class to lead it into a decisive victory over colonialism and a bourgeois-democratic revolution of either the classic nineteenth-century type under the hegemony of the bourgeoisie or a more modern type under the hegemony of workers and peasants, that is, a 'new democracy'— *it is the study of this failure which constitutes the central problematic of the historiography of colonial India.* There is no one given way of investigating this problematic. Let a hundred flowers blossom and we don't mind even the weeds. Indeed we believe that in the practice of historiography even the elitists have a part to play if only by way of teaching by negative examples. But we are also convinced that elitist historiography should be resolutely fought by developing an alternative discourse based on the rejection of the spurious and un-historical monism characteristic of its view of Indian nationalism and on the recognition of the co-existence and interaction of the elite and subaltern domains of politics.

16. We are sure that we are not alone in our concern about the present state of the political historiography of colonial India and in seeking a way out. The elitism of modern Indian historiography is an oppressive fact resented by many others, students, teachers and writers like ourselves. They may not all subscribe to what has been said above on this subject in exactly the way in which we have said it. However, we have no doubt that many other historiographical points of view and practices are likely to converge close to where we stand. Our purpose in making our own views known is to promote such a convergence. We claim no more than to try and indicate an orientation and hope to demonstrate in practice that this is feasible. In any discussion which may ensue we expect to learn a great deal not only from the agreement of those who think like us but also from the criticism of those who don't.

A note on the terms 'elite', 'people', 'subaltern', etc.
as used above

The term 'elite' has been used in this statement to signify *dominant* groups, foreign as well as indigenous. The *dominant foreign* groups included all the non-Indian, that is, mainly British officials of the colonial state and foreign industrialists, merchants, financiers, planters, landlords and missionaries.

The *dominant indigenous* groups included classes and interests operating at two levels. At the *all-India level* they included the biggest feudal magnates, the most important representatives of the industrial and mercantile bourgeoisie and native recruits to the uppermost levels of the bureaucracy.

At the *regional and local levels* they represented such classes and other elements as were *either* members of the dominant all-India groups included in the previous category *or* if belonging to social strata hierarchically inferior to those of the dominant all-India groups still *acted in the interests of the latter and not in conformity to interests corresponding truly to their own social being*.

Taken as a whole and in the abstract this last category of the elite was *heterogeneous* in its composition and thanks to the uneven character of regional economic and social developments, *differed from area to area*. The same class or element which was dominant in one area according to the definition given above, could be among the dominated in another. This could and did create many ambiguities and contradictions in attitudes and alliances, especially among the lowest strata of the rural gentry, impoverished landlords, rich peasants and upper-middle peasants all of whom belonged, *ideally speaking*, to the category of 'people' or 'subaltern classes', as defined below. It is the task of research to investigate, identify and measure the *specific* nature and degree of the *deviation* of these elements from the ideal and situate it historically.

The terms 'people' and 'subaltern classes' have been used as synonymous throughout this note. The social groups and elements included in this category represent the *demographic difference between the total Indian population and all those whom we have described as the 'elite'*. Some of these classes and groups such as the lesser rural gentry, impoverished landlords, rich peasants and upper-middle peasants who 'naturally' ranked among the 'people' and the 'subaltern', could under certain circumstances act for the 'elite', as explained above, and therefore be classified as such in some local or regional situations—an ambiguity which it is up to the historian to sort out on the basis of a close and judicious reading of his evidence.

The Prose of Counter-Insurgency¹

RANAJIT GUHA

I

When a peasant rose in revolt at any time or place under the Raj, he did so necessarily and explicitly in violation of a series of codes which defined his very existence as a member of that colonial, and still largely semi-feudal society. For his subalternity was materialized by the structure of property, institutionalized by law, sanctified by religion and made tolerable—and even desirable—by tradition. To rebel was indeed to destroy many of those familiar signs which he had learned to read and manipulate in order to extract a meaning out of the harsh world around him and live with it. The risk in 'turning things upside down' under these conditions was indeed so great that he could hardly afford to engage in such a project in a state of absent-mindedness.

There is nothing in the primary sources of historical evidence to suggest anything other than this. These give the lie to the myth, retailed so often by careless and impressionistic writing on the subject, of peasant insurrections being purely spontaneous and unpremeditated affairs. The truth is quite to the contrary. It would be difficult to cite an uprising on any significant scale that was not in fact preceded either by less militant types of mobilization when other means had been tried and found wanting or by parley among its principals seriously to weigh the pros and cons of any recourse to arms. In events so very different from each other in context, character and the composition of participants such as the Rangpur *dhing* against Debi Sinha (1783), the Barasat *bidroha* led by Titu Mir (1831), the Santal *hool* (1855) and the 'blue mutiny' of 1860 the

¹ I am grateful to my colleagues of the editorial team for their comments on an initial draft of this essay.

Note: For a list of Abbreviations used in the footnotes of this chapter, see p. 40.

Indian Constitutionalism
Ambedkar University, Delhi (2019)

Arudra Burra, IIT Delhi

Course packet V: Dr. Ambedkar and the Draft Constitution

1. Dr. B. R. Ambedkar, motion to introduce the Draft Constitution, *Constituent Assembly Debates* vol 7 (4 November 1948)
2. Pratap Bhanu Mehta, “What is Constitutional Morality?” *Seminar* 615 (2010)
3. André Bételle, “Constitutional Morality,” *Economic and Political Weekly* 43:40 (2008)
4. Surinder Jodhka, “Nation and Village: Images of Rural India in Gandhi, Nehru and Ambedkar,” *Economic and Political Weekly* 37:32 (2002)
5. Marc Galanter, “The Aborted Restoration of ‘Indigenous’ Law in India,” *Law and Society in Modern India*
6. Arudra Burra, “The Cobwebs of Imperial Rule,” *Seminar* 615 (2010)
7. Rohit De, selections from *A People’s Constitution: The Everyday Life of Law in the Indian Republic*

after which it would be stated that the Constitution will be considered on those particular dates. That being the case, Members have the right to send in their amendments, two days before the date when the particular amendments shall be discussed.]*

Mr. President: *[Let us not take a decision on this point at this stage.]*

Pandit Thakur Dass Bhargava: *[I am aware that you want to give full opportunity to the Members for discussion and that their right of giving notice of amendments should remain intact. Every Member has confidence in the matter of the exercise of your discretion. But in my humble opinion, the question of discretion does not arise here, because according to my interpretation, every Member can send in amendments as a matter of right. This is also the intention of Rules 38-P and 38-Q. Your order that Members should send their amendments by 5 o'clock on Sunday goes in a way, prima facie, against the Members, which is not in order and should be reviewed. You may not decide it now, if you do not want to, though incidentally and in a way, the decision is there. In my humble opinion, if without reviewing the order, you extend the date, instead of 7th, to 10th and decide the question, when occasion arises, then nobody will have any grievance.]*

Shri T. Channiah (Mysore State): On a point of order, Mr. President, Sir, most of the honourable Members who spoke previously know the English language very well. We are very sorry to bring it to your notice that most of the Members, especially Members coming from Madras, from Bengal, Bombay, Assam and many other places cannot understand Hindi or Hindustani. We have to sit almost like dumb people. Mr. President, Sir, you are here to protect the interests of all the Members. I would, therefore, request you to see that all those members who know English and who are able to speak in English are made to speak in English.

MOTION *re.* DRAFT CONSTITUTION

Mr. President: I think we shall now proceed with the discussion. I call upon the Honourable Dr. Ambedkar to move his motion.

The Honourable Dr. B. R. Ambedkar (Bombay: General): Mr. President, Sir, I introduce the Draft Constitution as settled by the Drafting Committee and move that it be taken into consideration.

The Drafting Committee was appointed by a Resolution passed by the Constituent Assembly on August 29, 1947.

The Drafting Committee was in effect charged with the duty of preparing a Constitution in accordance with the decisions of the Constituent Assembly on the reports made by the various Committees appointed by it such as the Union Powers Committee, the Union Constitution Committee, the Provincial Constitution Committee and the Advisory Committee on Fundamental Rights, Minorities, Tribal Areas, etc. The Constituent Assembly had also directed that in certain matters the provisions contained in the Government of India Act, 1935, should be followed. Except on points which are referred to in my letter of the 21st February 1948 in which I have referred to the departures made and alternatives suggested by the Drafting Committee, I hope the Drafting Committee will be found to have faithfully carried out the directions given to it.

The Draft Constitution as it has emerged from the Drafting Committee is a formidable document. It contains 315 Articles and 8 Schedules. It must be admitted that the Constitution of no country could be found to be so bulky as the Draft Constitution. It would be difficult for those who have not been through it to realize its salient and special features.

The Draft Constitution has been before the public for eight months. During this long time friends, critics and adversaries have had more than sufficient time to express their reactions to the provisions contained in it. I dare say that some of them are based on misunderstanding and inadequate understanding of the Articles. But there the criticisms are and they have to be answered.

For both these reasons it is necessary that on a motion for consideration I should draw your attention to the special features of the Constitution and also meet the criticism that has been levelled against it.

Before I proceed to do so I would like to place on the table of the House Reports of three Committees appointed by the Constituent Assembly # (1) Report of the Committee on Chief Commissioners' Provinces (##) (2) Report of the Expert Committee on Financial Relations between the Union and the States, and (###) (3) Report of the Advisory Committee on Tribal Areas, which came too late to be considered by that Assembly though copies of them have been circulated to Members of the Assembly. As these reports and the recommendations made therein have been considered by the Drafting Committee it is only proper that the House should formally be placed in possession of them.

Appendix A ## Appendix B ### Appendix C (1 to 3)

Turning to the main question. A student of Constitutional Law if a copy of a Constitution is placed in his hands is sure to ask two questions. Firstly what is the form of Government that is envisaged in the Constitution; and secondly what in the form of the Constitution? For these are the two crucial matters which every Constitution has to deal with. I will begin with the first of the two questions.

In the Draft Constitution there is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of this functionary reminds one of the President of the United States. But beyond identity of names there is nothing in common between the forms of Government prevalent in America and the form of Government proposed under the Draft Constitution. The American form of Government is called the Presidential system of Government. What the Draft Constitution proposes is the Parliamentary system. The two are fundamentally different.

Under the Presidential system of America, the President is the Chief head of the Executive. The administration is vested in him. Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. Under the American Constitution the President has under him Secretaries in charge of different Departments. In like manner the President of the Indian Union will have under him Ministers in charge of different Departments of administration. Here again there is a fundamental difference between the two. The President of the United States is not bound to accept any advice tendered to him by any of his Secretaries. The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do any thing without their advice. The President of the United States can dismiss any Secretary at any time. The President of the Indian Union has no power to do so long as his Ministers command a majority in Parliament.

The Presidential system of America is based upon the separation of the Executive and the Legislature. So that the President and his Secretaries cannot be members of the Congress. The Draft Constitution does not recognise this doctrine. The Ministers under the Indian Union are members of Parliament. Only

members of Parliament can become Ministers. Ministers have the same rights as other members of Parliament, namely, that they can sit in Parliament, take part in debates and vote in its proceedings. Both systems of Government are of course democratic and the choice between the two is not very easy. A democratic executive must satisfy two conditions - (1) It must be a stable executive and (2) it must be a responsible executive. Unfortunately it has not been possible so far to devise a system which can ensure both in equal degree. You can have a system which can give you more stability but less responsibility or you can have a system which gives you more responsibility but less stability. The American and the Swiss systems give more stability but less responsibility. The British system on the other hand gives you more responsibility but less stability. The reason for this is obvious. The American Executive is a non-Parliamentary Executive which means that it is not dependent for its existence upon a majority in the Congress, while the British system is a Parliamentary Executive which means that it is not dependent for its existence upon a majority in the Congress, while the British system is a Parliamentary Executive which means that it is dependent upon a majority in Parliament. Being a non-Parliamentary Executive, the Congress of the United States cannot dismiss the Executive. A Parliamentary Government must resign the moment it loses the confidence of a majority of the members of Parliament. Looking at it from the point of view of responsibility, a non-Parliamentary Executive being independent of Parliament tends to be less responsible to the Legislature, while a Parliamentary Executive being more dependent upon a majority in Parliament become more responsible. The Parliamentary system differs from a non-Parliamentary system in as much as the former is more responsible than the latter but they also differ as to the time and agency for assessment of their responsibility. Under the non-Parliamentary system, such as the one that exists in the U.S.A., the assessment of the responsibility of the Executive is periodic. It takes place once in two years. It is done by the Electorate. In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses. Periodic assessment is done by the Electorate at the time of the election which may take place every five years or earlier. The Daily assessment of responsibility which is not available under the American system it is felt far more effective than the periodic assessment and far more necessary in a country like India. The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.

So far I have explained the form of Government under the Draft Constitution. I will now turn to the other question, namely, the form of the Constitution.

Two principal forms of the Constitution are known to history - one is called Unitary and the other Federal. The two essential characteristics of a Unitary Constitution are: (1) the supremacy of the Central Polity and (2) the absence of subsidiary Sovereign polities. Contrariwise, a Federal Constitution is marked: (1) by the existence of a Central polity and subsidiary polities side by side, and (2) by each being sovereign in the field assigned to it. In other words. Federation means the establishment of a Dual Polity. The Draft Constitution is, Federal Constitution inasmuch as it establishes what may be called a Dual Polity. This Dual Polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. This dual polity resembles the American Constitution. The American polity is also a dual polity, one of it is known as the Federal Government and the other States which correspond respectively to the Union Government and the States Government of the Draft Constitution. Under the American Constitution the Federal Government is not a mere league of the States nor are the States administrative units or agencies of the Federal Government. In the same way the Indian Constitution proposed in the Draft Constitution is not a league of States nor are the States administrative units or agencies of the Union Government. Here, however, the similarities between the Indian and the American Constitution come to an end. The differences that distinguish them are more fundamental and glaring than the similarities between the two.

The points of difference between the American Federation and the Indian Federation are mainly two.

In the U.S.A. this dual polity is followed by a dual citizenship. In the U.S.A. there is a citizenship of the U.S.A. But there is also a citizenship of the State. No doubt the rigours of this double citizenship are much assuaged by the fourteenth amendment to the Constitution of the United States which prohibits the States from taking away the rights, privileges and immunities of the citizen of the United States. At the same time, as pointed out by Mr. William Anderson, in certain political matters, including the right to vote and to hold public office, States may and do discriminate in favour of their own citizens. This favoritism goes even farther in many cases. Thus to obtain employment in the service of a State or local Government one is in most places required to be a local resident or citizen. Similarly in the licensing of persons for the practice of such public professions as law and medicine, residence or citizenship in the State is frequently required; and in business where public regulation must necessarily be strict, as in the sale of liquor, and of stocks and bonds, similar requirements have been upheld.

Each State has also certain rights in its own domain that it holds for the special advantage of its own citizens. Thus wild game and fish in a sense belong to the State. It is customary for the States to charge higher hunting and fishing license fees to non-residents than to its own citizens. The States also charge non-residents higher tuition in State Colleges and Universities, and permit only residents to be admitted to their hospitals and asylums except in emergencies.

In short, there are a number of rights that a State can grant to its own citizens or residents that it may and does legally deny to non-residents, or grant to non-residents only on more difficult terms than those imposed on residents. These advantages, given to the citizen in his own State, constitute the special rights of State citizenship. Taken all together, they amount to a considerable difference in rights between citizens and non-citizens of the State. The transient and the temporary sojourner is everywhere under some special handicaps.

The proposed Indian Constitution is a dual polity with a single citizenship. There is only one citizenship for the whole of India. It is Indian citizenship. There is no State citizenship. Every Indian has the same rights of citizenship, no matter in what State he resides.

The dual polity of the proposed Indian Constitution differs from the dual polity of the U.S.A. in another respect. In the U.S.A. the Constitutions of the Federal and the States Governments are loosely connected. In describing the relationship between the Federal and State Government in the U.S.A., Bryce has said:

"The Central or national Government and the State Governments may be compared to a large building and a set of smaller buildings standing on the same ground, yet distinct from each other."

Distinct they are, but how distinct are the State Governments in the U.S.A. from the Federal Government? Some idea of this distinctness may be obtained from the following facts:

1. Subject to the maintenance of the republican form of Government, each State in America is free to make its own Constitution.
2. The people of a State retain for ever in their hands, altogether independent of the National Government, the power of altering their Constitution.

To put it again in the words of Bryce:

"A State (in America) exists as a commonwealth by virtue of its own Constitution, and all State Authorities, legislative, executive and judicial are the creatures of, and subject to the Constitution."

This is not true of the proposed Indian Constitution. No States (at any rate those in Part I) have a right to frame its own Constitution. The Constitution of the Union and of the States is a single frame from

which neither can get out and within which they must work.

So far I have drawn attention to the difference between the American Federation and the proposed Indian Federation. But there are some other special features of the proposed Indian Federation which mark it off not only from the American Federation but from all other Federations. All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances. In normal times, it is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system. Once the President issues a Proclamation which he is authorised to do under the Provisions of Article 275, the whole scene can become transformed and the State becomes a unitary state. The Union under the Proclamation can claim if it wants (1) the power to legislate upon any subject even though it may be in the State list, (2) the power to give directions to the States as to how they should exercise their executive authority in matters which are within their charge, (3) the power to vest authority for any purpose in any officer, and (4) the power to suspend the financial provisions of the Constitution. Such a power of converting itself into a unitary State no federation possesses. This is one point of difference between the Federation proposed in the Draft Constitution, and all other Federations we know of.

This is not the only difference between the proposed Indian Federation and other federations. Federalism is described as a weak if not an effete form of Government. There are two weaknesses from which Federation is alleged to suffer. One is rigidity and the other is legalism. That these faults are inherent in Federalism, there can be no dispute. A Federal Constitution cannot but be a written Constitution and a written Constitution must necessarily be a rigid Constitution. A Federal Constitution means division of Sovereignty by no less a sanction than that of the law of the Constitution between the Federal Government and the States, with two necessary consequences (1) that any invasion by the Federal Government in the field assigned to the States and vice versa is a breach of the Constitution and (2) such breach is a justiciable matter to be determined by the Judiciary only. This being the nature of federalism, a federal Constitution have been found in a pronounced form in the Constitution of the United States of America.

Countries which have adopted Federalism at a later date have attempted to reduce the disadvantages following from the rigidity and legalism which are inherent therein. The example of Australia may well be referred to in this matter. The Australian Constitution has adopted the following means to make its federation less rigid:

- (1) By conferring upon the Parliament of the Commonwealth large powers of concurrent Legislation and few powers of exclusive Legislation.
- (2) By making some of the Articles of the Constitution of a temporary duration to remain in force only "until Parliament otherwise provides."

It is obvious that under the Australian Constitution, the Australian Parliament can do many things, which are not within the competence of the American Congress and for doing which the American Government will have to resort to the Supreme Court and depend upon its ability, ingenuity and willingness to invent a doctrine to justify it the exercise of authority.

In assuaging the rigour of rigidity and legalism the Draft Constitution follows the Australian plan on a far more extensive scale than has been done in Australia. Like the Australian Constitution, it has a long list of subjects for concurrent powers of legislation. Under the Australian Constitution, concurrent subjects are 39. Under the Draft Constitution they are 37. Following the Australian Constitution there are as many as six Articles in the Draft Constitution, where the provisions are of a temporary duration and

which could be replaced by Parliament at anytime by provisions suitable for the occasion. The biggest advance made by the Draft Constitution over the Australian Constitution is in the matter of exclusive powers of legislation vested in Parliament. While the exclusive authority of the Australian Parliament to legislate extends only to about 3 matters, the authority of the Indian Parliament as proposed in the Draft Constitution will extend to 91 matters. In this way the Draft Constitution has secured the greatest possible elasticity in its federalism which is supposed to be rigid by nature.

It is not enough to say that the Draft Constitution follows the Australian Constitution or follows it on a more extensive scale. What is to be noted is that it has added new ways of overcoming the rigidity and legalism inherent in federalism which are special to it and which are not to be found elsewhere.

First is the power given to Parliament to legislate on exclusively provincial subjects in normal times. I refer to Articles 226, 227 and 229. Under Article 226 Parliament can legislate when a subject becomes a matter of national concern as distinguished from purely Provincial concern, though the subject is in the State list, provided a solution is passed by the Upper Chamber by 2/3rd majority in favour of such exercise of the power by the Centre. Article 227 gives the similar power to Parliament in a national emergency. Under Article 229 Parliament can exercise the same power if Provinces consent to such exercise. Though the last provision also exists in the Australian Constitution the first two are a special feature of the Draft Constitution.

The second means adopted to avoid rigidity and legalism is the provision for facility with which the Constitution could be amended. The provisions of the Constitution relating to the amendment of the Constitution divide the Articles of the Constitution into two groups. In the one group are placed Articles relating to (a) the distribution of legislative powers between the Centre and the States, (b) the representation of the States in Parliament, and (c) the powers of the Courts. All other Articles are placed in another group. Articles placed in the second group cover a very large part of the Constitution and can be amended by Parliament by a double majority, namely, a majority of not less than two thirds of the members of each House present and voting and by a majority of the total membership of each House. The amendment of these Articles does not require ratification by the States. It is only in those Articles which are placed in group one that an additional safeguard of ratification by the States is introduced.

One can therefore safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible federation.

There is another special feature of the proposed Indian Federation which distinguishes it from other federations. A Federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and in judicial protection. Upto a certain point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of Government to local needs and local circumstances. But this very diversity when it goes beyond a certain point is capable of producing chaos and has produced chaos in many federal States. One has only to imagine twenty different laws-if we have twenty States in the Union-of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and cheques, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the State but becomes intolerant to the citizen who moves from State to State only to find that what is lawful in one State is not lawful in another. The Draft Constitution has sought to forge means and methods whereby India will have Federation and at the same time will have uniformity in all basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Constitution are three

(1) a single judiciary,

(2) uniformity-in fundamental laws, civil and criminal, and

(3) a common All-India Civil Service to man important posts.

A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the U. S. A. the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law. This is done to eliminate all diversity in all remedial procedure. Canada is the only country which furnishes a close parallel. The Australian system is only an approximation.

Care is taken to eliminate all diversity from laws which are at the basis of civic and corporate life. The great Codes of Civil & Criminal Laws, such as the Civil Procedure Code, Penal Code, the Criminal Procedure Code, the Evidence Act, Transfer of Property Act, Laws of Marriage Divorce, and Inheritance, are either placed in the Concurrent List so that the necessary uniformity can always be preserved without impairing the federal system.

The dual polity which is inherent in a federal system as I said is followed in all federations by a dual service. In all Federations there is a Federal Civil Service and a State Civil Service. The Indian Federation though a Dual Polity will have a Dual Service but with one exception. It is recognized that in every country there are certain posts in its administrative set up which might be called strategic from the point of view of maintaining the standard of administration. It may not be easy to spot such posts in a large and complicated machinery of administration. But there can be no doubt that the standard of administration depends upon the calibre of the Civil Servants who are appointed to these strategic posts. Fortunately for us we have inherited from the past system of administration which is common to the whole of the country and we know what are these strategic posts. The Constitution provides that without depriving the States of their right to form their own Civil Services there shall be an All India service recruited on an All- India basis with common qualifications, with uniform scale of pay and the members of which alone could be appointed to these strategic posts throughout the Union.

Such are the special features of the proposed Federation. I will now turn to what the critics have had to say about it.

It is said that there is nothing new in the Draft Constitution, that about half of it has been copied from the Government of India Act of 1935 and that the rest of it has been borrowed from the Constitutions of other countries. Very little of it can claim originality.

One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their Constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly what are the fundamentals of a Constitution are recognized all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country. The charge of producing a blind copy of the Constitutions of other countries is based, I am sure, on an inadequate study of the Constitution. I have shown what is new in the Draft Constitution and I am sure that those who have studied other Constitutions and who are prepared to consider the matter dispassionately will agree that the Drafting Committee in performing its duty has not been guilty of such blind and slavish imitation as it is represented to be.

As to the accusation that the Draft Constitution has produced a good part of the provisions of the

Government of India Act, 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution. What I am sorry about is that the provisions taken from the Government of India Act, 1935, relate mostly to the details of administration. I agree that administrative details should have no place in the Constitution. I wish very much that the Drafting Committee could see its way to avoid their inclusion in the Constitution. But this is to be said on the necessity which justifies their inclusion. Grote, the historian of Greece, has said that:

"The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendancy for themselves."

By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own." (*Hear, hear.*)

While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.

In these circumstances it is wiser not to trust the Legislature to prescribe forms of administration. This is the justification for incorporating them in the Constitution.

Another criticism against the Draft Constitution is that no part of it represents the ancient polity of India. It is said that the new Constitution should have been drafted on the ancient Hindu model of a State and that instead of incorporating Western theories the new Constitution should have been raised and built upon village Panchayats and District Panchayats. There are others who have taken a more extreme view. They do not want any Central or Provincial Governments. They just want India to contain so many village Governments. The love of the intellectual Indians for the village community is of course infinite if not pathetic (laughter). It is largely due to the fulsome praise bestowed upon it by Metcalfe who described them as little republics having nearly everything that they want within themselves, and almost independent of any foreign relations. The existence of these village communities each one forming a separate little State in itself has according to Metcalfe contributed more than any other cause to the preservation of the people of India, through all the revolutions and changes which they have suffered, and is in a high degree conducive to their happiness and to the enjoyment of a great portion of the freedom and independence. No doubt the village communities have lasted where nothing else lasts. But those who take pride in the village communities do not care to consider what little part they have played in the affairs and the destiny of the country; and why? Their part in the destiny of the country has

been well described by Metcalfe himself who says:

"Dynasty after dynasty tumbles down. Revolution succeeds to revolution. Hindoo, Pathan, Mogul, Maratha, Sikh, English are all masters in turn but the village communities remain the same. In times of trouble they arm and fortify themselves. A hostile army passes through the country. The village communities collect their little cattle within their walls, and let the enemy pass unprovoked."

Such is the part the village communities have played in the history of their country. Knowing this, what pride can one feel in them? That they have survived through all vicissitudes may be a fact. But mere survival has no value. The question is on what plane they have survived. Surely on a low, on a selfish level. I hold that these village republics have been the ruination of India. I am therefore surprised that those who condemn Provincialism and communalism should come forward as champions of the village. What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism? I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.

The Draft Constitution is also criticised because of the safeguards it provides for minorities. In this, the Drafting Committee has no responsibility. It follows the decisions of the Constituent Assembly. Speaking for myself, I have no doubt that the Constituent Assembly has done wisely in providing such safeguards for minorities as it has done. In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate themselves. A solution must be found which will serve a double purpose. It must recognize the existence of the minorities to start with. It must also be such that it will enable majorities and minorities to merge someday into one. The solution proposed by the Constituent Assembly is to be welcomed because it is a solution which serves this twofold purpose. To diehards who have developed a kind of fanaticism against minority protection I would like to say two things. One is that minorities are an explosive force which, if it erupts, can blow up the whole fabric of the State. The history of Europe bears ample and appalling testimony to this fact. The other is that the minorities in India have agreed to place their existence in the hands of the majority. In the history of negotiations for preventing the partition of Ireland, Redmond said to Carson "ask for any safeguard you like for the Protestant minority but let us have a United Ireland." Carson's reply was "Damn your safeguards, we don't want to be ruled by you." No minority in India has taken this stand. They have loyally accepted the rule of the majority which is basically a communal majority and not a political majority. It is for the majority to realize its duty not to discriminate against minorities. Whether the minorities will continue or will vanish must depend upon this habit of the majority. The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish.

The most criticized part of the Draft Constitution is that which relates to Fundamental Rights. It is said that Article 13 which defines fundamental rights is riddled with so many exceptions that the exceptions have eaten up the rights altogether. It is condemned as a kind of deception. In the opinion of the critics fundamental rights are not fundamental rights unless they are also absolute rights. The critics rely on the Constitution of the United States and to the Bill of Rights embodied in the first ten Amendments to that Constitution in support of their contention. It is said that the fundamental rights in the American Bill of Rights are real because they are not subjected to limitations or exceptions.

I am sorry to say that the whole of the criticism about fundamental rights is based upon a misconception. In the first place, the criticism in so far as it seeks to distinguish fundamental rights from non-fundamental rights is not sound. It is incorrect to say that fundamental rights are absolute while non-fundamental rights are not absolute. The real distinction between the two is that non-fundamental rights are created by agreement between parties while fundamental rights are the gift of the law. Because fundamental rights are the gift of the State it does not follow that the State cannot qualify them.

In the second place, it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court. It would be sufficient to quote one such judgment of the Supreme Court in justification of the limitation on the right of free speech contained in Article 13 of the Draft Constitution. In *Gitlow Vs. New York* in which the issue was the constitutionality of a New York "criminal anarchy" law which purported to punish utterances calculated to bring about violent change, the Supreme Court said:

"It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

It is therefore wrong to say that the fundamental rights in America are absolute, while those in the Draft Constitution are not.

It is argued that if any fundamental rights require qualification, it is for the Constitution itself to qualify them as is done in the Constitution of the United States and where it does not do so it should be left to be determined by the Judiciary upon a consideration of all the relevant considerations. All this, I am sorry to say, is a complete misrepresentation if not a misunderstanding of the American Constitution. The American Constitution does nothing of the kind. Except in one matter, namely, the right of assembly, the American Constitution does not itself impose any limitations upon the fundamental rights guaranteed to the American citizens. Nor is it correct to say that the American Constitution leaves it to the judiciary to impose limitations on fundamental rights. The right to impose limitations belongs to the Congress. The real position is different from what is assumed by the critics. In America, the fundamental rights as enacted by the Constitution were no doubt absolute. Congress, however, soon found that it was absolutely essential to qualify these fundamental rights by limitations. When the question arose as to the constitutionality of these limitations before the Supreme Court, it was contended that the Constitution gave no power to the United States Congress to impose such limitation, the Supreme Court invented the doctrine of police power and refuted the advocates of absolute fundamental rights by the argument that every state has inherent in it police power which is not required to be conferred on it expressly by the Constitution. To use the language of the Supreme Court in the case I have already referred to, it said:

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question. . . ."

What the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose limitations upon the fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute.

In the Draft Constitution the Fundamental Rights are followed by what are called "Directive Principles". It is a novel feature in a Constitution framed for Parliamentary Democracy. The only other constitution framed for Parliamentary Democracy which embodies such principles is that of the Irish Free State. These Directive Principles have also come up for criticism. It is said that they are only pious declarations. They have no binding force. This criticism is of course superfluous. The Constitution itself says so in so many words.

If it is said that the Directive Principle have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law.

The Directive Principles are like the Instrument of Instructions which were issued to the Governor-General and to the Governors of the Colonies and to those of India by the British Government under the 1935 Act. Under the Draft Constitution it is proposed to issue such instruments to the President and to the Governors. The texts of these Instruments of Instructions will be found in Schedule IV of the Constitution. What are called Directive Principles is merely another name for Instrument of Instructions. The only difference is that they are instructions to the Legislature and the Executive. Such a thing is to my mind to be welcomed. Wherever there is a grant of power in general terms for peace, order and good government, it is necessary that it should be accompanied by instructions regulating its exercise.

The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles possess will be realized better when the forces of right contrive to capture power.

That it has no binding force is no argument against their inclusion in the Constitution. There may be a difference of opinion as to the exact place they should be given in the Constitution. I agree that it is somewhat odd that provisions which do not carry positive obligations should be placed in the midst of provisions which do carry positive obligations. In my judgment their proper place is in Schedules III A & IV which contain Instrument of Instructions to the President and the Governors. For, as I have said, they are really Instruments of Instructions to the Executive and the Legislatures as to how they should exercise their powers. But that is only a matter of arrangement.

Some critics have said that the Centre is too strong. Others have said that it must be made stronger. The Draft Constitution has struck a balance. However much you may deny powers to the Centre, it is difficult to prevent the Centre from becoming strong. Conditions in modern world are such that centralization of powers is inevitable. One has only to consider the growth of the Federal Government in the U.S.A. which, notwithstanding the very limited powers given to it by the Constitution, has out-grown its former self and has overshadowed and eclipsed the State Governments. This is due to modern conditions. The same conditions are sure to operate on the Government of India and nothing that one can do will help to prevent it from being strong. On the other hand, we must resist the tendency to make it stronger. It cannot chew more than it can digest. Its strength must be commensurate with its weight. It would be a folly to make it so strong that it may fall by its own weight.

The Draft Constitution is criticized for having one sort of constitutional relations between the Centre and the Provinces and another sort of constitutional relations between the Centre and the Indian States. The Indian States are not bound to accept the whole list of subjects included in the Union List but only those which come under Defence, Foreign Affairs and Communications. They are not bound to accept subjects included in the Concurrent List. They are not bound to accept the State List contained in the Draft Constitution. They are free to create their own Constituent Assemblies and to frame their own constitutions. All this, of course, is very unfortunate and, I submit quite indefensible. This disparity may even prove dangerous to the efficiency of the State. So long as the disparity exists, the Centre's authority over all-India matters may lose its efficacy. For, power is no power if it cannot be exercised in all cases and in all places. In a situation such as maybe created by war, such limitations on the exercise of vital powers in some areas may bring the whole life of the State in complete jeopardy. What is worse is that the Indian States under the Draft Constitution are permitted to maintain their own armies. I regard this as a most retrograde and harmful provision which may lead to the break-up of the unity of

India and the overthrow of the Central Government. The Drafting Committee, if I am not misrepresenting its mind, was not at all happy over this matter. They wished very much that there was uniformity between the Provinces and the Indian States in their constitutional relationship with the Centre. Unfortunately, they could do nothing to improve matters. They were bound by the decisions of the Constituent Assembly, and the Constituent Assembly in its turn was bound by the agreement arrived at between the two negotiating Committees.

But we may take courage from what happened in Germany. The German Empire as founded by Bismark in 1870 was a composite State, consisting of 25 units. Of these 25 units, 22 were monarchical States and 3 were republican city States. This distinction, as we all know, disappeared in the course of time and Germany became one land with one people living under one Constitution. The process of the amalgamation of the Indian States is going to be much quicker than it has been in Germany. On the 15th August 1947 we had 600 Indian States in existence. Today by the integration of the Indian States with Indian Provinces or merger among themselves or by the Centre having taken them as Centrally Administered Areas there have remained some 20/30 States as viable States. This is a very rapid process and progress. I appeal to those States that remain to fall in line with the Indian Provinces and to become full units of the Indian Union on the same terms as the Indian Provinces. They will thereby give the Indian Union the strength it needs. They will save themselves the bother of starting their own Constituent Assemblies and drafting their own separate Constitution and they will lose nothing that is of value to them. I feel hopeful that my appeal will not go in vain and that before the Constitution is passed, we will be able to wipe off the differences between the Provinces and the Indian States.

Some critics have taken objection to the description of India in Article 1 of the Draft Constitution as a Union of States. It is said that the correct phraseology should be a Federation of States. It is true that South Africa which is a unitary State is described as a Union. But Canada which is a Federation is also called a Union. Thus the description of India as a Union, though its constitution is Federal, does no violence to usage. But what is important is that the use of the word Union is deliberate. I do not know why the word 'Union' was used in the Canadian Constitution. But I can tell you why the Drafting Committee has used it. The Drafting Committee wanted to make it clear that though India was to be a federation, the Federation was not the result of an agreement by the States to join in a Federation and that the Federation not being the result of an agreement no State has the right to secede from it. The Federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration the country is one integral whole, its people a single people living under a single *imperium* derived from a single source. The Americans had to wage a civil war to establish that the States have no right of secession and that their Federation was indestructible. The Drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation or to dispute.

The provisions relating to amendment of the Constitution have come in for a virulent attack at the hands of the critics of the Draft Constitution. It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the Constitution by a simple majority while the latter has been denied the same right. It is paraded as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple are the provisions of the Draft Constitution in respect of amending the Constitution one has only to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest. The Draft Constitution has eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum. The Powers of amendment are left with the Legislature Central and Provincial. It is only for amendments of specific matters - and they are only few - that the ratification of the State legislatures is required. All other Articles of the

Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution.

What is said to be the absurdity of the amending provisions is founded upon a misconception of the position of the Constituent Assembly and of the future Parliament elected under the Constitution. The Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable constitution it has no axe to grind. In considering the Articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in their way Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it.

I believe I have dealt with all the adverse criticisms that have been levelled against the Draft Constitution as settled by the Drafting Committee. I don't think that I have left out any important comment or criticism that has been made during the last eight months during which the Constitution has been before the public. It is for the Constituent Assembly to decide whether they will accept the constitution as settled by the Drafting Committee or whether they shall alter it before passing it.

But this I would like to say. The Constitution has been discussed in some of the Provincial Assemblies of India. It was discussed in Bombay, C. P., West Bengal, Bihar, Madras and East Punjab. It is true that in some Provincial Assemblies serious objections were taken to the financial provisions of the constitution and in Madras to Article 226. But excepting this, in no Provincial Assembly was any serious objection taken to the Articles of the Constitution. No Constitution is perfect and the Drafting Committee itself is suggesting certain amendments to improve the Draft Constitution. But the debates in the Provincial Assemblies give me courage to say that the Constitution as settled by the Drafting Committee is good enough to make in this country a start with. I feel that it is workable, it is flexible and it is strong enough to hold the country together both in peace time and in war time. Indeed, if I may say so, if things go wrong under the new Constitution. The reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile. Sir, I move.

Mr. President: Maulana Hasrat Mohani has given notice of an amendment. It was given at half-past Eleven this morning. I will allow him to move it, particularly because it will have the effect, if it is lost, of blocking another motion of which I have got notice. Maulana Sahib, will you kindly move your amendment?

Maulana Hasrat Mohani: *[Sir, the amendment, of which I have given notice, is to the effect that the present Constitution Assembly is not competent and there are three reasons why I do not regard it as competent. The first and the most important reason is]*

Shri B. Das (Orissa: General): Mr. President, Sir, will Maulana Sahib please read out the amendment first?

Mr. President: I will read out the amendment. The amendment is this:

"That the Consideration of the Draft Constitution of India be postponed till the election of a fresh and competent Constituent Assembly on the basis of joint electorate and the formation of political rather than communal parties in India."

What is constitutional morality?

PRATAP BHANU MEHTA



THE phrase ‘constitutional morality’ has, of late, begun to be widely used. Yet the phrase rarely crops up in discussions around the Constituent Assembly. Of the three or four scattered uses of the phrase, only one reference has any intellectual significance. This is, of course, Ambedkar’s famous invocation of the phrase in his speech ‘The Draft Constitution’, delivered on 4 November 1948. In the context of defending the decision to include the structure of the administration in the Constitution, he quotes at great length the classicist, George Grote. The quotation is worth reproducing in full:

The diffusion of ‘constitutional morality’, not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves.¹

What did Grote mean by ‘constitutional morality’? Ambedkar quotes Grote again:

By constitutional morality, Grote meant... a paramount reverence for the *forms* of the constitution, enforcing obedience to authority and *acting under and within these forms*, yet combined with the habit of *open speech*, of action subject only to definite legal control, and *unrestrained censure* of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the *forms of constitution will not be less sacred* in the eyes of his opponents than his own.

In Grote’s rendition, ‘constitutional morality’ had a meaning different from two meanings commonly attributed to the phrase. In contemporary usage, constitutional morality has come to refer to the substantive content of a constitution. To

be governed by a constitutional morality is, on this view, to be governed by the substantive moral entailment any constitution carries. For instance, the principle of non-discrimination is often taken to be an element of our modern constitutional morality. In this sense, constitutional morality is the morality *of* a constitution.

There was a second usage that Ambedkar was more familiar with from its 19th century provenance. In this view, constitutional morality refers to the conventions and protocols that govern decision-making where the constitution vests discretionary power or is silent.

But Grote's use of the term was different from these two uses, and more important for Ambedkar's purposes. Ambedkar was making a series of historical claims about constitutionalism. Like Grote, he had little doubt that constitutional morality was rare. It was not a 'natural sentiment'. The purpose of Grote's *History of Greece* had been, in part, to rescue Athenian democracy from the condescension of its elitist critics like Plato and Thucydides, and argue that Athenian democracy had, even if briefly, achieved elements of a genuine constitutional morality.

For Grote, there were only two other plausible instances of a constitutional morality having been remotely realized: the aristocratic combination of liberty and self-restraint experienced in 1688 in England, and American constitutionalism. All other attempts at enshrining a constitutional morality had grievously foundered. For Ambedkar, this note of historical caution simply added to his worries about India. Democracy in India was only, as he put it, 'top dressing on Indian soil, which is essentially undemocratic.'² Our people have 'yet to learn' constitutional morality.

What are the elements of constitutional morality that Ambedkar is so concerned about? His invocation of Grote is meant not as a reference merely to historical rarity, but also as a pointer to the distinctiveness of constitutionalism as a mode of association. In both the 4 November 1948 speech and the final 'Reply to the Debate' on 25 November 1949, Ambedkar – amidst discussions of a whole range of substantive issues such as federalism, rights, decentralization, and parliamentary government – returns to elements of constitutional morality prefigured in his use of Grote. For him, the real anxiety was not 'Constitution' the noun, as much as the adverbial practice it entailed.

For Grote, the central elements of constitutional morality were freedom and self-restraint. Self-restraint was a precondition for maintaining freedom under properly constitutional government. The most political expression of a lack of self-restraint was revolution. Indeed constitutional morality was successful only in so far as it warded off revolution. Ambedkar also takes on the explicitly anti-revolutionary tones of constitutionalism. In a strikingly odd passage, he says that the maintenance of democracy requires that we must 'hold fast to constitutional methods of achieving our social and economic objectives. It must mean that we abandon the bloody methods of revolution. It means we must abandon the method of civil disobedience, non-cooperation and satyagraha.'³

In one stroke, both violent revolution and passive resistance are equated as exemplifying a kind of excess and lack of self-restraint incompatible with constitutional morality. The tacit equivalence he posits between satyagraha and violence has roots in Ambedkar's experience of satyagraha as a form of coercion. It is a feature of constitutional morality that while government is subject to the full force of criticism, this criticism must, in some sense, be 'pacific' criticism.

Ambedkar dismisses an entire repertoire of political action used during the nationalist movement as being incompatible with the demands of constitutional morality, as he understood it. These forms of political action continue to be seen by many as essential to democracy, though it is doubtful that Ambedkar would have admitted them within the ambit of constitutional morality. But there is perhaps a deeper element at play in his ruling out satyagraha as incompatible with the basics of constitutional morality. And this in part springs from his understanding of the distinctiveness of constitutional morality.

For the second element of constitutional morality is the recognition of plurality in its deepest form. What is surprising is that Ambedkar turns out to be as, if not more, committed to a form of non-violence as Gandhi. For him, respecting constitutional forms is the only way in which a genuinely non-violent mode of political action can come into being. For the central challenge in a political society is the management and adjudication of differences – though what Ambedkar had in mind were more differences of opinion than of identity.

The only way of non-violent resolution amidst this fact of difference is securing some degree of unanimity on a constitutional process, a form of adjudication that can mediate difference. Unilaterally declaring oneself to be in possession of the truth, setting oneself up as a judge in one's own cause,

or acting on the dictates of one's conscience might be heroic acts of personal integrity. But they do not address the central problem that a constitutional form is trying to address, namely the existence of a plurality of agents, each with his/her own convictions, opinions and claims.

Constitutional morality requires submitting these to the adjudicative contrivances that are central to any constitution – parliament, courts and so on. In the face of difference, the only point of unanimity that one can seek is over an appropriately designed adjudicative process. This is one reason, for example, why Ambedkar does not think socialism should be part of the constitution, even though equality is of paramount concern to him. What the parties have to agree to, as Ambedkar recognizes over and over, is an allegiance to a constitutional form, not an allegiance to a particular substance.

Therefore, constitutional morality requires that allegiance to the constitution is non-transactional. The essence of constitutional morality is that allegiance to the constitution cannot be premised upon it leading to outcomes that are a mirror image of any agent's beliefs. A constitutional morality requires putting up with the possibility that what eventually emerges from a process is very different from what citizens had envisaged.

The third element of constitutional morality is its suspicion of any claims to singularly and uniquely represent the will of the people. This is most deeply manifest in Ambedkar's hostility to any personification of political authority. In part what rendered satyagraha ominous, from a constitutional point of view, was not just its uncompromising character; it was also the fact that its agents saw themselves as personifying the good of the whole. Ambedkar is hugely suspicious of any form of hero worship – now a rather ironic fear in an age in which Ambedkar himself has been deified. But this suspicion of personification was part of a larger sensibility that formed a crucial element of his constitutional morality: he was suspicious of any claims to embody popular sovereignty. This may be a somewhat surprising claim to attribute to Ambedkar, and with him other architects of the Constitution. But the evidence of this is unmistakable.

Thus Ambedkar is very reluctant to see any branch of government, whether it be the legislature or the courts, or even the Constituent Assembly itself, as being able to claim

authoritatively that it embodies popular sovereignty and can speak in its name. He is often suspicious of the legislature's claim to do so (for instance, in his argument for why the form of administration should not be entrusted to the legislature). His defence of a relatively easy process of amending the constitution rests on a halfway compromise between, on the one hand, a radical Jeffersonianism that would subject the constitution to renegotiation at every generation and, on the other, a rigid constitution that would deeply entrench the present generation's preferences.

In short, any appeal to popular sovereignty has to be tempered by a sense that the future may have at least as valid claims as the present. Indeed, it has to be said of the Constituent Assembly as a whole, that there is very little demagoguery in the name of popular sovereignty. Almost never is a claim advanced or defended on the ground that it somehow represents the will of the people. Often the discourse is more centred on the responsibility to the people. This is not simply because the Constituent Assembly was not elected by universal suffrage; nor was it simply a product of elitism trying to keep popular sovereignty at bay. It was rather because there was a deeper grasp of a political truth: any claims to speak on behalf of popular sovereignty are attempts to usurp its authority. No claim to represent popular sovereignty therefore, should ever be considered fully convincing; the chief purpose of constitutional government is to challenge governmental, or any other claims to represent the people.

One piece of evidence for this is Ambedkar's defence of the parliamentary form of government because it embodies what he calls the principle of 'responsibility'. By this he means that the executive will be subject to 'daily assessment'. While elections will give an opportunity for the people to engage in what he calls 'periodic assessment', the arsenal of parliamentary democracy will facilitate daily assessment in the form of resolutions to no confidence motions, debates to adjournment motions, etc. Whether or not he was right about a parliamentary system of government is debatable, but it is deeply interesting that he sees parliament's function as questioning any claims the government might make to embody popular opinion or sovereignty simply on account of its majority.

The function of parliament is not so much to *represent*

popular sovereignty as it is to debate and constantly question government. But, paradoxically, this is to prevent government from claiming monopoly over popular will. There is not a single place in the debates where the protagonists raise the following questions: What form of democracy will best represent the will of the people? The predominant focus is on multiplying rather than on questioning claims to represent the people. Although someone like Nehru was occasionally impatient with institutions like the court, the subsequent contest between the judiciary and legislature can be seen as yet another exemplification of the Constitution's impulse that there should be no singularly authoritative arbiter of either popular will, or constitutional interpretation.

It is a concern for criticism rather than representation of popular will that ties Ambedkar most closely to Grote's invocation of constitutional morality. After all, the burden of Grote's great history of Athenian democracy was to defuse the criticism of Athens that popular sovereignty was a threat to freedom and individuality. Once popular sovereignty or the authority of the people had been invoked, who else would have any authority to speak? Grote defused this anxiety in a novel way. *Allegiance to forms of constitution was not to be confused with deference to popular sovereignty*. The claim by a government that it represented popular sovereignty did not, by itself, have any authority. Its claims and decisions could still be interrogated, censured and subject to unrestrained criticism. Indeed, what Athenian constitutional practice had achieved was precisely this: the space for unrestrained criticism that was nevertheless 'pacific and bloodless' and not silenced by claiming the authority of the people.

This account of constitutional morality may seem to emphasize the formal elements: self-restraint, respect for plurality, deference to processes, scepticism about authoritative claims to popular sovereignty, and the concern for an open culture of criticism that remains at the core of constitutional forms. These may seem rather commonplace, but Ambedkar had little doubt that the subjectivity that embodied these elements was rare and difficult to achieve. Ambedkar grasped singularly the core of the constitutional revolution: it was an association sustained not by a commonality of ends, or unanimity over substantive objectives (except at perhaps a very high level of generality). It was rather a form of political organization sustained by certain ways of doing things. It was sustained not so much by objectives as by the conditions through which they were realized. *This* was the core of constitutional morality.

A constitution thus was not a relationship between concrete persons, but rather a relationship between abstract *personae* bound together by abstract rules. It is precisely this abstraction, this distance from specific persons and wished for substantive outcomes that allowed a constitutional culture to emerge. Ambedkar was a powerful and trenchant critic of caste. In this context, caste was an impediment to constitutional morality in a very specific way. It is the form of social existence that prevented the emergence of those abstract *personae* so central to constitutional morality. It is the one particularity that constantly undermines the formation of the self, central to constitutional morality. For constitutional morality requires various forms of dissociation: the ability to dissociate a person from their views; the ability to trust someone despite deep disagreement based on the knowledge that there is a shared agreement on processes to adjudicate that disagreement. Caste identity, by its very character, made such dissociation impossible.

For Ambedkar, without fraternity, ‘equality and liberty would be no deeper than coats of paint.’⁴ Nowhere does Ambedkar make the argument that the Constitution is about distribution of power among different castes. Caste embodies a principle of social separation, and is, to use his phrase, ‘anti-national’.⁵ Its very existence precludes an ability to abstract from one’s identity. It ensures that the relationship between groups is perpetually competitive. A constitutional morality, by contrast, requires both these features – abstraction and agreement or cooperation. It requires the presumption that we are equal. However, that equality is possible only when for constitutional purposes our caste identities do not matter. A constitutional morality requires the sense that despite all differences we are part of a common deliberative enterprise.

But there are still several good reasons to unpack the references to constitutional morality. First, we simply need to complicate our understanding of how our framers understood the Constitution. Formalism of a certain kind was central to their imagination of the Constitution as a mode of association. Second, it is a striking fact that while Ambedkar recognized the contradictions between the actual injustice and constitutional aspirations, he did not collapse the Constitution into a doctrine of distributive justice. Implicit in his invocation of the contradiction is a dual-track conception of justice. There is constitutional justice, defined by certain rights and procedures. There is also substantive justice, embodied in

debates over private property and the rival claims of socialism versus capitalism.

In a way the constitutional discourse is caught between two impulses. On the one hand it wants to say that we can rise above these particular disagreements and provide a framework where both parties can contend; the rights of those who build billion dollar homes can contend with the claims of those who demand more radical forms of redistribution. Our Constitution has space for both socialists and capitalists or, to take another example, those who radically disagree over reservation. Constitutional morality is simply the conditions one subscribes to in determining the outcome, whatever that might be.

On the other hand, we might feel that there is something unstable about the political psychology associated with this dissociation of constitutional from distributive justice. Can citizens really be committed to a framework that allows both goals at once: the rights of the billion-dollar home owner and a commitment to redistribution? In almost all his speeches, Ambedkar himself wrestles with this tension: Can a constitution survive without a singular conception of distributive justice underlying it?

In the final analysis, he pitches for constitutional morality, an allegiance to constitutional forms, rather than collapsing the domains of constitutional and distributive justice. He doesn't cheat by giving us the (false) assurance that the forms of constitutional morality will produce deep substantive equality; nor does he cheat by saying that substantive equality simply is the same thing as constitutional morality. No society has yet adequately negotiated the tension between the domain of constitutional morality and the domain of substantive justice. He wanted a revolution, but never became a revolutionary.

The final reason for focusing on constitutional morality is historical. What was the nature of the Constituent Assembly's achievement? It is fair to say that it became a supreme exemplar of what Ambedkar defined as constitutional morality. This is a sensibility that few analysts of the Constitution can recover. They are often fixated on transactional views of the Constitution, measuring it by a yardstick of justice external to its purposes. Perhaps the frame of constitutional morality can direct our attention to a crucial question: What kind of a political sensibility was required to make a constitution possible?

Constitutions not only allocate authority, define the limits of power or enunciate values. They also constitute our sense of

history and shape a sense of self. They often mark a new beginning and define future horizons. Despite the centrality of the Constitution to our social and political life, it has been ill-served by our historical imagination. In a very mundane sense, with a handful of exceptions, there is no serious or deep historiography associated with our Constitution, one that can put it in proper historical and philosophical perspective.

The promulgation of India's Constitution was made possible by a sensibility that few contemporary historians can recover. While the Constitution was an extraordinary work of synthesis, our historical imagination is given to divisiveness. There is no more striking example of this than the way in which members of the Constituent Assembly have been divided up and appropriated, rather than seen in relation to each other. Ambedkar, Patel, Nehru, Prasad and a host of others are now icons in partisan ideological battles, as if to describe Ambedkar as a Dalit, or Patel as proto-BJP, or Nehru as a Congressman exhausts all that needs to be said about them.

The greatness of each one of them consists not just in the distinctive points of view they brought together, but their extraordinary ability to work together despite so many differences. Congress itself facilitated the entry of so many people with an anti-Congress past into key roles in the Assembly. It takes a willful historical amnesia to forget the fact that the men and women of the Assembly worked with an extraordinary consciousness that they needed and completed each other. The historiography of the Constituent Assembly has not regarded it as an exemplar of constitutional morality. It has rather assessed it on a much more ideological yardstick.

The ability to work with difference was augmented by another quality that is rarer still: the ability to acknowledge true value. This may be attributed to the sheer intellectualism of so many of the members. Their collective philosophical depth, historical knowledge, legal and forensic acumen and sheer command over language is enviable. It ensured that the grounds of discussion remained intellectual. Also remarkable was their ability to acknowledge greatness in others. It was this quality that allowed Nehru and Patel, despite deep differences in outlook and temperament, to acknowledge each other. Their statesmanship was to not let their differences produce a debilitating polarization, one that could have wrecked India. They combined loyalty and frankness. Even as partial a biographer of Nehru as S. Gopal conceded that what prevented the rupture was their 'mutual regard and Patel's

stoic decency.’⁶

The third sensibility so many leaders of the Constituent Assembly carried was a creative form of self-doubt. They were all far more self-conscious that they were taking decisions under conditions of great uncertainty. Was it that easy to know what the consequences of a particular position were going to be? They also understood their mutual vulnerabilities. Nehru’s answer to Patel’s worry that Nehru was losing confidence in him was that he was losing confidence in himself. And anyone who has read the tortured last pages of *The Discovery of India* will understand how much Nehru meant it. Much of the cheap condescension of posterity heaped upon these figures would vanish if we could show as much self-awareness and a sense of vulnerability as our founding generation did. Many of them made mistakes of judgment. But one has the confidence that they were more likely to acknowledge their mistakes than most of those who comment upon them. They embodied the central element of a constitutional morality: to treat each other as citizens deserving equal regard, despite serious differences.

The fourth sensibility which we have lost sight of is the importance of form. We are all instinctive Marxists in the sense that we think of institutions, forms and laws as so many contrivances to consolidate power. But this was a generation with a deep sense that forms and institutions are not merely instrumental for an immediate goal; they are the enabling framework that allows a society the possibilities of self-renewal. Forms also allow trust to be built; they give a signal that power, even when it seeks to do good, is not being exercised in a way that is arbitrary. This is exactly why the members took the Assembly and its deliberations seriously.

The fifth feature of their sensibility is a sense of judgment. This is a very intangible political quality. Part of it is the ability to deliberate in a way that takes on board all the relevant considerations, and does not make politics hostage to a single mission. Another is the ability to judge one’s own power and place in relation to others and the public at large. This gives a better sense of when to compromise and when to press a point, when to curb one’s ego and when to project power.

The Constitution was made possible by a constitutional morality that was liberal at its core. Not liberal in the

eviscerated ideological sense, but in the deeper virtues from which it sprang: an ability to combine individuality with mutual regard, intellectualism with a democratic sensibility, conviction with a sense of fallibility, deliberation with decision, ambition with a commitment to institutions, and hope for a future with due regard for the past and present.

Footnotes:

1. For easy access to the two Ambedkar speeches referred to in this text, see the selection, *The Constitution and the Constituent Assembly Debates*. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183.

The quotation from Grote that Ambedkar uses can be found in a reissue of George Grote, *A History of Greece*. Routledge, London, 2000, p. 93.

2. Ambedkar, 'Speech Delivered on 25 November 1949' in *The Constitution and Constituent Assembly Debates*, p. 174.

3. Ibid., p. 174.

4. Ibid., p. 181.

5. Ibid., p. 181.

6. S. Gopal, *Nehru*. Vol II. Harvard University Press, Cambridge, p. 308.



Constitutional Morality

ANDRE BÉTEILLE

The strength or weakness of constitutional morality in contemporary India has to be understood in the light of a cycle of escalating demands from the people and the callous response of successive governments to those demands.

In a parliamentary democracy, the obligations of constitutional morality are expected to be equally binding on the government and the opposition. In India, the same political party treats these obligations very differently when it is in office and when it is out of it. This has contributed greatly to the popular perception of our political system as being amoral.

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Nearly 30 years ago when I gave the Ambedkar lectures at the University of Bombay, I chose as my subject the changing place of the backward classes in Indian society [Béteille 1981]. That seemed a natural choice in view of my own interest in equality and inequality, and in view of B R Ambedkar's towering position as a leader of the backward classes. Many developments in our social and political life have taken place since then, and I have developed my own ideas on the backward classes, on social exclusion and on policies of affirmative action [Béteille 1987, 2003]. I decided not to go over the same ground again in this lecture, but to speak on a different and, for me, a relatively new subject.

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Constitutional morality, apart from its own intrinsic importance, is a subject on which B R Ambedkar spoke with insight and eloquence in the Constituent Assembly. It has been said that Ambedkar has become an icon of the backward classes. This is certainly true. But he is also one of the makers of modern India and the architect of its present constitutional order. His observations on constitutional morality, made at a critical juncture in our social and political life, are of the utmost significance not only for the backward classes or the minorities, but for all Indians.

The Constituent Assembly met in an atmosphere of great expectation. The country had attained freedom after a long period of colonial rule, and the possibilities of constructing a new social order based on liberty, equality and social harmony seemed inexhaustible. From being subjects of an alien power Indians had become citizens in their own land. The Constituent Assembly brought together a galaxy of outstanding persons, remarkable for their intellectual ability, their political acumen and their moral standing. Yet among all these persons Ambedkar stood out as the most clear-sighted in his understanding of the contradictions facing Indian society at that time.

He saw more clearly than the others the pervasive contradictions between the hierarchical social structure inherited from the past and the urge for a democratic legal and political order forcefully expressed in the Assembly. Like the other members of it, he too had expectations about the future, but unlike most of them he had few illusions about the past. He did not believe that India had a democratic tradition in any meaningful sense; if such a tradition ever existed, it was in a distant past, long since lost in the mists of time. The social order of caste was antithetical to the political institutions of democracy, and caste had been the defining feature of Indian society since time immemorial.

No doubt the members of the Constituent Assembly were aware of the inequality, conflict and disorder prevalent in Indian society in their time. But most of them had by then acquired the convenient habit of attributing every Indian misfortune to the misdeeds of colonial rule. That habit continues among large sections of the Indian intelligentsia to this day. If it is not colonialism, then it is neocolonialism that is the villain. It does not speak well of us to shift the burden of responsibility for all our contradictions and dilemmas on to some external agency, acting either directly or indirectly through forces over which we ourselves never seem to acquire control.

No colonial power acts in the interest of the colonised against its own interest. The British who ruled India were not saints; but they were not villains either. They introduced innovations in law and governance, some of which were mutually beneficial and continue to be of value even after the end of colonial rule. Our present Constitution owes a great deal to these innovations. The Drafting Committee was attacked more than once for what it borrowed from the Government of India Act of 1935. The Constitution that came to be adopted has a much closer affinity with that Act than with the Manusmriti or any other Dharmashastra. Ambedkar recognised this, and he did not hesitate to speak his mind on it.

In his closing speech to the Constituent Assembly, he drew pointed attention to the burden of responsibility that the cessation of colonial rule was going to place on the leaders of independent India. "By independence, we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves" (ibid: xi, 980). The British left more than 60 years ago, but there is no lack of intellectual ammunition among patriotic Indians, of the left as well as the right, to fire at them and other western nations when things go wrong with us.

Absence of a Democratic Tradition

The Constitution was designed to serve the needs of a modern society. It looked to the future rather than the past. Its

architects did not hesitate to draw upon such elements from the Government of India Act of 1935 as could be adapted to the needs of a free and independent nation. It also drew inspiration from other modern constitutions such as the American, the Australian and the Irish. Ambedkar did not wish to take India back to its past but to prepare it to take its place in the forefront of the comity of free and independent nations of the modern world.

Rightly or wrongly, he felt the lack of a living democratic tradition in India. Indian society was a society of castes and communities. It was not a society of citizens based on the equal consideration of individuals without regard for caste, creed or gender. To transform a society of castes and communities into one of citizens would be no easy task. The Constitution could at best provide a legal framework, a necessary but not sufficient condition for such a transformation. It could not by itself conjure into existence the attitudes, dispositions and sentiments without which the transformation could hardly be effective.

To be effective, constitutional laws have to rest on a substratum of constitutional morality. Could the presence of such a morality be taken for granted in our country? Ambedkar was deeply concerned over the question. "Constitutional morality", he said, "is not a natural sentiment. It has to be cultivated. We must realise that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic" [Constituent Assembly Debates 1989: vii, 38]. It is clear that he was speaking not just of Indians as they were under British rule, but as they had been over a very long span of time.

In the absence of constitutional morality, the operation of a constitution, no matter how carefully written, tends to become arbitrary, erratic and capricious. It is not possible in a democratic order to insulate completely the domain of law from that of politics. A constitution such as ours is expected to provide guidance on what should be regulated by the impersonal rule of law and what may be settled by the competition for power among parties, among factions and among political leaders. It is here that the significance of constitutional morality lies. Without some

infusion of constitutional morality among legislators, judges, lawyers, ministers, civil servants, writers and public intellectuals, the Constitution becomes a plaything of power brokers.

Ours is a very lengthy and elaborate Constitution. This was pointed out in the Constituent Assembly itself. Ambedkar's justification was that the absence of a democratic tradition required the provisions in the Constitution to be written out in much greater detail than in the more mature democracies where there was greater consensus on how democratic institutions should function (*ibid*: vii, 38). Not only were the American and French constitutions very brief compared with ours, but Britain, which had evolved the most successful system of parliamentary democracy, did not have a written constitution. The stronger the presence of constitutional morality, the less need there is to put everything down in black and white.

The Drafting Committee decided not to leave too much to the discretion of future legislatures whose political sagacity could not be taken for granted. "It follows that it is only where people are saturated with constitutional morality...that one can take the risk of omitting from the Constitution details of administration and leaving it for the legislature to prescribe them" (*ibid*). The venality of legislatures increasingly brought to light by the media confirms Ambedkar's worst misgivings.

Despite the best efforts of the Drafting Committee to make the Constitution fool-proof, it has not been possible to insulate it fully from the vagaries of legislative pressures. No democratic constitution can do without provisions for its own amendment. These provisions were crafted with great care so as to make amendments difficult and not easy. Nevertheless, the amendment provisions have been used liberally. Already in Nehru's time, Rajaji, the most sagacious among the nationalist leaders, was warning against the cavalier use of the amendment provisions. The Constitution has been amended close to a hundred times since its adoption in 1950.

When it comes to amending the Constitution, what seems to count for more than considerations of constitutional morality, is the calculation of numbers. If it has not been amended more frequently, it is in

part because getting the numbers together has become increasingly difficult in an era of coalition politics. It is, of course, easier to amend legislative enactments, including Acts of Parliament, than to amend the Constitution. In a state legislature, where there is a clear though unstable majority, getting an amendment through is a relatively easy matter.

It might appear that dissension, discord and clamour in Parliament would make enactments and amendments difficult. This is true to some extent, but bargains can always be made that benefit members across parties in order to ensure the relatively smooth passage of a bill. What passes through Parliament and what is held back have begun to appear increasingly unpredictable to concerned citizens who watch with dismay parliamentary proceedings on television. There is growing suspicion that legislation is sometimes enacted not in the public interest but in order to accommodate a particular faction, a particular community or, in the extreme case, even a particular political leader. The leader will, of course, have cleared his ground in advance by softening up power brokers of various political persuasions.

Resilience of Democracy in India

India survives as a democracy despite many predictions to the contrary at the time of independence and in the years that immediately followed [Guha 2007: xi-xvii]. Ambedkar himself had expressed anxiety about the prospects of democracy in his closing speech to the Constituent Assembly. He pointed to the fragility of democratic institutions in the country and the adverse social environment in which they would have to operate. Looking to the future, he asked, "What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again?" [Constituent Assembly Debates 1989: xi, 978].

India's record since independence has confounded the doubters in many respects. Democracy has shown great resilience in the country, and its capacity for survival is no longer seriously questioned by many. Elections are held periodically, and they are reasonably free and fair. The legitimacy of opposition is acknowledged,

and opposition parties lead a vigorous existence. The legislatures conduct their affairs openly, despite the disorder and horse-trading. The courts enjoy a fair measure of public trust despite mounting allegations of venality against judges. Even the administrative executive has to act with circumspection when it violates the rule of law, which it does frequently if not regularly. There is freedom of movement and assembly and, most important of all, freedom of expression: nobody will deny that in India people are free to speak their minds or that they express themselves openly and vigorously.

Whereas 60 years ago, there was anxiety about the survival of democracy, today its continued existence has come to be taken for granted. With India's successful economic performance during the last couple of decades, the country is now held up as a success story for democracy by leaders of many countries, including the United States. It is even said that if democracy does not work in India, it does not have much of a future in the world.

Today, the question is no longer whether democracy will survive in India, but what kind of democracy it will be. Here I would like to introduce the distinction I have made earlier between "constitutional democracy" and "populist democracy" [Béteille 1999: 2591, 2000a: 194-96], and to argue that democracy has survived in India not by adhering strictly to the ideal of a constitutional democracy but by moving away from it towards a more populist form.

It is, of course, well known that democracy has many forms. Moreover, in our times the magic of the word "democracy" is such that many dictatorships would like to present themselves as democracies of the purest kind. The 20th century made us familiar with the idea of "peoples' democracy" which is very different from the kind of democracy to which the Indian Constitution sought to give shape. The idea behind a "peoples' democracy", so far as I have been able to understand it, is to put the interests of the people, viewed as a more or less homogeneous body, above considerations of constitutional procedure, or, as some would put it, above "mere legality". The proponents of populism do not in principle deny the value of rules and procedures, only they are prepared to

override them when that can be justified by an appeal to the interests of the people.

It would be a mistake to underestimate the strong appeal of populist democracy, particularly in countries that were late-comers to development and without the strong foundations for the rule of law required for the success of a constitutional democracy. Lenin and Mao were among the great political innovators of modern times, and no one can deny the admiration, not to say veneration, they inspired among ordinary people in their respective countries and outside. Yet they, and particularly Mao, had little regard for the procedural forms essential to constitutional democracy which their followers have dismissed as "bourgeois democracy". In the Soviet Union and the People's Republic of China, "constitutional legality" had often to make way for "revolutionary legality".

A strong argument against constitutional democracy has been that it gives the advantage to the bourgeoisie or the middle class over other social classes and hence it makes equality, which many view as coterminous with democracy itself, an early casualty. This argument has been made repeatedly by left intellectuals, and it cannot be easily dismissed. In India it is becoming increasingly common for the elected representatives of the people to claim supremacy for Parliament over the other organs of the state, on the ground that it is closer to the people by virtue of its class composition than the other two organs. But no constitutional democracy can function without a significant place given in it to a professionally trained and qualified judiciary and civil service, and these are both components of the middle class rather than the working class or the peasantry. It is pointless to castigate judges and civil servants for their middle class affiliation when their very profession makes them members of that class. But one can hardly conclude from this that civil servants, judges or even legislators can act only in the interest of the class to which they belong and never in the general interest.

Writing about Germany on the eve of Hitler's ascendancy, Alan Bullock (1993: 428) observed: "While democratic ideas had failed to take firm root in Germany, the concept of a *Rechtsstaat*, a constitutional

state, guaranteeing the rule of law and judicial independence, was accepted in principle in Prussia and other German states from the end of the eighteenth century and had been consolidated in practice during the nineteenth". With us, the tendency since independence has been the opposite. Here the democratic urge for equality appears to have gripped the political imagination far more firmly than the idea of the constitutional state.

As I have noted, constitutionalism, because of its alleged class bias has always been viewed with a degree of mistrust in the tradition of Leninist politics, and that tradition continues to have an appeal among important sections of the Indian intelligentsia. Ambedkar, who was well aware of this, did not shrink from expressing his disdain for it either within or outside the Constituent Assembly.

In his closing speech he said, "The Communist Party wants a Constitution based upon the principle of the Dictatorship of the Proletariat. They condemn the constitution because it is based on parliamentary democracy" [Constituent Assembly Debates 1989: xi, 975]. Today, of course the communist parties are somewhat different from what they were in Lenin's or even Mao's time. They have learnt to operate through the parliamentary system and to coexist with other parties, not only when they are in opposition but also when they are in government. In a country like India it is impossible for the communists, even when they are in authority, to practise "revolutionary legality" without let or hindrance. But their fascination for its ideals makes their attachment to constitutional legality at best half-hearted. Their earlier hostility towards constitutionalism has been replaced by a more ambivalent disposition, due in part to the divisions and subdivisions within the communist movement itself.

Constitutional democracy acts through a prescribed division of functions between legislature, executive and judiciary. Populist democracy regards such division of functions as cumbersome and arbitrary impediments that act overtly or covertly against the will of the people. Populism sets great store by achieving political objectives swiftly and directly through mass mobilisation in the form of rallies, demonstrations

and other spectacular displays of mass support. Constitutionalism, on the other hand, seeks to achieve its objectives methodically through the established institutions of governance.

The Leninist and Maoist traditions of mass mobilisation are not the only inspirations for populism in Indian politics. There is also the Gandhian tradition of civil disobedience used with great effect during the nationalist movement. No two leaders could be more different than Lenin and Gandhi. Lenin considered violence as a legitimate instrument of politics whereas for Gandhi non-violence was the supreme virtue in both principle and practice. However, one has to make a distinction between Gandhi and those who have acted in his name after his passing, which happened before the Constitution was adopted. No one has shown – or can be expected to show – the restraint and moral discipline of which he was the great exemplar.

Ambedkar appealed against the politics of mobilisation in the altered conditions created by the Constitution. He conceded that such politics may have been necessary to bring about a change of regime but that it could no longer be justified under the new regime. What does it mean to adopt a system of constitutional democracy? “It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us” (ibid: 978).

It is no small achievement of Indian democracy that, despite the economic crises and social turbulence the country has undergone, the Constitution has remained in place for close to six decades. It has been amended many times, and there have been those who have said that it has been defaced and defiled [Palkhivala 1974]. Yet it remains as an important signpost for the judiciary, and also the legislature.

How deeply has the Constitution influenced the outlook of ordinary citizens in India? Ambedkar had hoped that our

people would learn the lessons of constitutional morality in course of time. How much have they in fact learnt? Not very long ago, a prominent member of the union cabinet had said, “I know that most members of Parliament see the constitution for the first time when they take an oath on it” [Guha 2007: 660]. This does not provide much comfort to those who cling to the belief that constitutional values will soon come to prevail in India.

Dynasty and Democracy

The infirmity of constitutional values is brought into relief when the political system undergoes a crisis. It has undergone many crises, large and small, since independence, and has come out of them more or less successfully. But there can be little doubt that the long-term effect of these crises has been a weakening rather than a strengthening of constitutional values, at least as these were conceived of at the time of independence.

The Emergency of 1975-77 and the events that preceded and followed it clearly revealed the connection between anarchy and the abuse of power as two forces that feed on the weakness of constitutional morality [Béteille 2000b]. It did not last very long, but it left deep scars on India's democratic political system. Those who supported the Emergency pointed to the turmoil and disorder, bordering on anarchy, let loose by various popular movements in Gujarat, Bihar and elsewhere [Dhar 2000: 223-68, 371-406]. Those who opposed it – and they prevailed in the end – pointed to the naked abuse of power and the flagrant violation of the spirit, and sometimes even the letter, of the Constitution during it. The Emergency was bad in itself; to add to its own inherent evil, it created an opposition which legitimised a populist disregard of established institutions that has spread its roots in the Indian soil.

In the summer of 1975, the prime minister in the face of mounting social and political turmoil, lost her nerve and declared a state of Emergency. The Emergency was meant to quell the turmoil through strong executive action and to secure the compliance of the legislature and the judiciary to the executive. It made the arbitrary use of power and its increasing misuse inevitable.

P N Dhar, who was then the prime minister's principal secretary, has documented the way in which the centre of decision-making shifted from the Prime Minister's Office (PMO) to the prime minister's house (PMH) (ibid: 300-51).

Power began to be exercised from the PMH with little regard for constitutional proprieties, not to speak of constitutional morality. It would be surprising if it were otherwise. From his strategic position in the PMH, her younger son, Sanjay Gandhi, who enjoyed no constitutional authority of any kind, took decisions that caused bewilderment and fear among ministers, legislators and judges. Many of them complied with a show of servility far in excess of what was required, revealing to the world at large the infirmity of constitutional values at the top of the political hierarchy.

Those who remained loyal to Indira Gandhi point out that the Emergency did not last very long, and that it did not hit people equally hard in all parts of the country. They also point out that it was Indira Gandhi herself who lifted it and called for elections at a time when the political pressure for such a move was not very strong. Her manner throughout the period showed that she was not at ease with herself. Nevertheless, it revealed deep fault lines in the political order. The ascendance of Sanjay Gandhi showed how fragile constitutional proprieties are in the face of personal loyalties and family attachments. Indira Gandhi's conduct made it clear that in the end she could trust neither her cabinet nor her party, nor even her secretariat, but only her son and his cronies.

It will be difficult to exaggerate the significance of family, kinship and community in Indian society. Loyalty to family and community are not dictated merely by personal interest; they arise out of moral compulsions that are deeply rooted in Indian social values. It will be a mistake to deny the moral basis of the obligations of family, kinship and community. But the moral basis of these obligations is different from the basis of constitutional morality. Problems arise when the loyalties of kinship and community are allowed to distort and override the demands of constitutional government.

The salience of the dynastic principle and its pernicious hold over Indian politics

has been noted by many [Malhotra 2003]. The subject has led to endless moralising but not much systematic analysis. Here the Congress Party and the pre-eminent position in it of the Nehru-Gandhi family has received the most attention nationally and internationally [Guha 2007: 575-602]. From the record, it will be difficult to deny Nehru's own commitment to constitutional norms and proprieties. But the story changes after him. The Emergency appears as a turning point because it brought out Indira Gandhi's failure to trust anyone outside her own family. When one son died, she brought in the other, and thereafter her family came to occupy an unassailable position within the Congress Party.

Critics of the dynastic principle have found it natural to blame the Nehru-Gandhi family for refusing to yield its pre-eminent position in Indian politics. But this would be to take a short-sighted and one-sided view of the matter. It is a truism that in a democracy the followers get the leaders they deserve. How has it come about that India's premier political party, the party of the nationalist movement, from the highest office-bearers to the lowest rank-and-file member, has become so abjectly dependent for its survival and success on one single family? We will fail to understand the nature of the problem if we refuse to recognise the fact that millions of Indians continue to believe that the natural succession to high office lies within the family. It is neither individual nor institutional charisma, but the charisma of the family that prevails.

The Nehru-Gandhi family may be the most striking example of the dynastic principle but it is by no means the only example of it in Indian politics. Inder Malhotra, who has been a keen observer of the Indian political scene since Nehru's time, has given many examples of what he calls "mini" and "midi" dynasties in the states. He too has related the operation of the principle to the strength of family ties and family obligations among the people of the subcontinent [Malhotra, *op cit*: 25-26]. No political institution, whether a legislature or a party, can be sustained without trust in its leadership. It seems that millions of Indians are more willing to repose their trust on a member of the

leader's family than on a person of proven experience and ability but unrelated to him. This raises the larger question of how much trust they have in the institutions of democracy as compared with their trust in family, kinship and community.

The Emergency

I would now like to return to the point made earlier that anarchy and the abuse of power are but two sides of the same coin. Each is in its own way antithetical to constitutional morality.

Without in any way extenuating Indira Gandhi's toleration, not to say endorsement, of the abuse of power from the PMH during the Emergency, it is necessary to turn now to the other side of the coin. The Emergency did not come out of the blue in the summer of 1975. It came under conditions of unprecedented disorder and turmoil in the country. Perhaps Indira Gandhi called for the Emergency because she lost her nerve, or perhaps there was an inherently authoritarian strain in her personality waiting for an occasion to find expression. Whatever may have been the flaws in Indira Gandhi's personality, we cannot afford to ignore the social and political conditions that were the immediate antecedents of the Emergency. As P N Dhar (2000: 373) looking back on the events wrote, "Indeed the Emergency as well as the JP movement further weakened the institutions essential for genuine democracy. Both these events reduced respect for the rule of law: the Emergency by an authoritarian disregard for legal norms and the JP movement by rationalising and glamourising the defiance of all authority."

Opposition to Indira Gandhi's government was building up in many parts of the country from 1972 onwards although the government enjoyed a comfortable majority in parliament. The movement against it was already gathering strength when Jayaprakash Narayan, known throughout the country as JP, took over its leadership. JP was a leader of outstanding political and moral stature, who was known for his integrity and selflessness and who had enjoyed the esteem of an earlier generation of nationalists, including Jawaharlal Nehru. His re-entry into the political arena galvanised the opposition against Indira Gandhi.

JP had had an interesting political formation and career. He had been influenced successively by Marxism and Gandhism, and these two influences combined in him to create a revolutionary movement of a very distinctive kind. When he took over the movement against Indira Gandhi, he was hoping to carry the masses forward not simply to a change in the government within the existing regime but to a change of the regime itself.

As the rallies, dharnas and bandhs were gathering momentum, JP gave the call for 'sampurna kranti'. That became the rallying cry for the movement against Indira Gandhi's government. Sampurna kranti or total revolution (literally total struggle) was JP's term for a comprehensive social revolution that would purge Indian society of all its accumulated ills, and recreate it on a higher moral plane. Where total revolution is the issue, one cannot remain confined to constitutional methods and shrink from the use of extra-constitutional ones. Ambedkar might argue the case for constitutional morality, but there are others who feel that a revolutionary morality stands superior to it.

Though influenced by Marxism in his early years, JP had moved beyond the class struggle. In his effort to achieve total revolution, he sought to mobilise youth power or 'yuva shakti' as the driving force. Youth power had been used earlier in western countries such as France and the US in moderate doses, and with devastating effect in China during the Great Proletarian Cultural Revolution of 1966 onwards. It did not destroy constitutional practices and conventions in India, but it certainly fostered an attitude of disdain towards them.

Impressed by the success of the students working through the Nav Nirman Samiti in Gujarat, JP decided to carry the movement into his home state of Bihar. The students there were agitating on various issues such as shortages, inflation, unemployment, fees and scholarships when they sought JP's intervention to bring the state government to its knees and get the state legislature dissolved. Conditions had become unsettled and there was tension in the air. It was hoped that the legislators could be persuaded to resign in large numbers. When persuasion failed, JP gave a call for the gherao of the

assembly and the residences of the MLAs. He himself led a procession to the secretariat where he staged a dharna.

The JP movement of 1974-75 dismayed some, but it elated others. It brought in a new sense of expectation. The expectation, shared by many at the time, and particularly the youth, was that democracy in India was about to acquire a new lease of life and, even, that a new kind of democracy was about to be born. But this new democracy would not be a constitutional but a populist one. I would go so far as to say that the spirit of populism, never too far from the surface, came out into the open and invested the political system with new energy.

The capacity to mobilise large masses of people for rallies and demonstrations encouraged political leaders to disregard the rule of law. The opposition parties were not alone in organising rallies. If JP could attract huge crowds in Patna, Indira Gandhi could do the same in Delhi. On her side, the organisation of rallies was put in the care of her younger son who had taken over the leadership of the Youth Congress. Sanjay Gandhi took little care to conceal his disdain for constitutional proprieties, relying on muscle power instead.

Competitive populism reached its high-water mark in the summer of 1975. No political party, whether of the left, the right or the centre, can disown responsibility for its rise. All political parties, including the smallest, know that in India it does not take much to organise a rally of a 1,00,000 persons. Rallies have a social as well as a political side, and sometimes they have the atmosphere of a carnival. Nor are rallies organised only by political parties. They may be organised by religious bodies, by farmers and by caste formations of various kinds. The recent organisation of rallies by the gujjar community in Rajasthan is a case in point. Its leaders had no doubt that they were only using the most effective means available to exercise their democratic rights.

Democracy rests on a delicate balance between the rule of law and the rule of numbers. Populism invokes the principle of numbers, and constitutionalism the principle of legality. No constitutional order can continue for long if it has no support among the people, and a populist

movement in course of time develops its own rules and conventions. At the same time, the way in which the balance is attained between the attachment to numbers and the attachment to legality differs from one democratic system to another and, within the same system, from one phase in its life to the next. In India there has been a clear shift since 1977 in favour of numerical support. This can be seen from the decisions taken in Parliament, where the calculation of numbers acquires priority over legislative consistency.

Looking back on the events that came immediately before the Emergency, one cannot help remembering the wise words of Ambedkar's closing speech in the Constituent Assembly. The attainment of independence did not lead to the rejection of the "Grammar of Anarchy" but, in course of time, to its more extensive use. Neither the ruling party nor the parties in opposition paid much heed to the restraints required by constitutional morality or the principle of legality. The Congress felt that it had the numbers in Parliament, and the parties behind the JP movement felt that they could paralyse the government by bringing their supporters on to the streets. The ruling party in its turn brought out the thugs of the Youth Congress. When that did not work, the government declared a state of emergency.

No one can deny that in declaring the Emergency Indira Gandhi strayed from the path of constitutional rectitude. It will be generally agreed that among all the prime ministers of independent India, Indira Gandhi was the most repressive and the most ruthless. But she was not animated by the kind of destructive ideological passion that caused so much violence in the Soviet Union under Lenin and Stalin and in China under Mao. The nationalist tradition in Indian politics was very different from the Bolshevik and the communist traditions, and it is doubtful that she could ever fully put behind her the examples of Gandhi and Nehru. So in the end she did call off the Emergency and try to meet her constitutional obligations by a return to electoral politics.

State and the Citizen

Ambedkar was well aware that the successful operation of democracy would require not only the creation of a new

political order but also the creation of a corresponding social order. Would the prevalent social order in India be able to rise to the challenges presented by the new Constitution? He had misgivings about this, and developments in government and politics since his time have shown that his misgivings were not without foundation.

The operation of a modern democracy rests upon three interlinked components. These are (a) state, (b) citizenship, and (c) mediating institutions [Béteille 2000a: 172-97]. Each is important in its own way, but it is only in their mutual relations that they provide the basis for a democratic social and political order. Human history has witnessed many different kinds of state: the tribal state, the feudal state, the absolutist state, the imperial state, and so on. Our concern here is with the constitutional state governed by the impersonal rule of law, what the Germans call the *Reschtsstaat*. A constitutional state, by its very nature, sets clearly defined limits to its own authority.

What is not always recognised is that the constitutional state can operate only through an apparatus which is a system of graded authority. Populism of the kind represented by the call for *sampurna kranti* is on the other hand emancipationist and antinomian in its outlook. It regards all systems of graded authority as bastions against the immediate and pressing needs of the people. The gradation of authority and the abuse of power are, of course, two different things, but in a populist perspective they are easily confused, and the functionaries of the state become the natural targets of the hostility against privilege.

Citizenship represents the pole opposite to the state in a constitutional democracy. The concept of citizenship is a modern one. During the colonial period, Indians were subjects and not citizens, and traditional Indian society was a society of castes and communities rather than of citizens. The modern concept of citizenship is an individualising as well as a universalising one. The rights of citizenship are the rights of individuals, without consideration of race, caste, creed or gender, and they are the same for all Indian citizens.

Contrary to the hopes and aspirations of many in the Constituent Assembly, Indian society has not ceased to be a society of castes and communities. Democratic politics has in many ways strengthened collective identities at the expense of the identity of the individual as citizen. Here, what Ambedkar had said about majorities and minorities applies in a general way to all forms of collective identity. He had said, "It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate themselves" [Constituent Assembly Debates 1989: vii, 39]. The vicious cycle of discrimination and self-perpetuation continues unabated.

The two poles of the state and the citizen are linked together by organisations, associations, institutions and interpersonal networks of many different kinds. It is these mediating structures that hold society together and give to each society its distinctive character. Among the diverse arrangements, I would like to single out those that I describe as institutions. An institution is a social arrangement with a distinct identity, a distinct internal structure and culture, and a life span extending beyond the lives of its individual members. Mediating institutions themselves are of many different kinds, of which only some, and not all, are of central significance to the functioning of a constitutional democracy.

The mediating institutions that I have in mind are open and secular institutions, homologous in their character to the constitutional state and citizenship. They are very different from the institutions of kinship, caste and religion that formed the basis of state and society in traditional India. They are open in the sense that membership in them is independent of considerations of race, caste and gender, and they are secular in the sense that their internal arrangements are not regulated by religious rules or religious authorities.

The antinomian currents by which populist democracy is propelled find themselves at odds not only with the institutions of the state but, more generally, with public institutions and their structures of authority. Obvious examples of public institutions that have had to withstand the currents of populist movements in India

are its universities and colleges. Their organisation and functioning have been affected for long stretches at a time in many parts of the country, and in some cases they have been seriously, and perhaps irreversibly, impaired.

University and college students are ideally positioned for mobilisation in support of populist causes. They are impressionable and idealistic, and they can be absent from their allotted work for long periods without risk of having to suffer any immediate consequences. If the movement is sufficiently large in its scope, it is likely to be joined by their teachers who provide it with additional momentum. Ordinarily, the forces of law and order treat such movements more indulgently than movements by workers or peasants. But if there is violence from one side, it may be matched by violence from the other.

Civil Disobedience

Constitutional morality would stand impoverished if it failed to accommodate the principle of civil disobedience. Under the leadership of Mahatma Gandhi, civil disobedience became the cornerstone of the nationalist movement, and it would be unreasonable to expect it to fade away from the Indian imagination. Whenever large popular movements are organised against the government, the idea of civil disobedience tends to be invoked. This happened at the time of the JP movement, and it was not the last time that it happened. The historical association with Gandhi gives a special appeal to any movement that presents itself as an act of civil disobedience.

Ambedkar had no doubt been right to point out that the context of popular protest had changed with the passage from colonial rule to self-rule. When they were ruled by an alien power, the people of India had limited means by which to influence their rulers. With independence, the rulers and the ruled became in some sense one and the same people. The impediments to being heard by the rulers and even calling them to account were no longer as unassailable as in the past. Where ordinary measures for the articulation of discontent had become accessible, extraordinary ones would no longer be required.

While independence was no doubt a watershed in the life of the nation, things have not stood still since it was attained. I have referred to those days as days of high expectations. Not surprisingly, many of those expectations could not be met. The people of India have gradually learnt that their own elected leaders can be as deaf to their pleas as the ones who came from outside. Sometimes they have shown themselves to be even more venal and self-serving than the British who ruled India. Or perhaps, because Indians had developed such high expectations of their own elected leaders, they lost patience with them more quickly and became more peremptory with their demands on them.

The strength or weakness of constitutional morality in contemporary India has to be understood in the light of a cycle of escalating demands from the people and the callous response of successive governments to those demands. In a parliamentary democracy, the obligations of constitutional morality are expected to be equally binding on the government and the opposition. In India, the same political party treats these obligations very differently when it is in office and when it is out of it. This has contributed greatly to the popular perception of our political system as being amoral.

In a political system in which the principal parties, whether in office or in opposition, have shown themselves to be venal and self-serving, it would be folly to close the door on civil disobedience. But civil disobedience, as no one understood better than Gandhi, is not a panacea, and it does not come without a price. Gandhi was unyielding in his view that civil disobedience had to be non-violent, and he was prepared to eat humble pie, and call it off when it took a violent turn.

Reflective advocates of it have pointed out that civil disobedience cannot be a matter only of disobedience, it must also be civil. For Gandhi, civil disobedience, as a form of non-violent resistance, was essentially a moral force. It required the cultivation of distinctive moral qualities to pass muster as a form of non-violent resistance. In particular, it required among its practitioners a habit of obedience to the laws, including inconvenient ones [Gandhi 1961]. Civil disobedience, in this view,

cannot be aimed against inconvenient laws, but only against unjust ones. It is another matter that leaders of public protest in India have never found it difficult to present inconvenient laws as unjust ones.

The virtue of civility is an important component of constitutional morality. It calls for tolerance, restraint and mutual accommodation in public life. Civility is a moderating influence which acts against the extremes of ideological politics. "It restrains the exercise of power by the powerful and restrains obstruction and violence by those who do not have power but who wish to have it" [Shils 1997: 4]. Civility is an important condition for the smooth operation of public institutions such as universities. Universities in the modern world have learnt to live with protests, agitations and demonstrations. But when these acquire an adversarial or an antinomian form as a matter of habit, as they did on the eve of the Emergency and in its aftermath, something goes out of the life of the university as a centre of science and scholarship. It is against this kind of possibility that Ambedkar had issued his warning about the grammar of anarchy.

Civil disobedience may take a persuasive or a coercive form [Haksar 1986]. Gandhi certainly did not intend it to be used as an instrument of coercion. He agonised all the time that the movements he led might degenerate into anarchy and violence; he was no less mindful than Ambedkar of the destructive potential of the grammar of anarchy. Yet, it will be hard to deny that agitations, demonstrations and rallies undertaken in the name of civil disobedience have increasingly become coercive not only in their consequences but even in their intentions. What Ambedkar had hoped would die down after independence has in fact become intensified since 1977.

There are responsible citizens who would make a case for mass rallies and demonstrations even though they are fully aware that they can become coercive. They say that they are forced to take the risk of anarchy and disorder where they know that the authorities, whether in the government or in public institutions such as universities, pay no heed to reasonable

persuasion but respond only to threats. It is a fact that in recent decades public authorities have tended to respond more readily to threats than to persuasion even to the point of violating their own norms. As I have said, citizens alone cannot be expected to adhere to the norms of constitutional morality if the state persistently disregards those norms.

The JP movement of 1974-75 was the culmination of a period of uncertainty and disorder. The social and political conditions for its emergence had been growing in various parts of the country for some time. Nevertheless, it can be seen as a watershed in India's social and political life. When the Emergency was withdrawn, the political system did not return to the status quo ante. The new government that assumed office after Indira Gandhi's defeat adopted an ambitious social agenda. That agenda was dictated by the promises its leaders had made in the period that led to the Emergency and during the elections that brought them to power after it. It was too ambitious for it or for any government with its resources to fulfil.

The new government ran into difficulty almost immediately after it assumed office. It was a coalition of too many parties whose diverse constituents exerted contradictory pressures on it. A clash of personalities soon appeared on the surface, and the politics of principles was overtaken by the politics of patronage. Looking back on that period, someone who had worked closely with Indira Gandhi observed: "Indeed the Emergency as well as the JP movement further weakened the institutions essential for genuine democracy. Both these events reduced respect for the rule of law: the Emergency by an authoritarian disregard for legal norms and the JP movement by rationalising and glamourising the defiance of all authority" [Dhar 2000: 373].

As I have pointed out, the JP movement, like populist movements in general, was emancipationist and antinomian. These two closely related aims and tendencies did not die down with the end of the movement. They have become lodged in our political culture as an integral element of it. They cannot be wished out of existence, no matter how much they might

conflict with the principles of legality on which the Constitution is based.

Populism has not only become a part of our democracy, but from time to time it puts forward its demands in a very imperious form. When that happens, many naturally feel that the Constitution itself is under threat. At the same time, no serious move has ever been made to discard the Constitution, or to design a different one to replace it.

Even during the darkest days of the Emergency, Indira Gandhi retained a residual attachment to the Constitution, and JP's defiance of it in the cause of total revolution was at best half-hearted. Our politicians may devise ingenious ways of getting round the Constitution and violating its rules from time to time, but they do not like to see the open defiance of it by others. In that sense the Constitution has come to acquire a significant symbolic value among Indians. But the currents of populism run deep in the country's political life, and they too have their own moral compulsions. It would appear therefore that the people of India are destined to oscillate endlessly between the two poles of constitutionalism and populism without ever discarding the one or the other.

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Nation and Village

Images of Rural India in Gandhi, Nehru and Ambedkar

Scholars of modern Indian history have often pointed to the continuities in the colonial constructs of Indian society and the nationalist imaginations of India. The village was an important category where such continuity could be easily observed. However, a closer reading of some of the leading ideologues of nationalist movements also points to significant variations in their views on the substantive realities characterising rural India. Focusing primarily on writings of Gandhi, Nehru and Ambedkar, the paper attempts to show that though the village was a central category in the nationalist imaginations and there was virtual agreement that it represented the core of the traditional social order of India, the attitudes of the three leaders towards village society varied considerably. The paper tries to show that while for Gandhi the village was a site of authenticity, for Nehru it was a site of backwardness and for Ambedkar the village was the site of oppression.

SURINDER S JODHKA

For me, India begins and ends in the villages (Gandhi 1979b:45, in a letter to Nehru written on August 23, 1944.).

...the old Indian social structure which has so powerfully influenced our people...was based on three concepts: the autonomous village community; caste; and the joint family system [Nehru 1946:244].

The Hindu village is the working plant of the Hindu social order. One can see there the Hindu social order in operation in full swing [Ambedkar, in Moon 1989:19].

The village has for long been viewed as a convenient entry point for understanding 'traditional' Indian society. It has been seen as a signifier of the authentic native life, a social and cultural unit uncorrupted by outside influence. For the professional sociologists and social anthropologists, village represented India in microcosm, 'an invaluable observation centre' where one could see and study the 'real' India, its social organisation and cultural life. By studying a village, the pioneering Indian sociologist M N Srinivas claimed, one could generalise about the 'social processes and problems to be found occurring in great parts of India' [Srinivas 1955:99].

Apart from its methodological value, it being a representative unit of the Indian

society, village has also been an important ideological category in the modern Indian imagination. The village 'was not merely a place where people lived; it had a design in which were reflected the basic values of Indian civilisation' [Beteille 1980:108]. Though elsewhere also life in the countryside has been contrasted with urban/city life with the former believed to be having a purer form of the native/national culture [see, for example Williams 1973], it was perhaps only in the case of India that the village came to acquire the status of a primary unit representing social formation of the entire civilisation.

Villages have indeed existed in the subcontinent for a long time. However, it was during the British colonial rule and through the writings of the colonial administrators that India was constructed as a land of 'village republics'. Inden has rightly pointed out that though most other civilisations of the Orient too were primarily agrarian economies, it was only the Indian society that was essentialised into a land of villages [Inden 1990:30]. The British colonial rulers obviously had their own political reasons for representing India as they did and imputing qualities such as autonomy, stagnation and continuity to the village life in the subcontinent. It helped them justify their rule over the subcontinent to their people back home in Britain.

Since the villages had been autonomous republics, the rulers of India were anyway always outsiders [Cohn 1989; Inden 1990]!

Notwithstanding its historical origins, the idea of village has persisted in the Indian imagination and has found diverse uses. The historians of modern India have repeatedly pointed to the continuities between the orientalist/colonial categories of knowledge and the nationalist thinking [Chakravarty 1989; Breckenridge and van der Veer 1993; Uberoi 1993; Dirks 2001; Upadhyaya 2002]. Like many other categories, the idea of village too was accepted as given, characterising the Indian realities. Leaders of the nationalist movement, for example, invoked it in many different contexts. Despite disagreements and differences in their ideological orientations or political agenda, the 'village' remained a core category through which most of them conceptualised or thought of the 'traditional' Indian social life. However, unlike the colonial administrators, the nationalist leadership did not see village simply as the constituting 'basic unit' of Indian civilisation. For most of them, village represented 'the real' India, the nation that needed to be recovered, liberated and transformed. Even when they celebrated village life, they did not lose sight of the actual state of affairs marked by scarcity and ignorance.

Apart from having been educated about the Indian society through the colonial writings on the subcontinent, the middle class nationalist leaders were also confronted with the village during their struggle for freedom, trying to mobilise the 'common masses' of the subcontinent against colonial rule. It was during this interaction of the received frameworks acquired through the colonial education and concrete realities of life that their ideas about rural India were formed. Nehru was not the only one who set out on a mission to 'discover' and 'rediscover' India; others active in the independence movement also observed and wrote a great deal about the social, economic and cultural life of the Indian people.

However, given the regional and cultural diversities of the subcontinent, and social locations of the individual ideologues of the nationalist movement, the Indian social life was viewed differently by different leaders. The nationalist freedom movement was also a moment when the futures of India were being visualised. Their notions of India's pasts or its traditional social order invariably also reflected their future visions or the alternative agenda they had for free India. Village remained a central category in their scheme of things. Even in the constituent assembly, which was appointed to frame a constitution for free India, the question of whether the village or the individual should be the primary unit of Indian polity was debated with much passion.

Apart from influencing state policies for development and change in independent India, these constructs have also become part of, what could loosely be called as 'the Indian common sense'. For example, in some of the recent critiques of modern living, the idea of the traditional 'Indian village community' is invoked as an alternative to the alienating urban/city life. Many of the nationalist writings on the village have also become inspirations for some of the 'new' social movements that have emerged in India during the recent decades. Perhaps the most important in this category have been the writings of Gandhi. His critiques of modern science and his idea of an alternative living on the pattern of the traditional Indian village communities have all along been popular with a good number of environmentalists, in and outside India, and with many of the action groups, the non-governmental voluntary organisations (the NGOs).

A good deal of social scientific literature is available on the colonial constructions of the Indian village and the validities of their assumptions regarding the social and economic structures of the rural communities of the subcontinent [see for example Cohn 1987; Breman 1987; Breman et al 1997; Habib 1995]. Similarly, there have also been some studies on the manner in which village was used as a primary methodological category for understanding the Indian society by sociologists and social anthropologists during the 1950s and 1960s [Srinivas 1994; Breman et al 1997; Jodhka 1998]. Though one can also find a good deal of references on the ways in which the nationalist leadership approached the Indian village or the 'agrarian question', there have not been many comparative studies of the internal disagreements and differences within the nationalist leadership on the subject.

While much significance is attached to Gandhi's ideas of the Indian village, other strands of the nationalist movement tend to generally get ignored or subsumed within the Gandhian notion of village. Ambedkar's ideas on village, for example, were very different from those of Gandhi. Similarly, though Nehru agreed with Gandhi on many issues relating to rural India, his writings on the Indian peasantry, on the whole, present a very different approach to the subject. Even Gandhi's ideas on the Indian village are not as simple as they are often made out to be.

Focusing primarily on writings of these three leading activists and ideologues of the freedom movement, Gandhi, Nehru and Ambedkar, I hope to show in this paper that though village was a central category in the nationalist imaginations and there was a virtual agreement on the fact that it represented the core of the traditional social order of India, the attitudes of these leaders towards the village society varied considerably. They disagreed, both on the merits of traditional Indian village life, and also on the place it should have in the future India of their visions.

The Indian nationalist movement has mostly been seen as a subject that ought to concern the historians, and to a lesser extent the political scientists. Anthropologists and sociologists have only rarely ventured into it as something of their interest.¹ Since the village has been one of the most popular categories among sociologists and social anthropologists in India, a comparative study of the representations of rural life in the nationalist

imagination could perhaps also help us build a sociology of the Indian nationalist movement.

Further, available literature on the history of Indian sociology and social anthropology tends to attach a good deal of importance to the influence that colonial writings and the western theoretical traditions have had on the way these disciplines are practised in India today. However, it would be safe to underline that the nationalist movement for independence, and later, the programmes and policies of planned development introduced by the post-independence Indian state also influenced the practice of social science research and teaching in India. Sociology and social anthropology were no exception. Some of the founding fathers of Indian sociology and social anthropology, for example, were deeply involved with the nationalist movement.²

II

Colonial Context and the Nationalist Imaginations of India

Introduction of modern technology and the hitherto unknown structures of governance by the British colonial rulers during their rule over much of the south Asian subcontinent were extremely important factors in transforming the social, cultural and political life of the region. While these structural changes introduced by the colonial rulers were indeed extremely significant factors in integrating India into the world capitalist market, it was perhaps the nationalist movement for independence that became the defining moment of the 'modern' Indian society, a source of its new identity.

The nationalist movement for independence was much more than just a political struggle waged against foreign rulers. Not only did the national identity of modern India consolidate itself during these mobilisations, many of the regional and community identities were also shaped and sharpened during this period. Along with the rise of these identities, the newly emerged middle classes also spent a great deal of energy in generating new knowledges about their cultures and regions.

While most of the reformers were pre-occupied with localised communities, trying to find ways and means of negotiating between the traditions they inherited from their pasts and the ensuing modernity that

they received from the colonial educational system, the politically oriented amongst them had a much broader agenda. The challenge for them was to work out a case where India could be represented as a single cultural and political entity, on the basis of which they could imagine nationhood for India. Finding denominators and categories through which such a case could be made was obviously a challenging project. To the advantage of these ideologues of the nationalist and regional movements, the colonial rulers had already done a considerable amount of groundwork on this. Apart from writing extensively on the religious traditions of the communities in the subcontinent, and constructing India as an ancient civilisation, the colonial administrators had also gathered a good deal of information on the social structure and economic life of the Indian people. In the process of gathering this data they also deployed several categories that enabled them to make sense of the Indian society and situate it in the available evolutionary schema that were being worked out in the western academy around the same time [Cohn 1987, 1996; Inden 1990]. The 'caste system' and the 'village communities' were perhaps the two most important categories that the colonial ethnography deployed rather extensively to make sense of Indian society and to distinguish it from the west. Over the years, these two categories came to be accepted, almost universally, as the concrete social unit in terms of which the social structure of traditional India was to be talked about.

Much of this colonial knowledge of India would have obviously been found to be very useful by the middle class leaders of the Indian nationalist movement while trying to visualise India as a unified national entity. Many of these ideas about India would have initially come to them as plain or obvious 'facts' or 'truths' about their society. However, their involvement with mobilisations of the Indian masses and in this process their first-hand exposure to the realities of India, would have also been equally important factors in shaping their understandings of the Indian society. It would perhaps be safe to say that it was the combination of the received knowledges about India from available literature produced mostly by western writers, and the nature of their involvement with the people of the subcontinent that eventually shaped their own views of the Indian village.

III

Nation and the Village

Gandhi, Nehru and Ambedkar, the three most important leaders and ideologues of the freedom movement, all, in a sense, belonged to the city. Not only did they spend most of their lives in cities, much of their political action was also performed in urban centers. Of the three, Ambedkar was the only one who had a first hand experience of village life during his childhood. Though in terms of the class status of their families, the three came from completely different strata, they all belonged to mobile families, in the sense that even their parents had been 'mobile'. Occupationally also, they were engaged in 'secular' occupations.³ They all went to foreign lands for education or work and came back to India.

Thus, notwithstanding their attitudes or commitments to rural life, their writings on the subject were mostly reflective, and not experiential in nature. Yet their views on village life were not mere observations of what was happening on ground. They reflect their visions of India's pasts and futures. In fact none of them looked at village as a concrete reality with regional variations and historical specificities having internal dynamics of change. Irrespective of their attitude and the overall ideological orientation towards it, village for all of them was a civilisational entity. More importantly, they seemed to have assumed that the social structure of the village was similar everywhere in the subcontinent.

IV

Gandhi and the Village

Gandhi has been rightly known as the ideologue of the village. He celebrated the Indian village life as no one else did. He also wrote and spoke a great deal on various aspects of village life. Though, as mentioned above, he was not born in a village and did not even have 'an ancestral village' to identify with, much of his social and political philosophy revolved around the idea of the village.

Gandhi became preoccupied with 'the Indian village' right from his days in South Africa and remained so until the end of his life. However, his ideas on village, as also his politics, evolved with time and underwent some important changes along with his political career.

There are at least three different stages or ways in which he used the idea of the Indian village. In the first, he invoked it to establish equivalence of the Indian civilisation with the west. In the second, he counterposed the village to the city and presented the village-life as a critique of, and an alternative to, the modern western culture and civilisation. In the third phase of his engagement, he was concerned with the actual existing villages of India and emphasised on the ways and means of reforming them. Though he continued to see village as an alternative way of living, he also found many faults with the existing lifestyle of the rural people in the Indian countryside.

It was perhaps in 1894 that Gandhi for the first time invoked the idea of the Indian village as a political symbol. This was in a petition to the White government, an 'open letter' written to the Members of Legislative Assembly in Durban to demand voting rights for the people of Indian origin living in South Africa at par with the ruling English people. Gandhi argued in his petition:

In spite of the Premier's opinion to the contrary...I venture to point out that both the English and the Indians spring from a common stock, called the "Indo-Aryan" [Gandhi 1958:149].

The idea of village was used to further corroborate his argument and establish equivalence of the Indians with the ruling English community. In another 'petition to the Natal Assembly' in the same year he made reference to Sir Henry Maine's works on the village communities who,

...most clearly pointed out that the Indian races have been familiar with representative institutions almost from the time immemorial....The word panchayat is a household word throughout the length and breadth of India, and it means...a council of five elected by the class of the people whom the five belong, for the purpose of managing and controlling the social affairs of the particular caste [ibid:94-95].

Apart from his assertion about the traditional Indian village and its core social institution, the caste, as being compatible with the modern western ideas of democracy for their having been similarly organised on the principles of representative governance, the text also points to his sources of understanding the Indian village. It was not just to strengthen his argument being presented to the White rulers that Gandhi invoked the writings of a western commentator on India. The influence of

Sir Henry Maine and that of other western/colonial writings on the Indian village is visible all through his career.

Perhaps another important point that emerges out of these letters written to the White rulers of South Africa is his attitude towards the native African tribes. Gandhi, for example, makes no reference to the exclusion of 'blacks' from such rights. The Indians deserved the right to vote not because democracy required universal franchise but because of the nature and evolution of traditions in different communities. By invoking the idea of 'village republics' he obviously wished to argue that the Indians who have had a system of representation built into the caste panchayats were as advanced a community as the Whites were.

His more substantive and better-known writings on the village began when he came back to India and got involved with the nationalist freedom struggle. His move from South Africa to India changed both his location and his political concerns. Though in some crucial sense his notion of the Indian village remained the same, the uses he put it to in the second phase were however very different. After he returned back to India and engaged himself with the movement for independence, his politics underwent a complete change. The question of securing voting rights for the Indian people and establishing equivalence with the Whites was no longer his agenda. He was to assume the leadership of movement for independence from the British, which required driving the White rulers out of India.

In order to wage such a struggle, he needed a different set of ideas or an ideology that would de-legitimise the British rule over India. Such an ideology required construction of a difference that would establish the sovereign identity of India and restore its cultural confidence. The idea of village came in very handy in this endeavour.

He did this by counterposing the Indian village with the modern cities that were set up by the British in India. While the village-life represented the essence of India, the development of modern cities in India symbolised western domination and colonial rule. Village was the site of authenticity, the 'real/pure India', a place that, at least in its design, had not yet been corrupted by the western influence. The city was its opposite, totally western.

Though political freedom could be achieved by overthrowing the colonial rule, the real swaraj or self-rule, as Gandhi

imagined, could be achieved only by restoring the civilisational strength of India through revival of its village communities. 'The uplift of India depended solely on the uplift of the villages'. The growth of big cities, particularly those established by the British, was no sign of progress. They were signs of degeneration, 'the real plague spots of India' [Parel 1997:xlil]. In a letter addressed to Lord Amphill in 1909, he wrote:

To me the rise of cities like Calcutta and Bombay is a matter for sorrow rather than congratulation. India has lost in having broken up a part of her village system [Gandhi 1963:509].

He elaborated it further in *Young India* in 1921:

Our cities are not India. India lives in her seven and a half lakhs of villages, and the cities live upon the villages. They do not bring their wealth from other countries. The city people are brokers and commission agents for the big houses of Europe, America and Japan. The cities have cooperated with the latter in the bleeding process that has gone on for the past two hundred years [Gandhi 1966:288-89].

He reiterated his views on cities in exactly the same tenure some 25 years later, in 1946 at a workers' meeting, where he said:

When the British first established themselves firmly in India their idea was to build cities where all rich people would gravitate and help them in exploiting the countryside. These cities were made partially beautiful; service of all kinds were made available to their inhabitants while the millions of villagers were left rotting in hopeless ignorance and misery [Gandhi 1982:232].

Perhaps more important for the argument being developed here is the manner in which he counterposed the city with the village.

The village civilisation and the city civilisation are totally different things. One depends on machinery and industrialisation, the other rests on handicrafts. We have given preference to the latter. After all, this industrialisation and large-scale production are only of comparatively recent growth. We do not know how far it has contributed to our development and happiness, but we know this much that it has brought in its wake the recent world wars...

Our country was never so unhappy and miserable as it is at present. In the cities people may be getting big profits and good wages, but all that has become possible by sucking the blood of villagers [Gandhi 1977a:369].

Not only were the big cities symbols of alien rule and exploitation, they also had a morally corrupting influence on the village people. In another piece in *Young India* published in 1927, he wrote:

Some of the villages are deserted for six or eight months during the year. Villagers go to Bombay, work under unhealthy and often immoral conditions, then return to their villages during the rainy season bringing with them corruption, drunkenness and disease [Gandhi 1969:151].

Apart from the critique of western civilisation and colonial rule that he attempted through counterposing the village and the city, his politics was perhaps also a pointer to the shift that he brought about in the nationalist movement, from an elite-bourgeois activity directed at mobilising the newly emerging middle classes to a popular movement with growing participation of the peasantry from India's hinterlands. As Embree rightly points out, he, for the first time, gave the masses of India 'a sense of involvement in the nation's destiny' [Embree 1989:165]. As is well known, until Gandhi arrived on the scene, the nationalist movement had largely been an urban phenomenon. 'For the early nationalist generations, independence meant being free to emulate colonial city life' [Khilnani 1998:125]. Gandhi turned it upside down. The new nation was not to be found in the cities but in the villages where a large majority of the Indians lived.

What exactly was his notion of the Indian village and how did he visualise the actually existing rural India?

Village, for Gandhi was not merely a place where people lived in small settlements working on land. For him, it reflected the essence of Indian civilisation. The Indian village had a design, a way life, which had the potential of becoming an alternative to the city based and technology driven capitalist west. Empirically such villages did exist in the past and one might still find them in the interiors of India. Drawing support for his argument from Sir Henry Maine's writings, he argued in *Harijan* in 1939:

...Indian society was at one time unknowingly constituted on a non-violent basis. The home life, i.e., the village, was undisturbed by the periodical visitations from barbarous hordes. Maine has shown that India's villages were a congeries of republics [Gandhi 1978:4].

Similarly, responding to a question from a group of foreign visitors he advised them

that if they wanted to 'see the heart of India', they should 'ignore big cities'. The big cities here were but poor editions of their big cities. They ought "to go to the villages, and those too not close to cities or to railway line, but unspoilt by them". He suggested them to:

Go 30 miles from the railway line, and you will see that the people show a kind of culture which you miss in the west...you will find culture which is unmistakable but far different from that of the west. Then you will take away something that may be worth taking [Gandhi 1976:116-17].

He was very unhappy with the nature of changes that the Indian village life had gone through during the British colonial rule. In his views, these changes had impaired the villagers, made them less creative and more dependent on the outside world:

...the villager of today is not even half so intelligent or resourceful as the villager of fifty years ago. For, whereas the former is reduced to a state of miserable dependence and idleness, the latter used his mind and body for all he needed and produced them at home [Gandhi 1974:409].

Gandhi emphasised that freedom from colonial rule could become meaningful only if it was able to grant this autonomy back to the village:

The cry of 'back to the village', some critics say, is putting back the hands of the clock of progress. But is it so? Is it going back to the village, or rendering back to it what belongs to it? I am not asking the city-dwellers to go to and live in the villages. But I am asking them to render unto the villagers what is due to them [ibid:409-10].

While he asked for revival of the spirit of traditional village life, he also found many flaws with the actually existing villages, and not all these ills were a consequence of the western/urban influence. Two things that he commented quite frequently upon were the practice of untouchability and a general lack of cleanliness. Compared to the cities, where people were "educated and broad-minded to a little extent at least", untouchability was a more serious problem in the villages, which were "the centres of orthodoxy".

While he wanted the village society to abandon the practice of untouchability, he also wanted untouchables to change themselves. He, for example, wanted them to 'observe common cleanliness', "refrain from eating meat of dead animals and from drink, send their children to schools, remove untouchability among themselves

and generally carry on such reforms from within as is possible" [Gandhi 1972:406].

The lack of hygiene and sanitation were the other things that all villagers needed to pay attention to. He was often disappointed by the disregard for cleanliness that he observed in most of the villages he visited in different parts of the subcontinent. He also wrote quite extensively on this subject. In one of these typical comments, he wrote:

If we approach any village, the first thing we encounter is the dunghill and this is usually placed on raised ground. On entering the village, we find little difference between the approach and what is within the village. Here too there is dirt on the roads...If a traveller who is unfamiliar with these parts comes across this state of affairs, he will not be able to differentiate between the dunghill and the residential parts. As a matter of fact, there is not much of a difference between the two [Gandhi 1970:445].

In another piece, he praised the Europeans in Africa as being worth imitating in this regard:

There is no gainsaying the fact that our villager betrays a woeful ignorance of even the rudiments of village sanitation. One could deplore the race prejudice amongst the South African Europeans, but their attempts to keep their towns healthy and sanitary were heroic and worthy of imitation [Gandhi 1969:76].

Though he repeatedly talks about reviving the village, particularly its 'defunct handicrafts' to save the peasant from ills of industrialisation and inevitability of moving to the cities [Gandhi 1977b:228], a closer look at his writings tends to suggest that his vision of village was essentially 'a futuristic one', representing an alternative society that was different from the modern-industrial west. His villages would have had similarities with what Sir Henry Maine had written in his book about the past village society, but not everything that is believed to have existed in the past needed to be there in such a 'model village'. His writings reflect more of a reformist rather than a revivalist urge. His village had to be constructed through a concerted effort, often by outsiders – the village workers. He wanted to initiate a movement of village 're-construction' which would translate his ideal into practice.

Such a village would provide an alternative not only to the industrial west, but also to socialism. He was averse to socialism because it required the use of

"violence as a measure to achieve it". Villageism, on the contrary, could achieve social welfare without using such measures [Gandhi 1980:192].

And perhaps most importantly, a village-centric society was the most pragmatic choice for a country like India because its 'crores of people would never be able to live in peace with each other in towns and palaces'. In a letter addressed to Nehru in October 1945, he had argued that a society based on the principle of non-violence was possible to achieve only "in the simplicity of village life". However, by simplicity he did not mean that his 'dream-village' would completely exclude modern science. A certain amount of science and modern means of communication could be integrated into such a village [as in Parel 1977:150-51].

His idea of an alternative India is perhaps best spelt-out in one of his pieces published in *Harijan* in 1942 where he wrote:

My idea of village swaraj is that it is completely republic, independent of its neighbours for its own vital wants, and yet interdependent for many others in which dependence is a necessity. Thus every villager's first concern will be to grow its own food crops and cotton for its cloth...Then if there is more land available, it will grow useful money crops, thus excluding ganja, tobacco, opium and the like...Education will be compulsory upto the final basic course. As far as possible every activity will be conducted on the cooperative basis. There will be no castes such as we have today with their graded untouchability...The government of the village will be conducted by a panchayat of five persons annually elected by the adult villagers, male and female, possessing minimum prescribed qualifications.

...To model such a village may be the work of a lifetime. Any lover of true democracy and village life can take up a village, treat it as his world and sole work, and he will find good results...[Gandhi 1979a:308-09].

What would happen to the already existing cities? He did not ask for their destruction. The cities, he appealed, should also participate in 'the village movement'. Those living in cities and those working for the movement will "have to develop village mentality and learn the art of living after the manner of villagers". Though they need not "starve like the villagers", they must change their old style of life radically. "While the standard of the villagers must be raised, the city standard has to undergo considerable revision" [Gandhi 1975:319-20].

Gandhi was certainly not the only one in the freedom movement who saw village and its social structure as something that needed to be sustained and strengthened. He influenced a large number of others and his ideas on the village as an alternative to the modern/industrial west continue to inspire many even today. However, there were also some in the freedom movement who disagreed with him, particularly on the subject of the place of village in future India. Even some of those who worked very closely with him did not completely share his enthusiasm for the village. Nehru was one of them.

V

Nehru and the Village

After Gandhi, Nehru was perhaps the most important and influential leader of the Indian nationalist movement. Apart from being an important ideologue of the Indian National Congress, he also became the first prime minister of independent India. He was the catalyst of the approach India chose for its development after it achieved independence from colonial rule.

Though Nehru worked under the leadership of Gandhi and gave him a good deal of respect, his ideas on the nature of India's past and his vision of its future were not the same as those of Gandhi. These differences were also reflected in his views on the Indian village.

Unlike Gandhi, Nehru perhaps never identified himself with the village. He was also quite self-conscious about his urban and upper middle class upbringing. He admits in his *Autobiography* (first published in 1936) that until 1920 or so his 'political outlook' was that of his class, 'entirely bourgeois' [Nehru 1980:49]. It was only when he started his political career and came in direct contact with the common rural masses of India that he began to think differently. It was "a new picture of India... naked, starving, crushed, and utterly miserable" [ibid:52].

As was the case with Gandhi, Nehru's writings on village too have several different strands and could be classified into two or three categories. First of all, as in Gandhi, the idea of the Indian village communities is also quite central to his notion of traditional India. However, his approach to the 'realities' of rural classes as he saw them during his encounters with 'the actually existing rural India' was very different from Gandhi's. As mentioned

above, Nehru's importance also lies in the fact that he was the first prime minister of independent India and played a crucial role in shaping its policies and programmes for development. His comments on how rural India ought to be developed also reflect his notion of Indian village life.

His ideas on the traditional Indian society are perhaps best spelt-out in his well-known book, *Discovery of India* (first published in 1946). Though Nehru's approach to the understanding of Indian past was historical in nature, he apparently looked at the 'old' social structure of Indian society from an evolutionary perspective. This is particularly so in his discussion on village and caste. "The autonomous village community, caste and the joint family", that he identified as the three basic concepts of the "old Indian social structure", had something in common with traditional societies in general as the organising principles were the same everywhere:

In all these three it is the group that counts; the individual has a secondary place. There is nothing very unique about all this separately, and it is easy to find something equivalent to any of these three in other countries, especially in medieval times [Nehru 1946:244].

He further elaborated his 'functionalist' notion of an integrated traditional village society in the following text:

...The functions of each group or caste were related to functions of the other castes, and the idea was that if each group functioned successfully within its own framework, then society as a whole worked harmoniously. Over and above this, a strong and fairly successful attempt was made to create a common national bond which would hold all these groups together – the sense of a common culture, common traditions, common heroes and saints, and common land to the four corners of which people went on pilgrimage. This national bond was of course very different from present-day nationalism; it was weak politically, but socially and culturally it was strong [ibid:248].

Though Nehru did not celebrate the old 'village republics' of India as Gandhi did, the sources of their understanding of India's past seem to be common. Nehru too seems to have read the writings of colonial administrators and western scholars on the 'traditional Indian society' quite uncritically. This is best reflected in his comments on the 'old' agrarian economy. He writes:

Originally the agrarian system was based on a cooperative or collective village. Individuals and families had certain rights

as well as certain obligations, both of which were determined and protected by customary law [ibid:246].

He produced, almost verbatim, what Metcalfe and later Marx had said about the Indian village communities.⁴

Foreign conquests brought war and destruction, revolts and their ruthless suppression, and new ruling classes relying chiefly on armed force... The self-governing community, however, continued. Its break up began only under the British rule [ibid:246].

Similarly, in relation to village panchayats and political spirit of the traditional Indian village, he reinforced the prevailing notion about the village society as having been economically stagnant and community-oriented but democratically organised. The traditional social structure emphasised 'the duties of the individual and the group' and not 'their rights'.

The aim was social security: stability and continuance of the group; that is of society. Progress was not the aim, and progress therefore had to suffer. Within each group, whether it was the village community, the particular caste, or the large joint family, there was a communal life shared together, a sense of equality, and democratic methods [ibid:252].

However, he also emphasised that such a system of village republics had long degenerated into a society that was marked by various ills. There was a clear shift in Nehru's discussion on village life as he moved closer to contemporary times. He appears to have become more and more critical of the past structures, particularly of caste based hierarchies, which, in his scheme of things, should have no place in modern societies. Unlike Gandhi, Nehru saw no virtues in reviving the traditional social order. His modernist critique of the village and caste system is best presented in the following passage from *Discovery of India*:

...the ultimate weakness and failing of the caste system and the Indian social structure were that they degraded a mass of human beings and gave them no opportunities to get out of that condition – educationally, culturally, or economically... In the context of society today, the caste system and much that goes with it are wholly incompatible, reactionary, restrictive, and barriers to progress. There can be no equality in status and opportunity within its framework, nor can there be political democracy, and much less, economic democracy [Nehru 1946:254].

This shift becomes even more evident as we move to his comments/writings on Indian rural society of the colonial period. Not only did he become more critical of the traditional social order but he also began to increasingly talk about the existing social and economic structures of the village society in terms of 'social classes'. The peasants/kisans and landlords were the two classes that he frequently made reference to.

His writings clearly reflect a modernist attitude to the village class structure. He, for example referred to the landlords as a "physically and intellectually degenerate" class, which had 'outlived their day' [Nehru 1980:52]. On the other end, the peasants or "the kisans, in the villages" constituted the real masses of India [Gopal 1973:82].

The shift perhaps was also a consequence of his growing first hand encounters with the rural masses after the 1920s. He described quite lucidly the prevailing structure of agrarian relations while describing one such encounter with peasants in the following passage:

I listened to their innumerable tales of sorrow, their crushing and ever-growing burden of rent, illegal extraction, ejections from land and mud hut, beatings; surrounded on all sides by cultures who preyed on them – zamindar's agents, moneylenders, police; toiling all day to find that what they produced was not theirs and their reward was kicks and curses and a hungry stomach [Nehru 1980:52].

Nehru also developed his critique of the colonial rule through such accounts of the existing state of affairs in rural India. What he describes in the passage quoted above was not merely what he observed in a particular village. He saw landlordism as being organically linked to British rule. It was the British rulers who had in the first place implanted the landlord system in India "with disastrous results" [Nehru 1946:246] and they (the landlords) could survive in India "only so long as an external power like the British government props them up" [ibid:58].

He also blamed the British for disturbing the old economic equilibrium of the village. They implanted exploitative agrarian relations and destroyed the local industry, taking away non-agricultural sources of employment that were available to the local people. Elaborating his argument on India's deindustrialisation, he writes:

The Indian farmer who used to supplement his income by plying the *charkha* in his spare time was also suddenly deprived of

his extra income. Weavers, carders and dyers became unemployed. They were forced to fall back on the land for livelihood, by cultivating the land or by working as labourers, but there was already enough pressure on the land. The result was that the majority of the people were compelled to act as farm labourers, and somehow keep alive...And this poverty began from the time the British came here because they started their own trade while destroying ours [Gopal 1972:365].

Though he attributed the peasants' misery to their exploitation by landlords and the colonial rulers, he shared with western writers the popular opinion on the political character of Indian peasantry as being politically docile and fatalistic.

Indian peasant has an amazing capacity to bear famine, flood, disease, and continuous grinding poverty – and when he could endure it no longer; he would quietly and almost uncomplainingly lie down in his thousands or millions and die. That was his way of escape [Nehru 1980:306].

How did he visualise the future of Indian rural society? How far did he agree and/or disagree with Gandhi?

Though Nehru and Gandhi seem to agree on the nature of traditional Indian village society, Nehru's critique of village life, as also of the British rule, are very different from those of Gandhi. Perhaps the most critical difference between Gandhi and Nehru was their attitude towards the question of class and the class structure of the Indian agrarian society. While Gandhi almost always spoke about the village in a populist language, in terms of village as a unit with an underlying assumption about the unity of its interests, Nehru recognised and, in his later writings, foregrounded the internal differences in the rural society, the contradictions between landlords and the peasantry. Similarly, while Gandhi advocated the need for reviving the 'essential spirit' of village life, Nehru wanted to transform the village social and economic structure by using modern technology and changing agrarian relations. The landlords and landlordism, in his scheme of things, would have no place in independent India.

The kisans, on the other hand, were the real 'masses of India'. The colonial rulers were not the only enemies that the kisans had. The local landlords were as much a problem. Their difficulties 'in the main related to such questions as rent, ejection and possession of lands'. 'Swaraj would be of little avail if it did not solve' the problems of the kisans [Gopal 1973:82].

The policies of land reforms introduced after independence were a direct translation of such thinking. If agriculture was to develop, it was necessary that we put 'an end to zamindari and jagirdari systems. We must...eliminate all intermediaries and fix a limit for the size of holdings [Nehru 1954:94].

Similarly, Nehru also had very different views on the place that industry would have in the Indian economy. While Gandhi thought that villages could largely be self-sufficient and rejected the modern cities for their being a sign of colonial domination, Nehru saw industrialisation as being inevitable. Industrial development and urbanisation would help in reducing the burden on land and therefore would be good even for those who would be left in the village. Addressing the Associated Chamber of Commerce in Calcutta in December 1947, he had said:

...while we want to help the peasants and agriculturalists, industry also is of dominant importance in India. Agriculture can produce wealth but it will produce more wealth (if) more people are drawn from agriculture and put in industry. In fact, in order to improve agriculture we must improve industry (sic). The two are allied [Gopal 1986:566].

He also differed with Gandhi on the use of modern technology in agriculture. Instead of celebrating the traditionalist streak among the cultivators, he criticised them for 'using outdated methods', and for being 'content with whatever little they produced'. In contrast to Gandhi, he thought that modern technology was good for farmers. They could produce twice or thrice as much as they did if they learnt new techniques of farming [Gopal 1997:86-90].

However, he did share with Gandhi the need for a revival of handicrafts and cottage industry. The modern industry could not absorb all the surplus population, whatever may be its pace of development. "Hundreds of millions will remain who would have to be employed chiefly in agriculture". While development of the industry was necessary if we were to remain free, "the development of heavy industry would not by itself solve the problem of the millions in this country". Thus India needed to revive "the village and cottage industry in a big way" [Nehru 1954:84].

Need of reviving the cottage and small-scale industry was not the only point where Nehru spoke the language of

Gandhi. He also shared with Gandhi his broad philosophical approach to the village (also see above his notion of the traditional Indian village in the beginning of this section). Though, economically the village of future India could not be self-sufficient, socially and politically his ideas were pretty much the same as those of Gandhi. The following text is useful evidence of this:

The village, which used to be an organic and vital unit, became progressively a derelict area, just a collection of mud huts and odd individuals. But still the village holds together by some invisible link, and old memories revive. It should be easily possible to take advantage of these age-long traditions and to build up communal and cooperative concerns in the land and in the small industry. The village can no longer be self-contained economic unit...but it can very well be a governmental and electoral unit, each such unit functioning as a self-governing community within the larger political framework and looking after the essential needs of the village...I feel sure that the village should be treated as a unit. This will give truer and more responsible representation [Nehru 1946:534-35].

Thus, though Nehru's approach to industry and technology and the place they ought to have in the future of India were very different from Gandhi, he was not untouched by the influence of Gandhi. More crucially, perhaps, their sources of understanding India's past were mostly common. They both read the writings of colonial/western scholars on India rather uncritically. This seems particularly so with their understandings of the 'old' Indian village. The western writers, after all, had presented the Indian past in good light and these leaders had learnt much of their concepts of history and politics from the western education system.

It was left to B R Ambedkar, who hardly had any stakes in the glorification of traditional India, to develop a radical critique of the Indian village. Being a dalit and having spent a part of his childhood in a village of Maharashtra, he knew what living in a village meant for a dalit. He obviously had no attraction for orientalist notions of India that celebrated its past.

VI

Ambedkar and Indian Village

When compared with Gandhi and Nehru, the influence of B R Ambedkar was rather limited, particularly during the movement

for Indian independence. However, over the years, he has grown in stature. As Eleanor Zelliot has rightly pointed out, he is perhaps the only pre-independence leader who has continued to grow in fame and influence throughout the contemporary period [Zelliot 2001].

The significance of Ambedkar lies in his social background. Over the years, he has come to represent the most downtrodden sections of the Indian society, the 'untouchables' and the dalits. Though like Gandhi and Nehru he too was well educated and had spent a good part of his youth in the west, he identified, almost completely, with the dalit cause. This was reflected in his thinking and politics. Like Gandhi and Nehru he too wrote a great deal on India.⁵

As mentioned above, of the three ideologies of the freedom movement being compared here, Ambedkar was the only one who had a first hand experience of village-life and that too of looking at it from below, as a dalit child. Apart from having been born in a village, his last name, Ambavadekar, as it was initially registered in school, was also derived from his 'native' village called Ambavade. It was only later that a teacher in his school changed it to Ambedkar, giving him his own name [see Keer 1962:14].

Though his father was a mobile dalit and was employed in a 'secular' occupation, Ambedkar could not escape the difficulties of his caste and class background during his childhood. The economic hardships that his family experienced during his childhood are quite starkly reflected in the fact that of the 14 children born to his mother, only five survived. Though he grew up to be a barrister with a degree in law and Doctor of Science from western universities, he could never forget the experiences of his childhood and the humiliations of being a dalit. It is this experience that was, to a significant extent, to shape his political outlook as also his perspective on the village life. Thus, in Ambedkar we find, what could be called, a dalitist view of the village.

Like most of his contemporaries, Ambedkar too spoke about the Indian society and the village life in civilisational terms. Despite recognising the obvious cultural diversities, the social structure of the Indian village was, for all of them, the same everywhere. However, unlike others, Ambedkar saw the Indian civilisation as being a Hindu civilisation. More importantly, he saw dalits as not being a part of this Hindu society. The structure of village

settlements too reflected this basic tenet. Quite like the Hindu civilisation, village too was divided:

The Hindu society insists on segregation of the untouchables. The Hindu will not live in the quarters of the untouchables and will not allow the untouchables to live inside Hindu quarters...It is not a case of social separation, a mere stoppage of social intercourse for a temporary period. It is a case of territorial segregation and of a cordon sanitaire putting the impure people inside the barbed wire into a sort of a cage. Every Hindu village has a ghetto. The Hindus live in the village and the untouchables live in the ghetto [Ambedkar 1948:21-22].

Thus for Ambedkar, village presented a model of the Hindu social organisation, a microcosm. It was 'the working plant of the Hindu social order, where one could see the Hindu social order in operation in full swing'. Though he often used the expression Indian village, the village, for him, did not include the untouchables, who lived outside, in the 'ghetto'.

The Indian village was not a single unit. It was divided into two sets of populations: 'touchables' and 'untouchables'. The 'touchables' formed, what he called, 'the major community' and the untouchables 'a minor community'. The 'touchables' lived inside the village and the untouchables lived outside the village in separate quarters.

The touchables were economically the dominant community and commanded power; the untouchables were a 'dependent community' and a 'subject race of hereditary bondsmen'. The untouchables lived according to the codes laid down for them by the dominant 'touchable' major community. These codes laid guidelines regarding their habitations; the distance they ought to maintain from the 'Hindus'; the dress they should wear; the houses they should live in; the language they should speak; the names they should keep. They could not build houses having tiled roofs; they could not wear silver or gold jewellery [Moon 1979, 1989].

Though Ambedkar did refer to the Indian village and its casteist social structure in his earlier writings, most of his ideas on the subject were perhaps crystallised in response to the debates in the constituent assembly where many 'Hindu members' of the assembly made 'angry speeches' in "support of the contention that the Indian Constitution should recognise the village as its base of the constitutional pyramid of autonomous administrative units with its own legislature, executive and judiciary" (1989:19).

In his well known response to those who wanted village to be treated as the basic unit of Indian civilisation, he had said:

I hold that these village republics have been the ruination of India...What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism? [Moon 994:62].

His concern obviously emanated from the standpoint of the 'untouchables', for whom recognition of the village as a unit of legal structure of India would have been 'a great calamity' [Moon 1989:19].

Though, as mentioned above, Ambedkar too was educated in the west, he was perhaps much more sceptical of western and colonial writings on the Indian society. While Gandhi and Nehru accepted the notion of 'village community' as a natural fact of Indian civilisation, Ambedkar perhaps saw it more in historical terms, as having been derived from the colonial/western imaginations of India, specifically from the writings of Sir Charles Metcalfe. He also thought that such a notion of village came to be accepted by the upper caste Hindus and the leaders of the independence movement because it projected them in a positive light. 'The average Hindu was always in ecstasy whenever he spoke of the Indian village. He regarded it as an ideal form of social organisation to which he believed there was no parallel anywhere in the world' [ibid:19].

The 'realistic picture' of village life was very different. For Ambedkar, the governing normative structure of the village was no way close to democracy. The village life was marked by experiences of exclusion, exploitation and untouchability. Not only did the members of upper/dominant castes make the untouchables live outside the village, in the ghetto, the untouchables were also excluded from most of the village festivities. 'When the whole village community was engaged in celebrating a general festivity such as Holi or Dasara, the untouchables must perform all menial acts which were preliminary to the main observance. These duties had to be performed without remuneration' [ibid: 22].

Apart from the experiences of near complete domination, the untouchables were also exploited and oppressed by the upper castes. They were not allowed to acquire wealth in form of land or cattle; they could not practice agriculture. Even as labourers they could not demand reasonable wages. They must submit to the rates fixed or suffer violence [ibid 23]. They lived a life that was full of humili-

ating experiences and dependency. There was only one source of livelihood open to them. It was 'the right to beg food from the Hindu farmers of the village. A large majority of the untouchables in the village were either servants or landless labourers. As village servants, they depended upon the Hindus for their maintenance, and had to go from door to door every day and collect bread or cooked food from the Hindus in return for certain customary services rendered by them to the Hindus' [ibid:24].

In his typically polemical style he concluded:

This is the village republic of which the Hindus are so proud. What is the position of the untouchables in this Republic? They are not merely the last but are also the least...in this Republic there is no place for democracy. There is no room for equality. There is no room for liberty and there is no room for fraternity. The Indian village is a very negation of Republic. The republic is an Empire of the Hindus over the untouchables. It is a kind of colonialism of the Hindus designed to exploit the untouchables. The untouchables have no rights...They have no rights because they are outside the village republic and because they are outside the so-called village republic, they are outside the Hindu fold [ibid: 25-26].

The 'Hindu domination' was not confined to the village. The local power/social structure was reflected at the macro/national level as well.

From the capital of India down to the village level the whole administration is rigged by the Hindus. The Hindus are like the omnipotent almighty pervading all over the administration in all its branches having its authority in all its nooks and corners [ibid:104].

Ambedkar also contested the popular anthropological thesis about the ideological unity of the Hindu society that claims that ideologically the untouchables also subscribed to ideas of pollution and purity. Against the idea of 'cultural consensus' and 'reciprocity' as characteristics of the caste system, he draws an analogy between caste and class and looks at caste exactly in the terms in which Marx had talked about classes.

The four varnas were animated by nothing but a spirit of animosity towards one another. There would not be slightest exaggeration to say that the social history of the Hindus is not merely of class struggle but class war fought with such bitterness that even the Marxists will find it difficult

to cite parallel cases to match...It seems that the first class-struggle took place between the brahmins, kshatriyas and vaishyas on the one hand and the shudras on the other [ibid:193].

There is a remarkable continuity in his writings on the village. His critique of the village and caste system resembles quite closely those anthropological writings that tried to consciously look at caste from below [see, for example, Mencher 1975].

Conclusion

Gandhi, Nehru and Ambedkar were the three most important leaders of the modern India. The three leaders have been important not only because they played a critical role in India's struggle for freedom from colonial rule, and have become symbols of India's independent nationhood. Their legacy is also imbibed in the perspectives they articulated on India, its pasts and its possible futures. Their writings continue to be sources of inspiration for all those engaged in further consolidating Indian democracy in many different ways. Their legacies also reflect many of the dilemmas being faced by Indian society today.

The reformist vision of Gandhi, who wanted to construct a harmonious and self-contained village, uncorrupted by the modern life of the city and western technology continues to find its echoes in present times. It was only through the reconstruction of the village that India, for Gandhi, could recover its lost self and attain true freedom. Though not very widespread in the present-day India, his appeal remains quite powerful amongst those looking for alternatives to the conflict ridden, polluted and unlivable big cities. Apart from his followers on the Indian political scene, his ideas have also inspired many of the environmentalist writings and ideologies in other parts of the world.

Nehru's modernist vision of the village has been the source of much of the official policies and programmes of rural development initiated by the government of India after independence, particularly during the 1950s and 1960s. Though he shared with Gandhi the notions of traditional Indian village having been a 'community' in the past, for him class divisions, backwardness and ignorance marked the actual existing villages. The question, for him was not to revive the old 'community' but to develop the village and the agriculture through new technology and abolition

of 'outdated' structures of agrarian relations.

Having become the first prime minister of India, he had the opportunity of translating his thoughts into practice. The policies and programmes initiated by the government of free India did carry his vision. The implementation of land reform, although with limited success, and various programmes of rural development that took modern technology and new seeds to the cultivators have transformed Indian agriculture significantly.

Unlike Gandhi and Nehru, Ambedkar was a 'rebel'. He had neither the moral authority of Gandhi, nor the institutional power of Nehru. His influence, however, cannot be underestimated. Over the years, he has grown in stature and has emerged as a symbol of a potent dalit identity all over India. His writings articulate a 'sub-altern view' on the village. When looked at from below, from the standpoint of those who were made to live outside the village and were treated as untouchables, the so-called virtues of traditional living turn into oppressive structures. The hope for the dalits, therefore, did not lie in its revival/reconstruction, or for that matter, even in its development. Though he does not suggest it explicitly, Ambedkar would

have perhaps voted against the very idea of village where it was impossible to escape from one's caste identity.

Before I conclude this paper, let me also point to the fact that notwithstanding their differences on the nature of Indian village, there are many ways in which the three seem to agree. As mentioned in the beginning of the paper, they all spoke about the village in civilisational terms. The Indian village had a pan-Indian structure. Irrespective of the differences of region, language or culture, villages were the same everywhere. Village, perhaps, was the only 'concrete' denominator of the Indian nationhood. However, I have also tried to show above that despite the use of categories like village popularised by the colonial discourses on India, their substantive notions of the empirical reality were shaped by a multitude of factors and the effects of their uses of such categories varied significantly. In other words, though orientalist/colonial categories provided them with conceptual resources; these categories could not completely limit/determine their politics and world-views.

Further, though their approaches were very different, they were all unhappy with the existing state of affairs in the rural

settlements. The village life, they all professed, needed to be changed. They also seemed to agree on the point that it was difficult for the village to produce such a change from within. They all, in different ways, called for outside agents to intervene. Even Gandhi emphasised on the need of outside volunteers to go to the village and translate his ideas into reality. Nehru thought that the peasants were 'ignorant' 'foolish' and 'simple folks' [Nehru 1980:61]. They needed to be encouraged and motivated to change their ways of cultivation and learn modern techniques in order to grow more food. The initiative had to come from the state. Ambedkar had from the outset no stakes in the village. The future of dalits lay elsewhere, not in the 'den of ignorance'. **EPW**

Notes

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1 There have been only a few sociologists, such as Desai 1948; Moore 1966; Dhanagare 1982.

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- who have worked on the Indian nationalist movement.
- 2 For example, the early Indian sociologists like G S Ghurye [see Pramanick 1994; Upadhyaya 2002] and anthropologists like N K Bose [Sinha 1972] were deeply influenced by or were closely associated with the nationalist movement for independence.
 - 3 Gandhi was born in 1869 in Porbandar in Gujarat. His family had been in the town for a long time. His grandfather was the administrator of Porbandar. Nehru's parents too had been urbanites. He was born in 1889 in the north Indian town of Allahabad in a prosperous and distinguished family of Kashmiri brahmins. His father was successful lawyer and admirer of western culture. Bhimrao Ambedkar was born in a village of Maharashtra called Mhow in 1891. His family belonged to the untouchable caste of mahar and came from the village Ambavadekar, located in the Ratnagiri district. His father was employed in the British Army.
 - 4 Marx's writings on the Indian village communities too reflected a similar understanding (see, for a critical exposition of Marx's views on the Indian village community Habib 1995).
 - 5 Most of his ideas on the Indian village are available in the fifth volume of his writings and speeches published by Government of Maharashtra in 1989 (edited by V Moon), which were not easily available earlier.

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One may compare the fate of British law with that of the English language as a medium of public business and civil life. In general, colonial languages appear to recede from their former preeminence, while the tide of law continues to advance. Strangely, the law seems more separable from its origin, relatively easy to borrow and hard to discard. Bryce found in the spread of Roman and British law 'a remarkable instance of the tendency of strong types to supplant and extinguish weak types in the domain of social development'.⁹⁴ But what made British law a 'strong type' was not the superiority of the norms it embodied or the elegance with which the system was elaborated. It should be noted that, unlike the civil law which spread widely by voluntary adoption, common law spread only by settlement or political dominion.

One observer noted that '... the spirit of English law which settled down on our legislative centres [in India] was that of a period when the law itself was the most technical, the least systematic and the least founded on general, equitable and coherent principles, that the world has ever seen'.⁹⁵ The 'strength' of British law lay in its techniques for the relentless replacement of local law by official law, techniques by which it accomplished its own imposition half inadvertently. And this imposition seems to be enduring in a way that language is not. An official language does not become a household language; each generation must recapitulate the painful process of estrangement. The official language does not necessarily gain at the expense of the household languages; on the contrary, we find in India an enrichment and development of indigenous languages during British rule. However, official law of the modern type does not promote the enrichment and development of indigenous legal systems; it tolerates no rivals; it dissolves away that which cannot be transformed into modern law and absorbs the remainder; it creates a numerous class of professionals who form the connecting links of the nation-state and a vast array of vested rights and defined expectations which disincline those holding them to support or even conceive drastic changes.

⁹⁴ Bryce (1901: 122).

⁹⁵ Baden-Powell (1886: 372).

3

The Aborted Restoration of 'Indigenous' Law in India *

Traditional law—Hindu, Muslim and customary—has been almost entirely displaced from the modern Indian legal system. Today, the classical *dharmaśāstra* component of Hindu law is almost completely obliterated. It remains the original source of various rules of family law. But these rules are intermixed with rules from other sources and are administered in the common-law style, isolated from *sāstric* techniques of interpretation and procedure.¹ In other fields of law, *dharmaśāstra* is not employed as a source of precedent, analogy or inspiration. As a procedural-technical system of laws, a corpus of doctrines, techniques and institutions, *dharmaśāstra* is no longer functioning.² This is equally true of Muslim law.³ The local customary component of traditional law is also a source of official rules at a few isolated points, but it too has been abandoned as a living source of law.⁴

'Legal system' and 'law' are employed here in a narrow (but familiar) sense to refer to that governmental complex of institutions, roles and rules which itself provides the authoritative and official definition of what is 'law'. In contemporary India, as in other complex societies, there are myriad agencies for making rules and settling disputes which lie outside of the legal system as narrowly

* Delivered at the annual meeting of the Association for Asian Studies, Boston, Mass., March 30, 1969.

¹ On the fate of *dharmaśāstra*, see Derrett (1961a); Galanter (1968).

² An exception must be made for a small but unknown quantity of private recourse to exponents of *dharmaśāstra*. (I am indebted to Professor V. V. Deshpande for allowing me to see an unpublished memorandum on the functioning of *dharmaśāstras* in contemporary India.) Similarly, some Muslims consult *muftis* for advice on matters of *Shari'a*.

³ While more textual Muslim law has been preserved in the family law area, it is equally detached from its former procedural and institutional setting. Muslim law is not discussed in the remainder of this paper because there has been no serious thought of reviving it. The Law Commission felt that it was unnecessary to consider Muslim law in the context of claims for a revived indigenous system; see Government of India, Ministry of Law (1958: 1, 26). More recently, attention has focused on recurrent proposals to abolish the existing separate Muslim law in the personal law fields in favour of a Uniform Civil Code, as directed in the Constitution.

⁴ On the role of custom in the courts, see Jain (1963); Kane (1950); Roy (1911).

and authoritatively defined. Many matters are regulated by traditional legal norms; tribunals of the traditional type continue to function in many areas and among many groups, but without governmental force.⁵ The point here is that they have been displaced from the official system, powerfully influenced by it and in many cases entirely supplanted by it.⁶ The official legal system comprises laws, techniques, institutions and roles which are, with few exceptions, modifications of British or other western models.

The first part of this paper examines briefly the failure—or perhaps containment is more accurate—of post-independence attempts to replace the present legal system with revived indigenous law. The second part attempts to explain this failure and to suggest its implications for the comparative study of legal systems.

The dichotomy between the official law and popular legality⁷ has been the theme of continuing stream of criticism from administrators, nationalists and students of Indian society, who have emphasized the unsuitability of British-style law in India.⁸ As a scholarly British District Officer plaintively concluded in 1945: '... we proceeded, with the best of intentions, to clamp down upon India a vast system of law and administration which was for the most part quite unsuited to the people. ... In Indian conditions the whole elaborate machinery of English Law, which Englishmen tended to think so perfect, simply didn't work and has been completely perverted.'⁹ Administrators and observers have blamed the legal system for promoting a flood of interminable and wasteful litigation,¹⁰ for

⁵ For a useful summary and analysis of the ethnographic data, see Cohn (1965). For detailed treatment, see Srinivas (c. 1964); Nicholas and Mukhopadhyay (1962); Ishwaran (1964); Berreman (1963). Extensive data on the functioning of Orissa tribunals can be found in Bose (1960). For an account of tribunals in an urban setting, see Lynch (1967).

⁶ For some instances of total eclipse of traditional tribunals, see Fox (1967); Gough (1960).

⁷ For analysis of the dissonance between British and Indian notions of legality, see Cohn (1959); Rudolph and Rudolph (1965).

⁸ There was, of course, an even broader stream of eulogy and appreciation of British legality and of its Indian personnel. Many recent examples may be found below.

⁹ Moon (1945: 22).

¹⁰ Shore (1837: II, 187–215) attributes excessive litigation to the inadequacies of the British legal system and to British ignorance of Indian customs. Henry St. George Tucker, a Director of the East India Company, complained in 1832 that 'the natives of these provinces, to whom the duel is little known, repair to our courts as to the listed field, where they may give vent to all their malignant passions' (Tucker, 1853: 21). For a contrary view, see Hunter (1897: 342–3) who finds that the supposed proneness to litigation of Indian peasants is due to the fact that rights in land are so widely spread (compared to England) and that British courts offer a vent for 'the pent up litigation of several centuries'. It is 'only a healthy and most encouraging result of three-quarters of a century of conscientious government'. For the first time, Indians 'are learning to enforce their rights'.

encouraging perjury and corruption, and generally exacerbating disputes by eroding traditional consensual methods of dispute-resolution. The indictment was familiar by the mid-nineteenth century:

... in lieu of this simple and rational mode of dispensing justice, we have given the natives an obscure, complicated, pedantic system of English law, full of 'artificial technicalities', which ... force them to have recourse to a swarm of attorneys ... that is ... *professional rogues* ... by means of which we have taught an ingenious people to refine upon the quibbles and fictions of English lawyers. ... The course of justice, civil as well as criminal, is utterly confounded in a maze of artifice and fraud, and the natives, both high and low, are becoming more and more demoralized. ...¹¹

In the nationalist movement, there were similar complaints, issuing in proposals for the restoration of indigenous justice. There was hostility to the courts as an agency of British control, and the civil disobedience movements of 1920–2 and 1931 included attempts to boycott the official courts and to organize truly Indian tribunals which would work by conciliation, relying on moral persuasion rather than coercive sanctions.¹² The misgivings of some nationalists about the legal system were succinctly expressed by a Gandhian publicist in 1946, who accused the British system of working havoc in India by replacing quick, cheap and efficient *panchayat* justice with expensive and slow courts which promote endless dishonesty and degrade public morality.¹³ Existing law, he said, is too foreign and too complex; this complexity promotes 'criminal mentality and crime'. In their place he would have *panchayats* dispense justice at the village level, thereby eliminating the need for lawyers and complex laws.¹⁴

The Constituent Assembly (1947–9) contained no spokesmen for a restoration of *dharmaśāstra*, nor for a revival of local customary

¹¹ Dickinson (1853: 46). Cf. Shore (1837: II, 236 ff); Connell (1880: chap. 3); P. N. Bose (1917); Moon (1945: especially chap. 2). See also the passionate but diffuse denunciation of Das (1967), which includes charges of foreignness, though the critique seems based more heavily on natural law than *dharmaśāstra* notions.

¹² Gandhi's attacks on lawyers for enslaving Indians by co-operation with the British legal system, his plans for indigenous arbitration courts, etc. are collected in Gandhi (1962: sections 4, 5). The 1920–2 and 1931 proposals for arbitration courts may be found in Malaviya (1956: 227 ff., 774). Earlier proposals for boycott of courts were made by B.G. Tilak and Sri Aurobindo in 1907. See de Bary (1958: 772, 727).

¹³ Agarwal (1946: 97, 100, 131). (In his Foreword to this volume M. K. Gandhi said 'There is nothing in it which has jarred me as inconsistent with what I would like to stand for'.)

¹⁴ Agarwal conceded that there should be higher courts of a professional type, but does not indicate what effect their law would have on the *panchayats* (1946: 98–9).

law as such. An attempt by Gandhians and 'traditionalists' to form a polity based on village autonomy and self-sufficiency was rejected by the Assembly, which opted for a federal and parliamentary republic with centralized bureaucratic administration.¹⁵ The only concession to the Gandhians was a Directive Principle in favour of village *panchayats* as units of local self-government.¹⁶ The existing legal system was retained intact, new powers granted to the judiciary and its independence enhanced by elaborate protections. All in all, the Constitution amounted to an endorsement of the existing legal system.

In the early years of independence there was much open discussion of the need for large-scale reform of the legal system. There was some outspoken criticism that the system was entirely unsuited to Indian conditions and should be radically altered or abandoned.¹⁷ In 1952 a member of the All-India Bar Committee discerned 'a large volume of opinion in the country that this legal system is entirely foreign to the genius and the traditions of the people of this country who need a simpler, quicker and cheaper . . . system than the present dilatory and costly system'.¹⁸

The most prominent and politically potent of these critics were Gandhians and socialists within the ruling Congress party, who supported a revival of *panchayat* justice. 'Among the depredations caused by the British, the destruction of the village system of decision over disputes, and the consequent imposition of British legal forms and courts, would have a pride of place'.¹⁹ Restoration of *panchayats* was proposed as one phase of the reconstruction of India's villages, in which faction and conflict, bred by colonial oppression, would be replaced by harmony and conciliation. Critical discussion focused almost exclusively on adjectival law — on court administra-

¹⁵ On the rejection of the village alternative, see Austin (1966: chap. 2); AVARD (1962).

¹⁶ Art. 40 provides: The State shall take steps to organize village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

¹⁷ During this period the legal system was also under attack from another direction by those who regarded the courts as obstacles to rapid reform and development and saw lawyers as agents of delay and obfuscation in the service of narrow private interests. Such sentiments were present in the highest places. E.g. in the debate over the First Amendment, Prime Minister Nehru complained: 'Somehow . . . this magnificent Constitution that we have framed was later kidnapped and purloined by the lawyers'. Parliamentary Debates XII-XIII (Part II) Col. 8832 (May 16, 1951). Proposals that judicial processes be replaced by administrative tribunals from which lawyers were to be excluded were common and frequently acted upon. See Law Commission 1958: 671 ff. This 'left' criticism tended to share with the Gandhian its unflattering estimate of lawyers.

¹⁸ C. C. Shah at the All-India Bar Committee (1952: 45).

¹⁹ Malaviya (1956: 773).

tion (delay, expense, corruption), complexity of procedure, unsuitability of rules of evidence, the adversarial rather than conciliatory character of the proceedings, and (occasionally) the nature of penalties. Although different personnel and procedures might be expected to entail different bases of decision, there was virtually no discussion of 'substantive law'.

This movement had little support among legal professionals.²⁰ Lawyers and judges agreed that the system displayed serious defects — perjury, delay, proliferation of appeals, expense. But they did not attribute its shortcomings to its foreignness.²¹ Except for a measure of decentralization for petty cases, they rejected the notion that the remedy lay in a return to indigenous forms. Almost without exception, the profession viewed the Anglo-Indian law as a most beneficial result of the British connection: ' . . . the British period gave us a rule of Law beneficial to our interests. If at all we are beholden to anything British, it is their system of Justice and Jurisprudence, that have taken an abiding and glorious place in the life of our country'.²² While many lawyers called for re-examination and even radical reformation of the legal system, almost none could perceive any advantage in reversion to pre-British models. 'The reform of our Legal Profession and our Legal system does not lie in that way of 'Village Panchayat Revival'. It is a suicidal policy that will lead only to factions and anarchy'.²³

Proposals for an indigenous system were among the many matters taken up by the Law Commission in its full-dress survey of the administration of justice in 1958. The Commission found that even a brief depiction of the ancient system

²⁰ The most prominent exception was the eminent advocate (later Home Minister and Governor) Dr K. N. Katju. See Katju (1948); Malaviya (1956: 781). Dr Katju was also a member of the Congress Village Panchayat Committee which proposed a cautious programme of giving *panchayats* small-cause powers and emphasized their conciliatory aspects of settling disputes by persuasion and advice. All-India Congress Committee (1954: 40).

²¹ Some, indeed, saw fault in the departures from the foreign model. Thus an experienced Punjab judge observed:

I have no doubt that the judicial machinery imported from England and set up here with slight modification can work efficiently if some of the dirt and grit can be eliminated. . . . Indeed the few departures from the British way and the local modifications are, to a great extent, responsible for the lack of public confidence in the Courts. . . . The defects in our judicial system are not the defects of a foreign institution planted in conditions wholly unsuited to its healthy growth, but arise from changes and modifications introduced for an ulterior purpose (Khosla, 1949: 70-1, 87).

²² Ramachandran (1950: 53). (It should be noted that this essay was awarded the Gold Medal at the Sixth Session of the Madras State Lawyers Conference in Coimbatore, May 1950.) Cf. Govinda Menon (1951: 91); Jagannadh Das (1955).

²³ Ramachandran (1950: 53); Rajamannar (1949); Shah at the All-India Bar Committee (1952: 45); Misra (1954); Ayyar (1958: 330-1).

shows how unsound is the oft-repeated assertion that the present system is alien to our genius. It is true that in a literal sense the present system may be regarded as alien. It is undoubtedly a version of the English system modified in some ways to suit our conditions. . . . But it is easy to see that in its essentials even the ancient Hindu system comprised those features which every reasonably minded person would acknowledge as essential features of any system of judicial administration, whether British or other. . . . We can even hazard the view that had the ancient system been allowed to develop normally, it would have assumed a form not very much different from the one that we follow today.²⁴

The commission notes that the attraction of the indigenous system lay not in the intricacies of classical textual law but in the simplicity and dispatch of popular tribunals that applied customary law. But it finds it unthinkable that such courts could be expected to cope with the complexities of the law in a modern welfare state:

No one can assert that in the conditions which govern us today the replacement of professional courts by courts of the kind that existed in the remote past can be thought of. . . . We cannot see how the noble aims enshrined in the Preamble to our Constitution can ever be realized unless we have a hierarchy of courts, a competent judiciary and well-defined rules of procedure.²⁵

While rejecting any fundamental change in system, the Commission indicates that to a limited extent it might be possible to utilize some of the simple features of judicial administration that obtained in the past in the form of judicial *panchayats*. Reviving or establishing popular village tribunals had been recommended by many bodies throughout the British period and such tribunals had been established in some places. After surveying their accomplishments the Law Commission recommended the establishment of *panchayats* with simplified procedure and exclusive jurisdiction over petty matters.²⁶

In the late 1950s the Government adopted the policy of community development, whereby elective village *panchayats* were established as instruments of village self-government in the hope that they would increase initiative and participation in economic development. The eager promotion of these administrative *panchayats* secured the acceptance of judicial *panchayats* in almost all states.²⁷ Either the administrative *panchayats* themselves or allied bodies, elected directly

²⁴ Government of India, Ministry of Law (1958: I, 29–30).

²⁵ Id., 30–1.

²⁶ Id., chap. 43.

²⁷ The basic policy study is Ministry of Law (Government of India, 1962). For a concise survey of developments, see Ministry of Food, etc. (Government of India, 1966).

or indirectly, were given judicial responsibilities in specific categories of petty cases. Almost uniformly lawyers were barred from appearing before these tribunals.

The establishment of judicial *panchayats* was officially urged in the hope of resolving the alienation of the villager from the legal system: ' . . . by reviving *panchayats* and moulding them on the right lines we will be taking a much needed step in the direction of making law and administration of justice reflect the spirit of the people and become rooted once again in the people'.²⁸ Although the establishment of these judicial *panchayats* derived sentimental and symbolic support from the appeal to the virtues of the indigenous system, it should be clear that these new tribunals are quite a different sort of body than traditional *panchayats*. The new judicial *panchayats* are selected by popular election from clear territorial constituencies,²⁹ they are fixed in membership, they decide by majority vote rather than a rule of unanimity; they are required to conform to and apply statutory law; they are supported by the government in the compulsory execution of their decrees; these decrees may be tested in the regular courts.³⁰

As might be expected, judicial *panchayats* enjoy little favour with bar and bench. They are largely ignored and disdained by lawyers and have been strongly criticized by judges.³¹ In reviewing their work on appeal, courts have tolerated some departure from ordinary judicial procedures,³² but they have also restricted the powers and discretion of *panchayats*,³³ In particular, the exclusion of lawyers in cases where a party has been arrested for a crime has been held unconstitutional by the Supreme Court.³⁴

The reception of judicial *panchayats* by villagers awaits systematic

²⁸ Ministry of Law (Government of India, 1962: 13).

²⁹ The very selection of the village *panchayat* as the unit to have governmental support implies a great change from the traditional system in many places, where there were functioning caste tribunals in addition to, or instead of, village ones. The emphasis on the village *panchayat* represents an attempt to recreate an idealized version of the traditional society — an ideal not only based upon a picture of the older society that emphasizes harmony and unity, but also infused with the designers' animus toward communal units.

³⁰ On the contrast of the new statutory *panchayats* with traditional village *panchayats*, see Retzlaff (1962: 23 ff.); Luschinsky (1963b: 73).

³¹ E.g., *Marwa Maghani v. Sangham Sampat*, A.I.R. 1960 Punj. 35; *Venkatachala Naicken v. Panchayat Board*, 1952 M.W.N. 912.

³² E.g., *Khachu Jagganath v. State of Madhya Pradesh*, A.I.R. 1964 M.P. 239; *Shrikishan Kaskavam v. Dattu Shwaam*, A.I.R. 1953 Nag. 14.

³³ E.g., *Ram Prakash v. Nyaya Panchayat*, A.I.R. 1967 H.P. 4 (*Panchayat* cannot try party for insult to bench); *Lohare v. Civil Judge*, A.I.R. 1964 Raj. 196 (*Panchayat* must adhere to rules regarding size of bench); *In re S. Rengaswamy*, A.I.R. 1964 Mad. 435 (self-help by *panchas* to affect decree not permissible).

³⁴ *State of Madhya Pradesh v. Shobharam*, A.I.R. 1966 S.C. 1910.

study. Little is known, e.g. about the kinds of cases *panchayats* are hearing,³⁵ the classes that are using them, the law being applied, the impact of revisions by regular courts,³⁶ the development of local expertise.³⁷ It is often claimed that *panchayats* have reduced litigation in the countryside and it is clear that they have to some extent relocated it and probably made it less expensive.³⁸ But it is not clear that there has been any strong movement away from the courts in favour of *panchayats*.³⁹

Like the traditional *panchayats*, the statutory ones seem to face severe problems of establishing their independence of personal ties with the parties,⁴⁰ of enforcing their decrees,⁴¹ and acting as expeditiously as it was hoped they would.⁴² A recent survey found it 'remarkable that rural respondents favoured a greater degree of

³⁵ Some useful works on the early years include Samant (1957); Purwar (1960); Government of Rajasthan (1964).

³⁶ The sheer quantity of intervention by the higher courts is not entirely clear. Purwar (1960: 228, 236) reports that over a six-year period in U.P. there was recourse to higher courts in 6.7 per cent of the cases decided by *panchayats*. But since many cases were compromised, transferred, or disposed of *ex parte*, it appears from his figures that 11 per cent of cases in which judgment was rendered were taken to higher courts. This may be higher, but it is certainly not lower than the general prevalence of appeals in the court system. See Government of India, Central Statistical Organization (1968: 526).

³⁷ E.g. it was reported that in Travancore-Cochin 'a class of professional agents attached to Village Courts has emerged. . . . All-India Congress Committee (1954: xxxiii). The Study Team on Nyaya Panchayats later identified this class as composed of lawyers' clerks (Government of India, Ministry of Law, 1962: 105).

³⁸ Such claims must be assessed in the context of a long-run decline in civil litigation in India. A preliminary examination of official statistics suggests that civil litigation in India has been declining since the 1930s. In 1961 the Indian courts decided 47 original civil cases per 10,000 population; in 1931 the courts of undivided India had decided 147 original civil cases per 10,000 population. Although criminal cases seem to have more than kept pace with population growth, the total per capita litigation in India was apparently lower in 1961 than at any time in this century.

³⁹ E.g. in a survey of government officers in the field conducted by the Rajasthan Study Team, almost two-thirds did not believe *nyaya panchayats* had led to a reduction litigation (Government of Rajasthan, 1964: 336).

⁴⁰ Robins (1962: 245). Malaviya (1956: 432). But cf. Ministry of Law (Government of India, 1962: 37).

⁴¹ Purwar (1960: 225); Ministry of Law (Government of India, 1962: 105).

⁴² Purwar (1960: 220); Government of Rajasthan (1964: 107). Cf. the urging of the Congress Village Panchayat Committee that cases be decided 'at one sitting' (All-India Congress Committee 1954: 38). It should be noted that the expeditiousness (and cheapness) of indigenous justice are at least partly legendary. For example, under the Mahrattas, cases concerning land tenure might take from two to twelve years and perhaps half of the cases were never decided. See 'Lunsden's report on the Judicial Administration of the Peshwas' (1819), reprinted in Gune (1953: 373 ff.). As to expense, see Gune (1953: 86, 131).

supervision and control by the Government . . . over their functioning'.⁴³

There is little reason to think of *panchayats* as a reassertion of local legal norms or institutions. It has been pointed out that administrative *panchayats* have tended to act as downward channels for the dissemination of official policies rather than as forums for the assertion of local interests as locally conceived. It is submitted that this is the case with judicial *panchayats* too. Rather than inspiring a resurgence of indigenous local law, they may serve as agencies for disseminating official norms and procedures and further displacing traditional local law by official law within the village.⁴⁴

Judicial *panchayats* invite comparison with Paul Brass's findings about Indian medicine, which he sees undergoing a dual modernization, in which the growth of 'modern medicine' in the western style is accompanied by a 'revival' of the indigenous schools of medicine. He finds that this revival is really another stream of modernization which he calls 'traditionalization', i.e. a movement that uses traditional symbols and pursues traditional values, but engages in technological and organizational 'modernization'.⁴⁵ Village *Panchayats* fit Brass's model of 'traditionalization': the traditional *panchayat* symbolism and values of harmonious reconciliation and local control and participation are combined with many organizational and technical features borrowed from the modern legal system—statutory rules, specified jurisdiction, fixed personnel, salaries, elections, written records, etc. The movement to *panchayats* then is not a restoration of traditional law, but its containment and absorption; not an abandonment of the modern legal system, but its extension in the guise of tradition.

Why was the movement for indigenous justice so readily contained? Why did the proponents of indigenous law settle for what is hardly more than the marginal popularization of existing law?

⁴³ G. S. Sharma (1967: 19). On the need for such external controls, see Nicholas and Mukhopadhyay (1962: 17, 24).

. . . despite the form of justice in these proceedings [in a traditional village *panchayat*] the odds appear to be strongly against the defendant. Everyone, including the 'judge' is trying for a conviction. . . . [T]he interest of the villagers is generally in raising money for the village fund, for trials 'represent an important source of income for the village collectivity'.

⁴⁴ Indeed, one may hazard the speculation that eventually the deficiencies of the *panchayats* will be remedied by training them in the law. Cf. Malaviya (1956: 432). The Study Team proposed paid and trained secretaries 'familiar with the law to be administered by the Nyaya Panchayats. . . . Ministry of Law (Government of India, 1962: 109–10). Cf. their proposals for training *panchas* (Id.: 65 ff.).

⁴⁵ Brass (1969).

Let us look at the actors, goals and issues in the 'dispute'.

First, the present legal system was supported by a numerous and influential class of lawyers (not to mention the many ancillary personnel who live off the legal system) who were fully committed to the system, had a heavy personal stake in its continuance, and were genuinely convinced of its general virtue⁴⁶ and that revivalism was a threat to them as well as a mistake for the country.⁴⁷ On the other hand, there was no organized body of carriers of the proposed alternative, no educational institutions to produce them and no existing group whose occupational prospects might be advanced. (In all of these, traditional law stands in contrast to *ayurvedic* medicine.)⁴⁸ The proponents of indigenous law tended to lack qualification as experts while the lawyers were generally recognized as competent authorities on legal reform.

Second, the proponents of an indigenous system presented no vivid alternative. Contrast, for example, movements for replacing one language with another, where there is an alternative that is palpable to all and clearly promises advantage, symbolic if not tangible, to many. Here, the proponents themselves were not moved by a lively sense of what the alternative might be. In part this reflected the absence of any plausible candidate—this was a restorationist movement without a believable pretender!

Dharmaśāstra, of course, was one alternative, an elaborate and sophisticated body of legal learning. But any proposal in this direction would run foul of some of independent India's most central commitments. It would violate her commitment to a secular state, insuring equal participation to religious minorities. Furthermore, *dharmaśāstra's* emphasis on graded inequality would run counter to the principle of equality and would encounter widespread opposition to the privileged position of the higher castes. Indeed, the one area where *dharmaśāstra* retained some legal force, Hindu family law, was in the early 1950s being subjected to thoroughgoing reform

⁴⁶ An eminent advocate (now Vice-President) who had been a member of the 1958 Law Commission recalled five years later that '... after a comparative study of the various systems prevailing in other countries [we] reached the conclusion that the British system which we had adopted was the best. This system secured greater and more enduring justice than any other system'. He went on to warn that 'Ideas from the foreign countries may be borrowed and adopted in our system. But it will be dangerous to introduce innovations which will result in radical changes. They may not fit in with our system which had been a part of our national life for a long time' (G. S. Pathak in Sen *et al.*, 1964: 80–1).

⁴⁷ On the size, eminence and influence of the legal profession, see Galanter (1968–9) and the various contributions to *Law & Society Review* (1968–9).

⁴⁸ In spite of the parallels on the consumer side (cf. footnote 59), the professional organization of 'traditional' law remains strikingly in contrast with that of traditional medicine, with its parallel and imitative professionalization. On the contrast, see Galanter (1973).

which largely abandoned the *śāstra* in favour of a Hindu law built on modern notions.⁴⁹ Thus, it is hardly surprising that none of the leading documents supporting *nyaya panchayats* even mentions *dharmaśāstra*. While few would condemn it (as had an earlier generation of reformers)⁵⁰ claims on its behalf were limited to the symbolic and intellectual levels.⁵¹ It was not an available alternative for practical application.

Nor was the local customary component of traditional law a likely candidate. Customary law with its innovative, quasi-legislative element restored would be a formidable counterweight to national unity, mutual intelligibility, free movement and interchange. It had no evident capacity to contend with nationwide problems and projects. Although there were vestiges of such traditional law extant, there was no pronounced widespread admiration for its contemporary representatives. Indeed they were in at least as bad a popular repute as the courts.⁵²

Yet another alternative, a creative synthesis of Indian and Western, blending the best of both into a new system adapted to India's needs and aspirations, was easy to call for, but hard not only to produce, but to portray.⁵³ Such a call was not without appeal to

⁴⁹ On these reforms, see Derrett (1958); on the crucial role of lawyers in producing them, see Levy (1968–9).

⁵⁰ The prominent exceptions are in neo-Buddhist, Scheduled Caste and 'non-Brahmin' (DMK) circles where Manu and *dharmaśāstra* are negative symbols. See e.g. Borale (1968). For a famous example of an earlier view that *dharmaśāstra* was suited only to a stagnant and slave society, see Sankaran Nair (1911: 216).

⁵¹ Thus a High Court judge calls for a renaissance of *dharmaśāstra* study to check the excessive rights-consciousness of India's educated classes and because its emphasis on duty is more consonant with socialism and India's urgent needs (Dhavan 1966: 102–3, 136–7). More common is the assimilation of *dharmaśāstra* to the modern system by stressing its adaptiveness, change over time and the extent to which it anticipated features of the modern system.

⁵² For example, Berreman (1963: 271–2, 281–2) reports that villagers have little faith in the objectivity of *panchayats* and avoid using them, especially in property disputes, on grounds that they would decide wholly in terms of self-interest. Contemporary *panchayats* seem to experience the same difficulties with tutored witnesses as do the official courts. Srinivas (c. 1964: 42, 95); Lynch (1967: 154). And most notably these tribunals may be oppressive to the poor and powerless and unable to enforce decisions opposed to the interests of powerful personages or factions. Srinivas (c. 1964: 66); Nicholas and Mukhopadhyay (1962); Hitchcock (1960: 262).

⁵³ Inaugurating a seminar on jurisprudence, the Governor of Rajasthan projected such a synthesis into the future:

... the Indian law of today ... is not a spontaneous growth at all, but an exotic growth, planted on Indian soil forcibly, by foreign rulers, not because this suited us but because it suited them. ... There are symptoms of a revolt against such foreign impositions. The spirit of the country seeks to go back to the fountainhead of its life. ... Fifty years hence ... India may have switched on to an entirely new system of laws, based on legal principles which have intimate contacts with the spiritual and cultural life-currents of the country. ... We should not for a moment

lawyers, but they were disinclined to abandon the existing system pending its arrival.⁵⁴

Third, the revivalist cause was not attached to any concrete grievance that could mobilize popular support. Court delay and expense were not adequate issues for this purpose. It was hard to attach organized personal or political ambition to them. Apparently the symbolic gratifications to be had from restoration of indigenous law were not sufficiently appealing to any significant sections of the population. On the other hand, the interests that were threatened were concrete and tangible and defended by organized and articulate groups.

We may ask then why actors, goals and issues were in such short supply, compared, for example, to linguistic changeover movements or even the *ayurvedic* movement described by Brass. Ironically it appears that the answer is that the legal system was so thoroughly domesticated. That is, indigenization on the ideological/programmatic level failed because the law had become 'indigenous' on the operational/adaptive level.

The law and the society had adapted to each other in several ways. The law itself underwent considerable adaptation. British institutions and rules were combined with structural features (e.g. a system of separate personal laws) and rules (e.g. *dharmaśāstra*, local custom) which accorded with indigenous understanding. The borrowed elements underwent more than a century and a half of pruning in which British localisms and anomalies were discarded and rules elaborated to deal with new kinds of persons, property and transactions.⁵⁵ By omission, substitution, simplification, elaboration, the law was modified to make it 'suitable to Indian conditions'.⁵⁶

ignore Dharmaśāstra. Let us rather seek to derive sustenance from it. I am not asking you to boycott the light that comes from the West: I want you to blend it with what has come down to us from our own past (Sampuranand, 1963: 4).

⁵⁴ 'It would be folly to throw away what we have acquired and start a search for something which may prove elusive and which may result in atavistic retrogression. . . . We must retain the present system as long as we are unable to replace it . . . with a superior one . . . that is at the same time more acceptable to . . . our sense of justice . . . our common man' (Misra, 1954: 49). Cf. Ramachandran (1950: 53).

⁵⁵ Special adaptations of common law to suit Indian conditions include, e.g. in the criminal law the elaborate protection of religious places and feelings, the different treatment of bigamy, adultery, false evidence and defamation; in contract law, treatment of duress and agreements in restraint of trade. See Lipstein (1957: 74-5); Acharyya (1914: Lecture III); Setalvad (1960: chaps. 2-3). Examples of distinctive 'Indian common law' may be found in Setalvad (1960: 59-60); Acharyya (1914: 38, 136).

⁵⁶ Derrett's (1969) provocative assessment of the carryover of traditional elements in contemporary Indian law includes a series of interesting examples of ways in which modern legislation (on, e.g. safety, welfare and employment) gives expression to traditional normative concerns.

The numerous body of legal professionals were, almost without exception, so thoroughly committed to the existing system that it was difficult for them to visualize a very different kind of legal system.⁵⁷ Its shortcomings were seen as remediable defects and blemishes, not as basic flaws which required fundamental change. To lawyers the system seemed fully Indian. This sense of being at home is expressed by an eminent Attorney General:

For over a hundred years distinguished jurists and judges in India have, basing themselves upon the theories of English common law and statutes, evolved doctrines of their own suited to the peculiar need and environment of India. So has been built up on the basis of the principles of English law the fabric of modern Indian law which notwithstanding its foreign roots and origin is unmistakably Indian in its outlook and operation.⁵⁸

The lawyers not only disseminated the official norms, but served as links or middlemen, putting the law in the service of a wide variety of groups in the society and providing new organizational forms for forwarding a variety of interests. The lawyers were the carriers of what we might call an all-India legal culture which provided personnel, techniques and standards for carrying on public business in a way that was nationally intelligible. Thus the legal system and the lawyer supplied much of the idiom of public life. To the lawyers and the nationally oriented educated class of whom they formed a significant part, the legal system was the embodiment and instrument of the working principles of the new India — equality, freedom, secularism, national uniformity, modernity.

In a very different way, villagers are also at home in this legal system. At least, they are neither as radically isolated from the system nor as passive as they appear to some critics of the present system. Villagers are, as Srinivas has observed 'bi-legal'; they utilize both 'indigenous' and official law in accordance with their own calculations of propriety and advantage.⁵⁹ Summing up the ethnographic evidence, Cohn finds that:

⁵⁷ Rowe (1968-9). In the course of several dozen interviews I conducted with Indian lawyers in 1965-6 and in 1968, I could uncover no sentiment for fundamental changes. The defects perceived in the present system were expense, delay and corruption. These were seen as the result of human failing, not as a result of the nature of the legal system. Defects were never attributed to the foreignness of the system, even by those lawyers who were devout Hindus or were connected to Hindu communal political organizations.

⁵⁸ Setalvad (1960: 225).

⁵⁹ Srinivas (c. 1964); Ishwaran (1964). Cf. Berreman (1963: 271) on villagers picking and choosing among tribunals. Similar 'forum shopping' among alternative treatment systems and popular syncretism in combining them has been observed in Indian consumption of medical services (Leslie, 1970). A recent study in Ghaziabad by T. N. Madan (1969) found that over 80 per cent of his respondents preferred allopathic medicine, but over two-thirds combined treatments from various schools.

Even though there are inadequacies of procedure and scope for chicanery and cheating, the lack of fit with indigenous jural postulates notwithstanding, the present court system is not an alien or imposed institution but part of the life of the village. Looked at from the perspective of the lawyer's law and that of the judges and the higher civil servants, the ability of some peasants to use the court for their own ends would appear a perversion of the system. However, looked at from the ground up it would appear that many in the rural areas have learned to use the courts for their own ends often with astuteness and effectiveness.⁶⁰

The displacement of indigenous law from the official legal system does not mean the demise of traditional norms or concerns. The official system provides new opportunities for pursuing these, at the same time that it helps to transform them.⁶¹ There is no automatic correspondence between the forum, the motive for using it and the effect of such use; both official courts and indigenous tribunals may be used for a variety of purposes.⁶² Official law can be used not only to evade traditional restrictions, but to enforce them.⁶³ Resort to official courts can be had in order to disrupt a traditional *panchayat*,⁶⁴ or to stimulate it into action. Official law can be used to vindicate traditional interests;⁶⁵ caste tribunals may be used to promote change.⁶⁶

Not only are villagers capable of using the official courts for their own ends, but they have assimilated many elements of official law into the workings of indigenous tribunals. Nicholas and Mukhopadhyay, in their study of two Bengal villages, report that 'almost all persons have had some experience in . . . the government court, and the form of village legal proceedings is modelled after this experience. Stress is laid upon evidence such as eye-witness accounts, written documents, markings of injury, correct description of a stolen article'.⁶⁷ Srinivas's studies indicate that even in villages where there

⁶⁰ Cohn (1965: 108-9).

⁶¹ On the role of law (and lawyers) in providing new modes of caste organization and activity, see McCormack (1966). More generally, Derrett (1968) argues that in spite of superficial discontinuities, modern legal concepts and institutions provide a vehicle for the authentic continuation of Hindu tradition.

⁶² 'The use of the courts for settlement of local disputes seems in most villages almost a minor use of the courts. In Senapur, courts were, and are, used as an arena in the competition for social status, political and economic dominance in the village. Cases are brought to harass one's opponents, as a punishment, as a form of land speculation and profit making, to satisfy insulted pride and to maintain local political dominance over one's followers. The litigants do not expect a settlement which will end the dispute to eventuate from recourse of the State courts' (Cohn, 1965: 105).

⁶³ E.g. Srinivas (c. 1964: 90).

⁶⁴ E.g. Lynch (1967: 153).

⁶⁵ Derrett (1964b); Ishwaran (1964: 243); Luschinsky (1963a).

⁶⁶ Cohn (1965: 98-9, 101).

⁶⁷ Nicholas and Mukhopadhyay (1962: 21).

is little recourse to government courts, the form of the dispute within a *panchayat* seems affected by official models in drafting of documents, keeping of records, terminology and procedure.⁶⁸

Traditional law, either absorbed into the official system or displaced from it, has been transformed along the lines of the official model. As I have argued elsewhere, the attrition of traditional law resulted not from the normative superiority of British law, but from its technical, organizational and ideological characteristics, which accomplished the replacement and transformation of traditional law half inadvertently.⁶⁹

Though spoken in accents grating to some, the present system is India's legal vernacular. Like many Indian languages it is characterized by functional diglossia. Overlapping formal and colloquial varieties form a multiplex medium through which interests are pursued and issues are perceived by various groups and strata. Its replacement would require not only a concrete alternative and specialists to implement the change, but powerful political support. Not only are alternatives and specialists in short supply, but the political support that could accomplish such a change is unlikely to assemble around this issue. Therefore, a qualitative change on the scale of the shift from pre-British to British legal institutions (or of a linguistic changeover) is highly unlikely.

The legal system then is 'indigenous' in quite different ways for the lawyer, the nationally-minded educated classes, and the villager. It is most palpably foreign to those sophisticated urbanites who attempt to view it through the eyes of the villager. (And, perhaps to the sophisticated foreigner who attempts to see it through Indian eyes.)

In the sense of unease and dismay that Indian law provokes in otherwise disparate observers⁷⁰ we may discern several components: its lack of an indigenous or autochthonous quality; its lack of congruence with underlying social norms; its internal disparities (i.e. the law in operation is remote from the law on the books). Modern India is measured against societies in which law is supposedly an accurate and coherent expression of social values—Britain for

⁶⁸ Srinivas (c. 1964: 46); Ishwaran (1964); Lynch (1967: 153-4).

⁶⁹ Galanter (1966a, chap. 2 above). The introduction of new opportunities into India's compartmented society generated numerous disputes that were not resolvable by the earlier decentralized dispute-settling mechanism, which relied on local power for enforcement and enjoyed only intermittent and remote external support. British law and courts fostered and filled a demand for near-at-hand authority that could draw upon power external to the immediate setting of the dispute.

⁷⁰ See footnotes 11-13. For a recent estimate of the Indian situation see von Mehren (1963a, 1963b). Cf. Derrett (1969: 11). For a broad comparative assessment, see Pye (1966: chap. 6).

British administrators,⁷¹ traditional India for the Gandhians, the 'West' for comparative scholars. The Indian situation is perceived as deficient or even pathological; prognoses range from stress and demoralization to rigidity and obstruction of development.

The Indian experience provides an occasion for questioning the familiar notions that underlie these judgments, notions of what is 'normal' in legal systems; that law is historically rooted in a society, that it is congruent with its social and cultural setting, and that it has an integrated purposive character. These notions express expectations of continuity and correspondence, of present with past, of law with social values, of practice with precept; expectations which are in part projections of the working myths of modern legal systems.⁷²

The Indian experience suggests a set of counter-propositions. It suggests that neither an abrupt historical break nor the lack of historical roots prevents a borrowed system from becoming so securely established that its replacement by a revived indigenous system is very unlikely. It suggests that a legal system of the modern type may be sufficiently independent of other social and cultural systems that it may flourish for long periods while maintaining a high degree of dissonance with central cultural values. It suggests that a legal system may be disparate internally, embodying inconsistent norms and practices in different levels and agencies.

These counter-propositions point to the need for some refinement of familiar notions of what legal systems are normally like. Specifically they point to the desirability of disaggregation: we need to find ways of asking how various parts of the legal system are related to different sectors of the society.⁷³

If a legal system need not be historically emergent from its society, what are the mechanisms by which it becomes 'rooted'? How does it secure acceptance and support from crucial sections of the popula-

⁷¹ Cf. Bernard Cohn's observation that British administrators in India had often left England after their schooldays and preserved a rather idealized picture of English life against which they measured the Indian reality.

⁷² They may also derive support from theories generated by the study of small and relatively homogeneous societies. Hoebel (1965: note 54) suggests that the theory which holds that law is the expression of jural postulates, which are in turn expressions of fundamental cultural postulates, 'is limited to autochthonously developed legal systems. It obviously cannot apply to a tyrannically or conquest-imposed system that has no roots in the local culture'. This seems to point to the rather startling conclusion that law in such places as India has a fundamentally different character than in primitive societies or in the West.

⁷³ See, e.g. Morrison's (1972) description of the articulation of professional activity with kinship and Khare's (1972) description of the selective insulation and 'restricted mutual validation of lawyer's law and traditional institutions.

tion? If a legal system can persist without pervasive support from other social institutions (or global agreement with cultural norms), what are the specific links that connect it with other institutions and norms and what are the mechanisms that maintain its segregation from them? If a legal system is not itself a normative monolith, what are the mechanisms that permit a variety of norms and standards to flourish? How are widely disparate practices accommodated? It is submitted that the discontinuities observed in the Indian case should not be dismissed as exceptional or pathological, but should be taken as the basis for hypotheses for probing some of the general characteristics of legal systems that are often obscured in our view of societies closer to home.

The cobwebs of imperial rule

ARUDRA BURRA

FORTY-FOUR years ago, the editor of this journal lamented the persistence of an institution which should, in his opinion, have been ‘swept away together with the other cobwebs of imperial rule.’¹ The institution he had in mind was the Indian Civil Service (ICS), ancestor of the modern-day IAS. The nationalist complaint against the ICS had been an old one. They were ‘neither Indian, nor civil, nor

servants’, as the saying went; they had formed the administrative backbone (the so-called ‘steel frame’) of British India, and played an important role in the suppression of the nationalist movement through the 1940s. So it seemed anomalous to many people that Indians in the ICS had not only survived the transfer of power intact, but had flourished in the new regime.

* This note is based in part on a longer work on the First Amendment to the Indian Constitution. For help with the longer paper, I’d like to thank President Aharon Barak, Yael Berda, Professor André Betéille, Anuj Bhunia, Jessica Boyd, Rohit De, Deborah Dinner, Mathew John, Siddharth Narrain, Vikram Raghavan, Bhavani Raman, Daniel Roths-

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In the same issue of *Seminar*, another author wrote that Nehru had been 'his own greatest enemy':

In 1947 he called his fellow-countrymen to help in building a new India at every level. He desired passionately to rouse the Indian spirit at home and to make the voice of India heard in the counsels of the world. And yet – this would be unbelievable were it not true – he sought to achieve these ends through the agency of those who had been the trained servants of imperialism.²

The charge could be made more broadly. The judges of the first Supreme Court were all serving members of the Federal Court of India, a creation of the British Raj. British judges continued in the High Courts well into the 1950s, as did many members of the armed forces.

The cobwebs of imperial rule were everywhere to be seen after Independence. The idea that India should be governed by a parliamentary system of government, on the Westminster model, was more or less taken for granted in the Constituent Assembly, whose members had themselves been elected under the terms of the Government of India Act, 1935, a British statute. The Constitution itself was modelled in large measure on this act, as Ambedkar acknowledged to the Constituent Assembly when he introduced the Draft Constitution on 4 November 1948:

One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world... As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act,

1935, I make no apologies. There is nothing to be ashamed of in borrowing.³

Let me use the term 'an argument from colonial continuity' to describe any argument against an institution, an idea, a policy, or a law, in which the fact that such an idea is continuous with, associated with, or representative of, colonial rule is used as a reason that counts against it. Such arguments are a familiar feature of current legal and political discourse, and have been so since the time of Independence.

To take a recent instance, one theme in the arguments made to the court in the Naz Foundation case against the criminalization of consensual same-sex sodomy was that s. 377 of the Indian Penal Code was a 'vestige of the colonial order.' In written submissions to the court, the Alternative Law Forum (ALF) argued that, 'While disgust and revulsion may have been a valid ground for colonial rulers to legislate by decree, it is clearly not the case in a civilized society governed by a Constitution.'⁴ Similar arguments are often made with respect to repressive security and anti-terrorism laws.

I believe that the scope of such arguments is more limited than we might initially think. In this short note, I will try to make my point with an historical example from an early and particularly interesting period in Indian constitutional history: the Constitution (First Amendment) Act of 1951.

The story begins with one of the first cases to make its way before the Supreme Court – filed, appropriately

3. B. Shiva Rao (ed.), *The Framing of India's Constitution: Select Documents IV*, 427-8 (4 vols.). Indian Institute of Public Administration, Delhi, 1966-68.

4. See *Naz Foundation vs. Govt. of NCT of Delhi & Ors.*, civil writ petition 7455/2001. My thanks to Arvind Narrain and Siddharth Narrain of the ALF for making these petitions available to me.

enough, by the founder-editor of this journal. Romesh Thapar was at that time the editor, printer, and publisher of a journal called *Cross Roads*, the weekly organ of the Communist Party of India. The journal was banned by the Government of Madras under the terms of the Madras Maintenance of Public Order Act, 1949. In *Romesh Thapar v. State of Madras*, Thapar challenged the ban, claiming that the act was unconstitutional because it conflicted with the right to freedom of speech guaranteed under Part III of the Constitution.

The case was heard along with *Brij Bhushan v. State of Delhi*, in which the printer and publisher of the *Organizer*, the organ of the Rashtriya Swayamsevak Sangh (RSS), made a similar challenge to the East Punjab Public Safety Act of 1949. Under the terms of that act, the Chief Commissioner of Delhi had sought to require prior scrutiny of material before publication on 'communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources.'

The Supreme Court cases concerned 'public safety' acts passed by provincial governments after Independence. They were accompanied by constitutional challenges in the High Courts of various provinces to provisions of other statutes which restricted press freedom: in particular the offence of 'sedition' in s. 124-A of the Indian Penal Code of 1860 and the Press (Emergency Powers) Act of 1931.⁵ These latter acts were 'colonial legacies' in a very straightforward sense: not only had they had been passed under colonial rule, but they had been crafted with a clear eye towards suppressing the nationalist movement. For instance, the so-called 'Press Act' had been passed at the height of the civil disobedience movement, and

1. 'The Problem', *Seminar* 84, 1966, p. 11.

2. 'Self Before Service', *Seminar* 84, 1966, p. 13.

gave the executive power to require owners of printing presses and newspapers to furnish security deposits, which could be forfeited upon a variety of grounds formulated in s. 4 of the act.

In 1932 the grounds for forfeiture specified in the Press Act were expanded to include, among other things the publication of material which tended, directly or indirectly, to bring into hatred or contempt' the Government of India; to 'excite disaffection' towards it; to encourage people to refuse to pay taxes or to interfere with the administration of the law; and to encourage public servants to resign to forebear or delay acts connected with their public functions.⁶ These were all clearly directed against Congress activities during the civil disobedience movement. So the government of independent India was applying and defending a law which had been used to suppress the very movement that brought independence to India, the passage of which had been among the grounds for regarding colonial rule to be illegitimate in the first place.

The laws were uniformly struck down by the courts on grounds of overbreadth. The relevant exception to the protection of freedom of speech in Art. 19(2) of the Constitution concerned laws relating to 'any matter which...undermines the security of, or tends to overthrow, the State.' The courts argued that these statutes gave

the executive power over press censorship that was much wider in scope than the Art. 19(2) exception allowed, and should be struck down on that basis. The government responded by attempting, in the First Amendment Bill, to expand the scope of these exceptions, giving them retrospective effect, by 'being deemed always to have been enacted' (s. 3(a), Amending Act). In addition, the amendment rehabilitated all laws which had been declared void because of being violative of Art. 19(2) as it was originally enacted.⁷

The First Amendment Bill was criticized in Parliament for many reasons. For one, the constitutional provisions in question had been discussed at great length during the deliberations of the Constituent Assembly in 1946-49; yet the government sought to amend them in May 1951, only fifteen months after the Constitution had been adopted. Questions were also raised about the legitimacy of this particular Parliament to amend the Constitution. Since elections under the new Constitution were not held until late 1951, the First Amendment was being debated by members of Parliament who had been elected on the basis of the restricted franchise given by the Government of India Act, 1935. Why not wait a few months until the formation of the first Lok Sabha, elected by universal franchise, so that the legitimacy of Parliament to amend the Constitution was not in doubt?

Against this, Nehru pointed out that the Parliament which debated these constitutional amendments consisted of the *very same people*, sitting as the Constituent Assembly, who had written the Constitution in the first

place. Under the terms of the India Independence Act, the power of legislation would reside in the first instance with the Constituent Assemblies of each of the new dominions of India and Pakistan.⁸ Having been elected in 1946 on basis of the Cabinet Mission Plan, the Constituent Assembly assumed legislative powers at independence, sitting as the 'Dominion Parliament' in the mornings and as the Constituent Assembly in the afternoons.⁹ Who better to interpret the Constitution, and amend it when the courts had shown themselves to interpret it incorrectly, than the very people who wrote the Constitution?

The idiom of colonial continuity played a central role in the debates around the amendment. Opponents of the bill argued, of course, that the amendment was a way of protecting the hated 'colonial laws'. But Nehru turned the argument on its head: to be suspicious of giving the government power to enact repressive laws was to be suspicious of democracy itself.

It is only here we seem not to rely on ourselves, not to have faith in ourselves, in our Parliament or our Assemblies, and rely, just as some of us may have relied on external authority like the British power of old days; we rely on some external authority – maybe geographically internal – and not perhaps have faith in this Parliament.¹⁰

It is not the government which displays continuity with the colonial

5. The cases challenging the Press (Emergency Powers) Act were *Amar Nath Bali v. The State* (AIR (38) 1951 Punjab 18), *In re Bharati Press* (AIR (38) 1951 Patna 12), and *Srinivasa v. State of Madras* (AIR (38) 1951 Madras 70). S. 124-A of the Indian Penal Code was challenged in *Tara Singh Gopi Chand v. The State* (AIR (38) 1951 Punjab 27).

6. Indian Press (Emergency Powers) Act (Act XXIII of 1931), amended by the Criminal Law Amendment Act (Act XXIII of 1932).

7. The act also sought to protect *zamindari* abolition and land reform laws, which had been held to conflict with the right to property guaranteed by Art. 31 of the Constitution, and to protect reservations by amending the non-discrimination clause of Art. 15(1).

8. India Independence Act, 1947 (10 & 11 Geo. 6).

9. After the Constitution was adopted on 26 January 1950 and India ceased to be a Dominion, the Constituent Assembly was dissolved, and what had been until then the Dominion Parliament was now known, pending elections under the new Constitution, as the 'Provisional Parliament'.

10. *Parliamentary Debates* vol. XII, pt. 2, 16 May 1951, col. 8825.

regime by trying to preserve laws enacted by the British for the purposes of press censorship. It is the opponents of the government who exemplify this continuity: just as the British did not trust Indians to rule themselves, so too these opponents do not put their trust in Parliament, but in 'external authority', i.e. the courts.

Nehru also used an argument from colonial continuity to impugn the legitimacy of the courts, claiming that the judges who presided in it were wedded to 'old ways of thinking.' The charge was echoed by N.G. Ranga, who worried about being 'condemned' to a situation in which progressive legislation would be held up until the judges of the Supreme Court either died or retired, and 'our government' could replace them with others who were more progressively minded.

Against this, the opposition pointed out that the Supreme Court should not be framed, as Nehru tried to do, as an alien institution (an 'external authority'), one which represented some reactionary element somehow opposed to the spirit of the constitution. As S. P. Mookerjee put it:

Here are a set of men who are selected by the Government. They are not foreigners coming from outside. They are our own chosen selected men holding office during their life, entrusted with the duty of seeing whether the country is being administered in the spirit of the Constitution.¹¹

And so arguments from colonial continuity were used to ingenious effect on both sides of the debate. Nowhere was this more evident than in an exchange between J. B. Kripalani and C. Rajagopalachari. Acharya Kripalani had been the Chairman of the Fundamental Rights Committee in

the Constituent Assembly and now opposed the amendment. One of his criticisms was that the proposed amendments would lead to the penalization of forms of nonviolent protest that had formed the moral basis for the independence movement:

What is not an offence? As a matter of fact, during all our struggle we were preaching against what was considered by the State laws as offences. The whole of our *satyagraha* movement was to break the law, to break such provisions of the law that created offences. Today, if you pass this amendment, even *satyagraha* can come to be legislated against.¹²

Rajaji, like Nehru before him, also turned the argument on its head. His response was that the whole *point* of civil disobedience conceived of as a form of protest was that it should be punished: it was the acceptance of the penalty which gave such protest its moral force. So to the extent that such a form of political agitation was worth preserving, it was important to allow it to be punished. To do otherwise would be like 'trying to learn to ride on a wooden horse. It must be a real horse; it must kick and throw out.'

Given the Congress majority in the house, and the Congress whip, it was a foregone conclusion that the bill would pass, despite the vociferous opposition against it. But my interest is not so much in the merits of the amendment itself, as in the form in which the amendment was debated. Those who attacked restrictions on the freedom of the press did not (by and large) couch their arguments in *institutional* terms having to do with the place of the press in a democracy; nor were their arguments generally couched in terms of free speech as a

basic civil right. Rather, they couched their opposition in terms having to do with the continuity of the new Indian regime with the one it displaced. Independence carried with it the promise of making a clean break with the past in order to ensure freedom and progress. Those who sought to protect or re-enact press laws were criticized on the grounds that they were no different from the British in this respect; that this would be a betrayal of the promise of independence.

But the sophistication of the rhetoric around colonial continuity – as seen in the responses of Nehru and Rajaji – might suggest one way in which such arguments are limited. They can be used for and against the same position, depending on the feature one isolates and identifies as 'colonial'. And deciding whether or not a feature is colonial in the relevant sense is hardly a straightforward thing. As a matter of brute historical fact, one might say that a law or an institution is colonial if it has its genesis in the colonial period. But surely this is much too crude a criterion, for if it were correct, arguments from colonial continuity would be much too general. It is true that s. 377 of the Indian Penal Code is a colonial legacy; but so is s. 300, which criminalizes murder. If we wish to keep one and scrap the other, then being a colonial legacy is not a sufficient condition of being a bad law, one needs something more.¹³

There is a more subtle reason for scepticism about the term 'colonial' as a category of legal and political criticism. This is the one provided

13. Of course, the petitioners in the *Naz* case did in fact make a number of different arguments against s. 377 in addition to the argument from continuity.

Note that there is nothing inconsistent about a completely revolutionary position, where one desires to get rid of *all* colonial legacies whatsoever and rebuild from the ground up. My

11. Ibid., col. 8855.

12. *Parliamentary Debates*, pt 2, v. XII, 30 May 1951, col. 9722.

by S. P. Mookerjee in response to Nehru's charge that the judges who struck down the press censorship laws were somehow alien to the Constitution. For the Supreme Court was after all a *creation* of the Indian Constitution. Judges of the colonial Federal Court became judges of the Supreme Court by virtue of Art. 374, one of the Transitional Provisions of Part XXI of the Constitution.

Another transitional provision, Art. 372, provided that 'all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.' If the Constitution is ours, then, given Art. 372, there is a perfectly legitimate sense in which the laws we inherited are ours as well. This is obviously not to say that they are immune from criticism, but merely to point out that it is not an easy matter to say what counts as colonial in an argument from colonial continuity.

Of course, this is not the only way in which to make sense of the 'colonial' in arguments from colonial continuity. One of the recurring themes in the parliamentary debates on the First Amendment was the fact that the laws which the government sought to protect had been enacted for the purposes of protecting colonial rule from nationalist challenge: they were *instruments* of colonial repression. But the response in defence of these laws was precisely that they were *merely* instruments of such repression. Recall Nehru's defence of press censorship laws: it is not laws but governments that repress, and the government of independent India would simply not

only point here is that if 'colonial continuity' is the instrument of critique, then it applies across the board.

use these laws to repress political dissent in the way the colonial government did.¹⁴ So according to Nehru, the historical association of a law or institution with colonial rule, even with colonial *repression*, does not provide us with a direct argument in favour of doing away with it: again one needs something more.

Finally, one might think that arguments from colonial continuity should be taken seriously because of what such continuity symbolizes: an acceptance of all that was wrong with colonial rule, for instance. In the Constituent Assembly, T.T. Krishnamachari emphasized the symbolic aspect of this debate in his discussion of K.M. Munshi's proposal to delete the word 'sedition' from among the exceptions to the right to freedom of speech. While he was in favour of the amendment, he pointed out:

The value of that amendment happens to be only, to a very large extent, sentimental. The word 'sedition' does not appear therein. Sir, in this country we resent even the mention of the word 'sedition' because all through the long period of our political agitation that word 'sedition' has been used against our leaders, and in the abhorrence of that word we are not by any means unique.¹⁵

While there is certainly something to such symbolic arguments, they too suffer from an important, and more general, limitation. For the symbolic value attached to something depends upon how one feels about that thing in the first place, and what one feels is to some extent a matter of choice and perspective, and to some

14. Here he echoed a point made by many people in the Constituent Assembly Debates around the right to freedom of speech.

15. *Constitutional Assembly Debates*, volume VII, 773.

extent a matter of argument. So for instance, when an independent country adopts a colonial legacy, one might see it symbolic of a colonized mindset that has not been able to shake off colonial rule; but one might equally see it as evidence of tolerance or broad-mindedness or strength. What makes the difference will be the content of what is adopted, not the fact that it has been adopted.

Now of course nothing I have said should be construed as a *defence* of any colonial legacies whatsoever. There are good reasons to do away with many of the laws and institutions that are in fact legacies of colonial rule; and these reasons might have to do with the reasons why that rule was illegitimate to begin with, e.g., that they are in fact repressive or fundamentally anti-democratic in some respect, that they have no place in a country that aspires to some form of social justice, and so forth. My point is that arguments from colonial continuity are only valid when we can articulate the reasons *why* we should do away with these laws and institutions. This is generally not difficult to do, and in practice – as in the *Naz* case – arguments from colonial continuity are supplemented by, or are supplementary to, these substantive first-order arguments as well.

But if we can articulate these substantive first-order arguments in this way, it's unclear what extra work is now being done by calling the impugned laws and institutions 'colonial'. Why point fingers at the origins of such laws and institutions when we can point fingers at their content? Perhaps Ambedkar was correct after all, and there is nothing to be ashamed of in borrowing – though one might add, as he did not, that there may be plenty to be ashamed of in what we have in fact borrowed.

India's first class-action suit—that challenged these bans through a language of economic rights rather than religious freedom. It examines how religious freedom, minority rights, and political mobilization were transformed through the emergence of the Constitution as a site for politics.

Chapter 4 explores the new laws against prostitution, enacted to enforce Article 23 of the Constitution, which sought to end the trafficking of women. For nationalists and leaders of the Indian women's movement, independence meant the achievement of constitutional and legal equality and the emergence of the republican female citizen as a moral, productive member of society. However, legislators and social workers were confronted by a different conception of freedom when sex workers began to file constitutional challenges to the antitrafficking laws. They asserted their constitutional right to a trade or a profession and to freedom of movement around the country, and they challenged the procedural irregularities in the new statutes. The chapter demonstrates that despite the sex workers' minimal success in the courts, this litigation prompted mobilization and associational politics outside the court and brought rights language into the everyday life of the sex trade. This is evident from the deep anxieties this largely unsuccessful litigation created for politicians, bureaucrats, and middle-class women's activists.

The epilogue underscores the three connected themes that emerge from the cases: the process through which the Constitution emerged as an organizational assumption and a background threat for the state; the greater acceptability of procedural over substantive challenges to government action; and the origins of constitutional consciousness among certain citizens.

Demonstrating the early emergence of the constitutional field through the acts of marginal citizens, this book challenges the established narrative of the rise of judicial power in India as well as theories of juristocracy globally, which locate this shift in the 1980s and identify the main actors as judges, politicians, and international nongovernmental organizations (NGOs).

Rethinking the People's Constitution: The Constitution

The title of this book, *A People's Constitution*, refers to how we understand constitutions and imagine people's relationship to them. Constitutional and administrative history has long been out of fashion in India. This is in complete contrast to the United States, the other nation with a long history of constitutionalism and a powerful Supreme Court, where constitutional history threatens to crowd out other bodies of legal history. The dry and voluminous tomes

that exist on the subject in India date back to the 1960s; they are consulted largely by those preparing for government service examinations or serve as treatises for practicing lawyers tracing the evolution of a doctrine.⁷⁷ Judges are central, and judgments are the final word. The historian's neglect of constitutional law arises from its identification with elite histories and linear narratives. This book makes a methodological shift by focusing on the contingency of constitutional law and the processes of mediation and translation.

The Constitution as Practice

This book argues that by asking "What did the court do?" in a certain case, we fail to consider the real contestations among judges, litigants, lawyers, and other actors in the presentation of legal claims. To understand how constitutional law works in India, then, it is necessary to understand what people (whether legal officials or ordinary citizens) believe law is and what they do with this knowledge as they make decisions in their daily lives.⁷⁸ An equally frustrating query is "Who won the case?" Although the question is tempting, it is reductive and often unhelpful in explaining people's repeated engagement with law. This book challenges the idea that constitutional interpretation is the monopoly of state elites and recognizes that there are various ways of reading and interpreting the text.⁷⁹

This book challenges the singular truth produced by a judgment-driven narrative by emphasizing the contingency and the contestation that make up the process of litigation. People who decided not to go to court are as important as subjects of study as people who did go to court when faced with a similar dispute. Similarly, this book pays equal attention to the losers in constitutional litigation, exploring what their vision of the correct constitutional order would have been. Legal losses are not always understood as such outside the legal arena. The book examines the afterlife of a court case, not just through its circulation as legal precedent but also through its effect on the lower courts, executive practices, and popular memory. This wider canvas shifts constitutional law away from a teleological project to an arena for struggle.⁸⁰

The Constitution as Archive

What changed with the adoption of a written constitution? What did it mean to be a citizen of a sovereign republic? What did freedom mean to citizens of the Indian state? The answers to these questions remain surprisingly elusive.

The Indian state after independence has received little historical attention compared to both its colonial predecessor and its more recent past. Until recently, disciplinary divisions marked the study of India before independence as the province of historians; after independence, political scientists and anthropologists dominate.⁸¹ Research was also stymied by poor record keeping and other archival practices of the postcolonial states. State documents after independence, the mainstay of histories of colonial India, have rarely been transferred to the archives.⁸²

This book focuses on the two decades that have been described as the Nehruvian period, which begins with Jawaharlal Nehru's appointment as prime minister in 1947 and ends with his death in 1964. Politically, the Congress Party, headed by Nehru (whose leadership was virtually unchallenged after 1952), held office continuously in the central government at Delhi and in almost all state and local bodies. In contrast to contemporary India, which is dominated by neoliberal economic policies and the increased visibility of a politics of identity based on caste and religion, the Nehruvian period has been defined as dominated by a consensus on socialism, secularism, and nonalignment.⁸³ Through centralized planning and modern developmental projects, the primary aims of the state were to combat poverty and to reduce India's dependence on Britain. Its politics were seen as modern and liberal and were dominated by debates about class rather than identity. Its foreign policy was based on principled nonalignment between the Eastern and Western blocs during the Cold War and an opposition to militarization.⁸⁴

We still know very little about the Nehruvian state.⁸⁵ We know particularly little about the role of provincial and local governments, let alone the quotidian lives of ordinary citizens.⁸⁶ However, these constitutional cases are valuable for the breadth of interactions between state and citizen that it makes visible. The Supreme Court Record Room provides a new archive of postcolonial India, and its files contain a variety of documents, including affidavits, government memoranda, newspaper reports, and printed material, that were submitted to the court for evidence. Given the spotty coverage of records in the state archives for this period, the court's record room becomes even more valuable.⁸⁷ These materials open up the cultural practices of the Nehruvian state, the institutionalization of law and legal discourse as the authoritative language of the state, and the "materialization of the state in . . . signs and rituals" and in the practical language of governance (i.e., assertion of territorial sovereignty, development, and management of the national economy).⁸⁸

The emerging scholarship on Nehru's India has focused on how citizens encountered the state in various places. As a result, studies on state formation in postcolonial India have focused on the centralized formation of cultural production from above, either through an analysis of debates among "powerful state actors" about state-produced documentaries, organization of parades, and new practices of town planning or by tracing the intellectual history of the new consensus on an Indian model of development that emerged among elites.⁸⁹ There is an assumption that most citizens remained outside these elite discussions altogether and were increasingly puzzled by their terms. Even though figures like Nehru were aware of the gap and constantly sought to explain the operations of the state and democratic politics to the people, they were caught within their own conceptual language and the limitations of the intelligibility of English.⁹⁰

There is a broad consensus that in the absence of a mechanism of representation, the colonial state relied more on oppressive power and less on self-discipline. The logic of racial difference made it impossible to create a modern liberal state without superseding the conditions of colonial rule.⁹¹ This book examines the nature of postcolonial governance: how regimes and techniques that were predicated on racial difference worked when discrimination was erased and popular representation introduced.

The ambition of the postcolonial state was to reshape both society and the economy. New instrumentalities were created to plan, review, and monitor these programs, and thousands of new laws were enacted by all levels of government. Of the 437 pieces of central-government legislation passed in a century and a half and found in a compilation of civil laws made in 1958, 140 were passed in the first decade of independence. In addition, 73 of the 191 acts involving penal sanctions belonged to the same period.⁹² The majority dealt with social or economic regulation or administrative process, whereas only 28 of the approximately 400 colonial laws could be identified as such.⁹³ The Constitution created a powerful central government with vast revenue-raising powers and virtually blanket powers of legislation. The Planning Commission was established to create overall plans within which a "protective but realistic socialism would be created." The economy was subjected to regulatory control, perhaps more stringent than that of the agencies set up by President Franklin D. Roosevelt as part of the New Deal. A huge public sector would make the manufacture and production of goods and services so vital that they could not be left to the vagaries of private enterprise, and a new import policy would

ensure a measure of austerity for the national good for the Indian middle classes.⁹⁴ The police powers of the state expanded massively at the same time that democratic processes were being implemented. Police powers are deeply rooted in the idea of public welfare, and by tracing changes in police power this book uncovers the transition from the colonial idea of the public to a postcolonial public. The familiar story of the state is of tax collectors marching into villages, social workers teaching housewives about nutritious diets, doctors vaccinating babies, and forest dwellers being displaced to make big dams. This book shows a different side of the experience, when the people not only refused to pay the tax but also started making claims against the state that used the state's own vocabulary.

The most visible practices of citizenship in Nehru's India have been those of refugees and of people displaced by partition. Research in this area has been aided by the preservation of the records of the Ministry of Refugee and Rehabilitation, unlike other ministries, as well as multiple projects to record the oral histories of partition survivors. The refugee experience offers two models of state society relations: one that recognizes the helplessness of individual citizens in the face of bureaucratic violence and decisions from above, and one that emphasizes the active agency of refugees, who used collective action to persuade lower-level officials to deviate from the letter of the law.⁹⁵ Drawing on both approaches, this book turns to the emergence of the Constitution as a field in which the state imagination and citizen agency would interact.⁹⁶

The archive of litigation captures a broad spectrum of everyday interactions between the different levels of the state and its citizens. In 1958 the Law Commission report on the administration of justice argued that since

the country stagnated for one hundred and fifty years of foreign rule, our legislatures are now trying to advance the nation in all directions. In their zeal to achieve quick results, they have not infrequently enacted legislation interfering with the vital and daily functions of the citizen. In order that their policies may go forward uninterrupted they have endeavored to entrench the executive and succumbed to the temptation of restricting the powers of the court.⁹⁷

As the new state sought to implement its policies through laws and administrative action, those affected by it frequently appeared before the courts. The docket might include an association of printers challenging the state government's takeover of textbook production;⁹⁸ a schoolgirl refusing to comply with a government order forcing her to study in her mother tongue;⁹⁹ a widow

protesting the requisitioning of her apartment by the rationing office;¹⁰⁰ a Hindu man unable to take a second wife because of marriage law reform;¹⁰¹ and a Communist Party newspaper editor facing censorship by the central government.¹⁰² It is not surprising, therefore that citizens "make of the rituals, representations, and laws imposed on them something quite different from what their originators had in mind."¹⁰³

The Constitution as Democratic Practice

Unlike studies on how the state was produced from above, the Constitution opens up ways that the state is undone and negotiated from below. As this book demonstrates, constitutional litigation provided an option for citizens to insert themselves into an elite conversation. The writ petition and the new Constitution compelled state authorities, including high-ranking bureaucrats and ministers, to come to court to defend their policies. It also required them to respond specifically to the claims made by the litigants. The constitutional courtroom is distinctly different in form and content from the records of the executive or the legislature; here, instead of citizens encountering the state, the state suddenly encounters its citizens.

The courtroom was therefore the space of the unexpected. A study of the Supreme Court in the mid-1960s showed that two-thirds of the cases involved a level of government on one side and an individual or a private party on the other side. The government lost fully 40 percent of its cases in this category of litigation. Moreover, in 487 of these 3,272 decisions, the validity of certain legislation had been explicitly attacked by the private party in the dispute, and in 128 of these instances the legislation was held unconstitutional or otherwise invalid in its entirety (twenty-seven state laws, four laws) or in part (seventy state laws, twenty-seven central laws). The study concluded that "few, if any, other governments in the world fare as poorly in encounters with their citizens before the nation's highest judicial tribunal."¹⁰⁴ It is the uncertainty of the encounter in the courtroom that makes it a valuable archive, for law is the arena in which abstract new principles run up against the messiness of social change.¹⁰⁵

Rethinking the People's Constitution: The People

The people who inhabit books on constitutional law are judges, lawyers, and the occasional politician. In doctrine-driven scholarship, judges emerge as the central actors, and little attention is paid to the actual litigants or to the

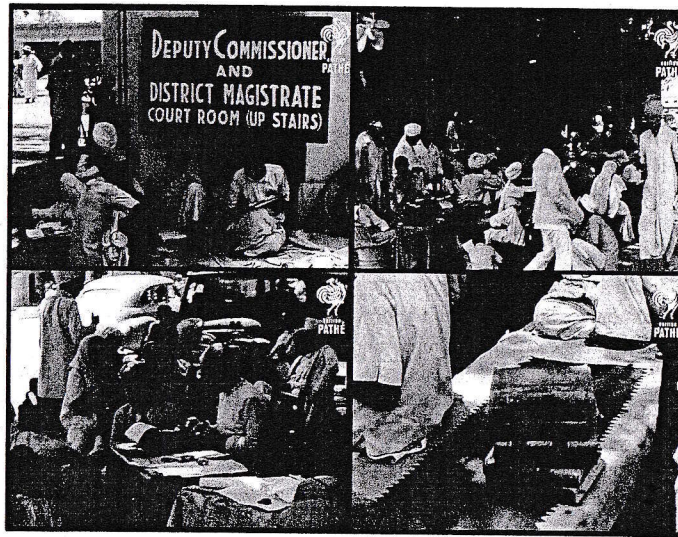


FIG. 0.4. Scenes from *Lawyers of Delhi* (Pathe Films, 1948) of refugee lawyers and clients conducting business on the streets outside the Delhi district courts.

histories of the disputes. It is not surprising, therefore, that the major debates over constitutional law in India have been framed around the question of judicial intervention or activism: What is the appropriate role for judges in a democracy?¹⁰⁶ This book makes a methodological shift away from the approaches distinguished above and toward a social history of constitutional law. In seeking to integrate the subjects of Indian social history (subaltern actors and everyday life) and Indian constitutional law (high politics, judges, and political theory), I draw upon the methods of constitutional ethnography to "better understand how constitutional systems operate by identifying the mechanisms through which governance is accomplished and the strategies through which governance is attempted, experienced, resisted, and revised, taken in their historical depth and cultural context (fig. 0.4)."¹⁰⁷

The central actor in this book is the citizen litigant, who has received little attention as a political actor in South Asian history. Litigants, and even litigation itself as a mode of political action, have easily been labeled bourgeois in India; as such, litigation has been regarded as an activity unavailable to the majority of the population. The popular argument is that the bulk of democratic

politics in the postcolonial world, particularly India, lies in the realm of political society in contrast to civil society. Whereas civil-society politics are marked by modern associations such as autonomy, deliberative decision making, and individual rights and operate through formal institutions like the courts and the media, political-society politics "make their claims on government, and in turn are governed not within the framework of stable constitutionally defined rights and law, but rather through temporary, contextual, and unstable arrangements arrived at through direct political negotiations."¹⁰⁸ Law is regarded with suspicion here because its application seeks to disrupt the tacit acceptance of illegalities, such as squatting or vending without a license.

This book challenges the above view as an empirical fact, showing that thousands of individuals who turned to the court were from groups that were marginalized both socially and economically in independent India. Although only a few could be considered to be absolutely poor, many participated in the informal economy or were rendered marginal because of their religion or their sex. This diverse group of litigants included prostitutes, Muslim butchers, Hindu refugees, Muslims who had been evicted from their homes, vegetable vendors, and even the occasional peasant rebel. This book does not suggest that litigation was an option available to all citizens of India but only argues that access to it was not determined solely by one's socioeconomic class.

Unlike litigation in the United States, to which it is often compared, strategic litigation in India was not driven by NGOs or public-interest law firms. For organizing legal campaigns nationally, there was no Indian equivalent to the American Civil Liberties Union in the United States or the Haldane Society of Socialist Lawyers in Britain. The lawyers who appear in this book are largely ordinary lawyers, handling a range of different matters, who were approached by their clients. However, India at the time of independence had at least 72,425 legal practitioners.¹⁰⁹ Although the number might seem small relative to India's population, it was the second highest in the world after the United States and was striking, compared to most newly independent states of Asia and Africa. For instance, on the eve of independence, Indonesia had only 36 native lawyers. China reported only 3,000 lawyers in 1957, despite having a comparable population to India's. The situation in the former British colonies was equally dire, with expatriate Indians making up most of the non-European legal profession in eastern and southern Africa.

By the 1940s the Indian legal profession had come to constitute a fairly well-defined professional public, with common journals, association meetings, and lobbying groups. Lawyers who represented opposite sides and the judges who

heard them continued to share professional and social bonds. It is this bond that the book explores in order to contextualize legal professionals as mediators. In the decade after independence, lawyers, judges, and legal academics were consciously engaged in examining the problems of the Indian legal system. Through commission reports, journal articles, biographies, and newspaper editorials, they spoke as lawyers expressing their concerns and visions for the new legal regime.

The People as Postcolonial Citizens

How were the claims and strategies of Indians as postcolonial citizens different from their claims as colonial subjects? Rights claims and rights consciousness in India did not emerge with the enactment of the Constitution. The challenges in a search for rights consciousness arise from the fragmented nature of the public sphere in colonial India. Indians were seen to lack the Liberty Tree of British imaginings. In his history of liberal thought in India, Christopher Bayly has emphasized how everyday encounters in colonial India informed the debates among both British and Indian intellectuals over the rights of Indians. For instance, cases of lascars (Indian seamen) in Britain who were damaging ships in response to mistreatment opened up a debate over the rights of Indians and their relationship to British property.¹¹⁰ Demanding access to new professions and jurisdictions across the empire, Indians formulated and laid claim to various universalist ideas of citizenship even when it was being denied to them.¹¹¹ However, these forms of rights and claim making were limited in significant ways.

First, even the most persuasive advocate of these British Indian claims had little ability to enforce them. The powers of the courts were trimmed, and the limited representative government that existed had minimal powers. Thus a majority of these claims were expressed through the petitioning of various authorities, a practice that later nationalists would pejoratively describe as mendicant liberalism. Early Indian liberals adopted a juridical model of justice, but they saw the British Crown and Parliament as their court, where they could make appeals against the despotic local colonial government.¹¹²

Second, in the absence of guaranteed liberties, many of these claims had to be made with great subtlety, through "parody, innuendo, and indirect criticism," and the claimants had to search for new forums in the absence of representative institutions and in view of the elusiveness of the law.¹¹³ Finally, Bayly makes an important distinction between claims made by rights-bearing

individuals (which formed the basis of Indian liberalism) and claims made by holders of "ancient customary liberties."¹¹⁴

The demand for the protection of "ancient customary liberties," made by subjects ranging from Hindu widows insisting on their inheritance rights to temple authorities resisting taxation, formed the more broad-based secondary order of rights claims in colonial India. This order drew on promises made by the colonial government, in 1772 and 1858, to apply Hindu and Muslim religious laws to matters concerning marriage and inheritance. These promises became a point of furious contestation between the state and various groups of citizens. The colonial state's interference in the private domain was resisted by many nationalists, who viewed the incipient nation as enjoying sovereignty and superiority in the inner domain of family, culture, and community while conceding the colonial state's dominance in the outer domain.¹¹⁵ As recent scholarship has argued, the administration of Hindu and Muslim law did not merely resurrect scriptural authority but transformed it through liberal ideas of equality, women's rights, and difference.¹¹⁶ Tanika Sarkar argues that rights were developed from messy encounters between scriptural law and the Anglo-American legal system rather than from any form of systematic political thinking.¹¹⁷ Unlike the West, where group rights emerged within established civic communities, in colonial India rights were accorded to groups before the formation of a civic community, that is, the nation.¹¹⁸

The Constitution transformed both orders of rights. It brought forward a written code that explicitly granted rights to all citizens. Citizens belonging to a broad range of classes presented themselves before the state as rights-bearing individuals, in contrast to petitioners seeking to have some rights recognized or propagandists working through innuendo or shadows. The difference is not merely semantic. Rights claims in colonial India were first a question of recognition—that is, of whether the subject had a right—whereas under the new Constitution they became a question of enforcement, based on an assumption that the existence of rights was already guaranteed. A legally enforceable right is distinct from the same right framed as a moral claim or as a privilege granted by the benevolent colonial state.

Furthermore, the distinction between claims made as rights-bearing individuals and those made as holders of customary liberties became difficult to sustain after independence. The argument for noninterference with custom and tradition had been based on the fragmented authority between the alien state and its communities. However, with independence the state moved from the outer sphere to encompass all areas of life. The Constitution explicitly

recognized religion and family as arenas for transformation. The right to practice and profess one's religion was limited on several grounds, including public order, morality, and health.¹¹⁹

The most drastic change from the precolonial system was the displacement of a normative inequality as the foundation for the conceptions of rights in India. Rights under the colonial government were determined by caste, class, and sex and drew on custom.¹²⁰ The Constitution, however, heralded a formal equality between all citizens and created a common source of rights for all. However, as the constitutional founders recognized, this did not herald immediate social transformation. Given the limited history of individual rights claims in colonial and precolonial India, from what source did the new postcolonial rights claims emerge?

The People, Property, and the Market

The cornerstone of the colonial legal system and classical liberal theory was the protection of individual property rights. Property law thus became the framework within which status-based community identities could be incorporated into state-recognized individual rights.¹²¹ The language of property rights was called on even when other rights were at stake—for instance, disputes over religious ritual and authority were settled by appealing to property titles.¹²² David Gilmartin and Jonathan Ocko argue that property law provided the model for the notions of rights in colonial India and linked the individual and indigenous conceptions of identity together. Thus, religious and customary privileges came to be conceptualized as forms of individual property. It was not surprising that the only right guaranteed in the colonial Government of India Act of 1935 was the right to property.¹²³

However, the right to property itself became a ground for contestation in the Constituent Assembly. Several members argued in favor of weaker property rights to allow the state to bring about land reforms and redistribute property. Although the Constitution guaranteed the right to hold, acquire, and dispose of property, the right was subject to several limitations. Confronted with early court decisions striking down land reform law as violating the right to property, parliament sought to successively amend the Constitution and narrow the right. The very first amendment to the Constitution in 1951 granted the state the power to acquire property for "public purposes" or to "secure property management." Laws implementing such acquisitions were declared immune to judicial review and fundamental-rights challenges. The right to

property continued to be eroded until the 42nd Amendment in 1978 deleted it entirely from the fundamental-rights section.¹²⁴

How did a rights order that was predicated on the right to property turn into a system in which property was the least secure right? This book uncovers a process of translation in which claims to property were increasingly coded as the right to freedom of expression, privacy, or equality. This move reversed the logic of the colonial order of rights in which various claims had to be translated through the right to property.

So how did the colonial rule of property change with independence? Based on archival findings, this book argues that the market replaced property as the basis for the new rights order. This challenges the political economy narratives about the Constitution that have almost exclusively considered real property (i.e., urban and agricultural land). The market had emerged as an object of governance in colonial India in the late nineteenth century but became central to the postcolonial state's imagination as it sought to simultaneously industrialize and redistribute property. Building on Ritu Birla's work on the imbrication of culture with economy, this book shows how the new order of rights grew out of questions of consumption, production, and retail.¹²⁵

Studies of democracy in independent India have predominantly focused on elections and representation and have given little attention to the judicial process. This book considers writ petitions against new government initiatives that sought to radically transform the state as critical events. A *critical event* is an event through which new modes of action emerge that redefine traditional categories and that can be acquired by a variety of political groups.¹²⁶ These critical events form a new genealogy of Indian constitutionalism that emerges from the everyday acts from citizens. Thus, to use the words of Hannah Arendt, this book explores the process by which the Constitution emerged as a hybrid realm where "private interests assumed public significance."¹²⁷

Epilogue

THE EVE OF INDIAN INDEPENDENCE was marked by joyous celebrations as thousands of ordinary Indians flooded the formerly inaccessible government buildings to witness the rituals of the transfer of power. Cheering crowds occupied every inch of the central government in Delhi and blocked the vice-regal cavalcade, forcing Jawaharlal Nehru to lean out from the Constituent Assembly terrace and cajole the crowd into letting the viceroy move. In Calcutta, boisterous crowds invaded the governor's palace, jumped on the four-poster beds, ran the bathtub faucets, and even knocked off the departing English governor's hat. The world had momentarily turned upside down—the people and the state had merged. Yet this moment was short-lived; as Nehru announced Indian independence, mounted policemen pushed back the crowds with sticks, and in the following week the rituals of state took over. The people were put back in their place; permitted to emerge only when an election was held. This book has argued that it was the promulgation of the republican constitution in 1950 that made the people a constant presence for the government.

Let us return to Mohammed Yasin, the vegetable seller from Jalalabad, to answer the two original questions raised in this book: Did the Indian Constitution matter, and to whom did it matter? Yasin emerged victorious in his bid to sell vegetables. The Supreme Court ruled that the Jalalabad municipality did not have the authority to impose a license fee and that this was an unreasonable restriction on Yasin's fundamental right to carry out a trade or business.

Yasin was not a wealthy man. Local tax records show that his father, Niamatullah, had asked to be excused from paying taxes because it was difficult to support his family of eight on an income of 150 rupees a month. Yasin's decision to go to court was a calculated risk, influenced by the fact that the

municipal regulation effectively shut down his business and that other people in neighboring towns had been successful in bringing similar action before the courts. Yasin's petition refers to two previous cases, before the high court and the Supreme Court, that involved Muslim vegetable sellers suing municipalities within the same district. The fact that both cases had been successful encouraged Yasin to take his chances in court.¹

Yasin's story mirrors that of dozens of others, making the case that the Indian Constitution *mattered* in the everyday lives of its citizens in significant ways. The first decade after independence saw constitutional law emerge as a field in which the postcolonial state and other authorities (e.g., religious, community, or political, or market logic) would interact and a new postcolonial governmentality would take shape. This was not a process that was strategized by a set of individuals or an organization with an agenda; it arose through the actions of thousands of Indians who learned from one another.² This marks a departure from other postcolonial narratives of constitutionalism in which the foundations were laid by either a heroic judge or a well-resourced, often internationally funded organization.³ For such a phenomenon to exist, there had to emerge a shared popular understanding of the role of constitutional law as distinct from ordinary law. As the rate of civil litigation fell, that of litigation against the state rose.

These claims are more significant than they might appear at first glance. Scholars writing about law and society in the West have not needed to be apologetic about legal histories. American historians, for instance, have held law and legal practices to be intrinsic to American life. Hendrik Hartog states, "Americans had law, they made law, they inherited law, they used law, and they were subject to law."⁴ However, this was not as apparent in India. Under colonial rule India was portrayed as a place without law, thus justifying British governance. Therefore, many of the laws that existed until 1947 were neither made nor inherited by Indians. Whether Indians used law or were actually subject to law in colonial India has been debated, with a significant number of scholars arguing that the law and the state was external to the imagination of a majority of Indians. Gandhi himself launched a blistering critique of the colonial legal system, encouraged both ordinary Indians and nationalist lawyers to boycott courts, and encouraged the development of indigenous systems of arbitration and mediation.

The constitutional litigation challenges the above narrative, for various groups and individuals showed a great awareness of the law and engaged the legal system quite skillfully. In fact, it is the government that often found itself

frustrated and underprepared before the courts. In Yasin's case, the municipality of Jalalabad found itself begging the Supreme Court for an extension of its deadline to file a response; it had no budget for litigation expenses because it had never had to deal with legal challenges in Delhi before.⁵ Litigation was an expense not just for the ordinary citizen but also for the state, and the bureaucrats began to note with alarm the exorbitant fees commanded by the government's own lawyers. For instance, a lawyer who was prosecuting men accused of treason in Kashmir was billing 1,750 rupees a day, with a total bill of 301,850 rupees. In more ordinary cases involving government promotions, the lawyer billed 600 rupees per hearing.⁶

This uncertainty about the results of a case and the novelty of constitutional law made possible a widespread investment in constitutional litigation. Writ petitions were new not just to litigants but also to lawyers and judges. Shanti Bhushan, a leading constitutional lawyer and a former law minister, recounts in his memoirs how he got out of a traffic ticket by filing a writ petition and educating a rather bemused judge about his new powers. Justice Mehr Chand Mahajan of the Supreme Court of India reminisced that he knew little of constitutional law when appointed to the bench, and he spent his first couple of years on the Supreme Court reading American constitutional treatises. Entrepreneurial law publishers sent agents to different cities to ask lawyers what books they needed and began to commission textbooks and treatises on constitutional and administrative law.⁷ This was a period of experimentation, flux, and creativity, when anything, much to the horror of the state, was possible.

Talking the State's Language

Critics of the Indian Constitution have repeatedly pointed out that it reflected a certain bourgeois nationalist vision of the state rather than popular constitutionalism. This concern was shared by B. R. Ambedkar, the chairman of the drafting committee; he warned the Constituent Assembly, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it."⁸ To its authors, the Constitution was a state project that had to be disseminated among the masses, through school textbooks, pamphlets, public exhibition, and documentaries.⁹

The availability of judicial remedies, however, made the Constitution a two-way process. This point was noted by Zairul Hassan Lari, a renegade Muslim League member of the Constituent Assembly, who left for Pakistan midway through the deliberations. Lari agreed with Ambedkar that "constitutional

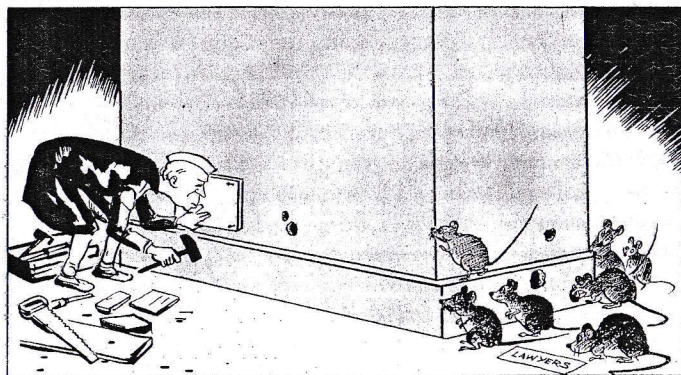


FIG. 5.1. "Battle of Wits." *Shankar's Weekly*, March 20, 1955.

"morality ... had to be cultivated," but he perceptively noted that not only people but governments had to learn it.¹⁰ The Constitution by itself was neither emancipatory nor repressive but merely provided a language in which the citizen could communicate with the state. Upendra Baxi has argued that the power of judicial discourse in India was the capacity to raise awkward questions about the intention, competence, and wisdom of the executive.¹¹ This awkwardness frustrated the executive, delayed and forced policy changes, and caused significant expenses. A newspaper cartoon (fig. 5.1) conveys some of this frustration; it shows Nehru patching up holes in the Constitution while lawyers are digging new ones.

Those who had made successful interventions in the process of constitution making now demanded that the Constitution be amended or transformed. Bombay ministers finally held that no solution except a constitutional amendment could successfully implement Prohibition.¹² After the *Hanif Qureshi* judgment, the cow protection lobby despaired of any solution under the present Constitution.¹³ Poignantly, a liberal lawyer like Durgabai Deshmukh, on being confronted by prostitutes asserting their right to their profession, argued that the solution lay in having the courage to amend the freedoms in the Constitution.¹⁴

Although the constitutional strategy was often used as a tactical tool, it also began to operate as an organizational assumption for citizens and as a background threat for the state.¹⁵ Despite frequent denials of their rights by the

state, Muslims in colonial India continued to assert that they could sacrifice cows based on a right rooted in their status as British subjects. Similarly, sex workers continued to assert that they had a right to practice their profession even after Supreme Court judgments to the contrary. This is slightly different from American constitutional rights consciousness, which Hartog defines as "a faith that the received meanings of constitutional texts will change when confronted with the legitimate aspirations of autonomous citizens and groups."¹⁶

This faith survived even when these aspirations, such as those of blacks, women, and gays, ran contrary to the current doctrines of constitutional law. However, implicit in this aspiration was the idea that the state would endorse such faith at some point in the future. In the Indian context, such faith seemed to exist without necessarily requiring or seeking state endorsement, and it remains a puzzle for further inquiry. It is tempting to suggest that Indians began to believe in the Constitution or that they were internally transformed by it, but it is impossible to prove this. What is definite is that Indians from a wide range of groups came to see the Constitution as a check on executive power and a powerful way to frame their claims.

Concurrently, state authorities began to become more cautious about law. In the Prohibition case, after multiple legal challenges, the government spent considerable time and energy trying to make the system of investigation and administration of Prohibition offenses conform to legal standards.¹⁷ Experts hired by the government drew widely on knowledge of comparative law and experiences in other jurisdictions, particularly the United States.¹⁸ Legal experts in the Ministry of Law at Delhi struggled to bring wayward state legislation in conformity with the Supreme Court decisions in the *Qureshis'* cases.¹⁹ Similarly, the problems of prosecuting sex workers led to significant rounds of consultations between police officers and social workers.²⁰ Therefore, it was a constitutionalism from below that made the postcolonial state attempt to discipline itself.

What emerges is not a story of simple resistance to state authority. The process of pushing back through the Constitution brought citizens into closer engagement with the state and reaffirmed its right to exist.

Procedure over Substance

It is evident that all arguments did not gain an equal level of traction before the courts. Substantive rights claims that were more likely to capture public imagination had less success. The answer lay partly in the nature of rights

themselves. As noted earlier, fundamental rights in the Indian Constitution could be circumscribed on a variety of grounds, and the list of grounds was expanded through amendments.²¹ Moreover, because the drafters feared litigation, the Constitution expressly provided that the rights could be limited by a procedure established through law rather than the more substantive due process of law.²² The courts were hesitant in the early years to strike down legislative initiatives even when they had concerns about the policy implications. Therefore, the courts found that the ban on cow slaughter and the imposition of commodity controls were reasonable restrictions on the right to a trade and a profession, the eviction of prostitutes was a reasonable restriction of their right to freedom of movement, and the imposition of Prohibition was a reasonable restriction on property. The courts remained conscious of the fact that these laws had been enacted by a popularly elected government that enjoyed both democratic legitimacy and popular authority, so they were careful about what they struck down.

However, it was precisely in the cases involving the more procedural aspect that the courts emerged as strict taskmasters. They came down heavily on what they perceived as bureaucratic arbitrariness. In the Prohibition cases, expanded police powers and the unfair burden of proof was challenged. In the commodity control cases, excessive delegation of authority to bureaucrats drew judicial ire. In the prostitution cases, the arbitrary powers of a local magistrate to evict any woman from the neighborhood became the area of contestation.

Independence created the conditions for such claims to resonate strongly. The state was being reconstituted, more than five hundred territories were being absorbed, the administration had rapidly expanded, and government was entering new arenas. This raised the question of defining jurisdictions. Federalism and the separation of the judiciary from the executive both became productive sites of litigation. With a strong centralized government for the first time, the local, provincial, and national arenas of politics began to interact more closely. Shared competences and diverging policies, in the case of Prohibition and cow slaughter, provided many loopholes that could be exploited. The centralizing tendencies of the Indian state were activated not just by state functionaries, who saw a patchwork of state laws as loopholes for those seeking to engage in illegal traffic (of women, alcohol, cows, or commodities), but also by electoral minorities who petitioned the Supreme Court or the newly empowered high courts over local authorities. The Qureshis organized nationally and petitioned the Supreme Court directly; information networks of prostitutes saw simultaneous action in Bombay, Allahabad, Punjab, and Bengal.

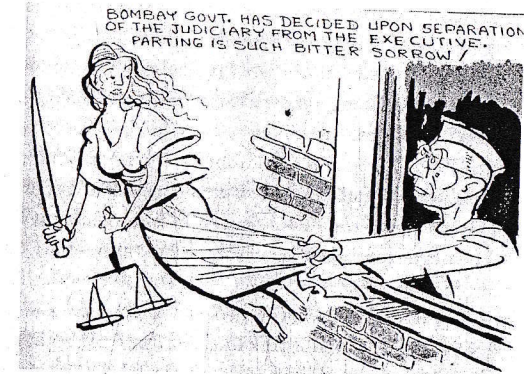


FIG. 5.2. The Congress Party government in Bombay was reluctant to create an independent lower judiciary, separate from the executive branch.

Shankar's Weekly, July 5, 1953.

Yet despite the constitutional mandate, the separation of the judiciary from the executive was a slow process (fig. 5.2).²³ The high courts, staffed largely by judges drawn from the bar, were suspicious of the district magistrates, who were drawn from the civil service and also served executive functions. The judges remained unconvinced that members of the administration could play an independent judicial role. In the prostitution cases, this is most clearly evident in the contrast between the decisions of the Allahabad and Andhra Pradesh High Courts on Section 20 of SITA. In Allahabad, where the separation of the judiciary from the executive had not yet taken place, the clause was struck down on the grounds that it permitted the magistrate to exercise power arbitrarily, but in Andhra Pradesh, which was one of the first states to separate the judiciary, the court upheld its constitutionality.

Karen Orren narrates an account of American constitutional development through the lens of conflict between the older notions of the rights of office-holders and those of private citizens, with the Supreme Court frequently siding with the former.²⁴ India did not have a long common-law history of office-holders, and the 1950s placed the offices that had evolved under colonial rule in a state of flux. As a representative democratic state, India did not hesitate to intervene with authorities (princes, landlords, priests, or husbands) that the colonial state had at least publicly appeared to grant neutrality. Similarly, the great office of the colonial district magistrate was also being redefined through these constitutional challenges.

Critical legal scholars have observed with some regret the transformation of a heated rights question into a debate over procedure. Upendra Baxi lamented how the crucial grassroots issue of agrarian reform was converted into a "superstructural issue" of the limits of judicial power and the plenary power over amendments.²⁵ The translation of politics into law has consequences. We are cautioned that the growing centrality of legal norms in people's attempts to resist governmental authority is changing the modes of resistance and submission. It reduces the pluralism of the "weapons of the weak" and replaces, to some degree, the many other forms of circumventing, subverting, and conforming to authority.²⁶

However, as this book has demonstrated, the consequences of this transformation can be beneficial to subaltern litigants. The four sets of litigants in this book represent groups that are marginal and have limited social capital amid a wider public. All were vilified in public discourse—as the pro-British Parsis, the corrupt and venal Marwari traders, the seductive and immoral prostitutes, and the brutal and cruel Muslim butchers—and had few allies outside their own groups. They stood outside the consensus of what a good Indian citizen should be.

Therefore, an argument rooted in their rights as prostitutes, traders, or butchers would not find popular resonance outside their groups. However, by framing their problem as one of procedure, these litigants were able to deflect attention from themselves and generalize the problem to the broader public. This was an interesting contrast to colonial India, where emphasizing particular rights was more profitable, but all of them were rooted in custom and religion.

Constitutionalism from the Margins

This book has shown that constitutional litigation was not limited to elites but was accessed by a cross-section of people. I would even suggest that the constitutional culture of the 1950s was shaped predominantly by the interventions of certain marginal groups. The institution of electoral democracy generated a particular form of subalternity: minorities that were unable to succeed electorally increasingly turned to the courts. Although this is not unusual in most democracies, the situation was complicated in India because electoral minorities are not just members of a socioeconomic class or followers of a certain ideology but are inextricably linked to ascriptive identities.

As I started looking for cases involving transformative legislation, I did not expect that every set of legal challenges would be dominated by members of

a particular community. Although cow slaughter was more easily an identity issue, I had not imagined that commodity controls, Prohibition, and prostitution would also have a preponderance of cases filed by certain electoral minorities. Conversely, all electoral minorities were not able to gain access to the courts. So what determined the ability to successfully litigate?

As this book has shown, it was often groups that faced the greatest degree of state oppression that were the most able to litigate. Butchers, liquor sellers, and sex workers all dealt with multiple sets of regulation and faced the intrusive presence of state officials (health inspectors, policemen, social workers, or municipal officers). They all experienced multiple points of contact with the state and gained familiarity with the rules and regulations.²⁷ The level of awareness demonstrated by illiterate sex workers about the intricacies of zoning regulations, for instance, is often surprising. Traders, often operating outside the gaze of the state, suddenly found themselves under surveillance during World War II, and this surveillance became institutionalized after independence.

The groups that exhibited greater legal consciousness and access were those with strong community associations. These included formal institutions like the Bombay Parsi Panchayat and the Marwari-dominated Federation of Indian Chambers of Commerce and Industry, more hybrid associations like the All India Jamiatul Quresh Action Committee, and the newly set-up Allahabad Dancing Girls Union. Groups that doubled as professional associations and caste or community organizations were instrumental in legal mobilizing, lobbying, circulating knowledge, and supporting litigation. The existence of these associational forms complicates the divide between the categories of civil society and political society. It also challenges traditional accounts of liberal politics and suggests that liberty, property, and community are inextricably linked in India. Although liberal theory has carefully distinguished individual rights and groups rights, it is clear that in India the claims for individual rights were organized, funded, and supported by a group seeking to protect its own practices.

Group rights, particularly minority rights in India, have largely centered on questions of culture (language, religion, and status). This is despite Ambedkar's memorandum on minority rights, which noted that the "connection between individual liberty and the shape and form of the economic structure of the society may not be apparent to everyone . . . nonetheless the connection is real."²⁸ In a society built on caste, ascriptive identities and the structure of the economy were closely interlinked, and the Nehruvian state's attempts to reengineer the economy were resisted through networks of caste. This

challenges the widely held belief that the vernacularization of Indian politics and the deepening of its electoral democracy happened in the 1970s and that this was when politics of caste, region, and religion erased an earlier vocabulary of class interests and capitalism. Claims for liberal rights in the 1950s arose from an economic world that was structured by caste. For instance, Yasin's case followed similar attempts by Muslim vegetable sellers in other towns in the province of Uttar Pradesh. This was not a coincidence. Much of the vegetable trade in north India is dominated by Arians, a Muslim subcaste of market gardeners, and it is likely that Yasin's petition was part of a coordinated action, or at least a result of networked information sharing.²⁹

This book has therefore built on the argument that the introduction of liberal democratic processes in India, whether elections or judicial review, have not eradicated caste but have been mediated by it. It is now widely acknowledged that the poorest and most vulnerable populations in India are perhaps the most active participants in electoral politics, and it is through their participation that the "democratic process has in some ways detached itself from the institutional infirmities that surround it and acquired an autonomy of its own."³⁰ Contrary to conventional belief, similar processes, I have shown, are at play with constitutionalism.

This is not to suggest that all castes and groups could participate in these processes in the 1950s. Landless peasants do not appear in these narratives, and Dalits and tribals remain underrepresented, except when they were arrested by the police. The majority of the groups appearing in the archive are able to participate in the bazaar economy. However, scholars have demonstrated that in recent years, both Dalits and tribal groups have drawn upon the Constitution to make assertive claims in the courts and outside.³¹

A Constitution for Butchers? Markets, Circulation, and the Origin of Rights

In 1978 the Supreme Court of India admitted a petition from a poor mason, Moti Ram, who was asking for his bail order to be modified. The local magistrate had set the bail surety at ten thousand rupees and required the sureties from the same district, rejecting the suretyship of the petitioner's brother because his assets were in another jurisdiction. Justice Krishna Iyer ruled in Ram's favor, holding that there was a need for "liberal interpretation in areas of social justice, individual freedom, and indigent rights." He thundered from the bench

that it shocked one's conscience to ask a mason like the petitioner to furnish sureties for ten thousand rupees. He reminded the court and the errant magistrate that "our Constitution, enacted by 'We the People of India,' is meant for the butcher, the baker, and the candlestick maker—shall we add the bonded laborer and the pavement dweller?"³²

Justice Iyer's exhortation was a conscious reference to a statement made by Justice Vivian Bose in 1956. Expressing exasperation at procedural delays in getting relief for a petitioner, Justice Bose declaimed "that the Constitution is not for the exclusive benefit of governments and states; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the butcher, the baker, and the candlestick maker."³³ Justice Iyer's inclusion of the pavement dweller and the bonded laborer to this list marks the beginning of public-interest litigation in the narrative of constitutional law in India.

Upendra Baxi argues that the elevation of Justice Iyer reinforced the tendency of the court to judicial populism, for he "unrelentingly insisted that the law is meant for the people, and not the people for the law, and as a neo-Marxist, he meant by people, mainly the proletariat and not the propertariat."³⁴ As Baxi states, this marked the beginning of a phase that led the Supreme Court of India to become the Supreme Court of Indians. This implies that the Supreme Court in the period this book covers was not a court for all Indians when it was only the court for butchers, bakers, and candlestick makers. Baxi echoes a criticism often made by Nehru and others in government that constitutional litigation was led by vested or special interests, unlike the state, which represented national interest. I argue that these value-loaded terms mischaracterize a natural consequence of the policies of the Nehruvian state.

Where did claims for rights emerge from in the 1950s? A common thread running through the cases in this book is a concern about the practice of a trade and profession and the free movement of people, goods and services. Although the butchers and the commodity traders directly fall into this category, it also exposes the commercial interests that lay behind the civil liberty challenges to prohibition. The cases brought by the sex workers were about harassment and equality but also fundamentally about the right to earn their livelihood. Therefore, a significant proportion of everyday rights cases in Nehruvian India emerged through the market.

The easiest explanation, of course, is that people would incur costs to go to court only if there was something substantial at stake. However, this also

sets up a new template for thinking about the Nehruvian state in India. The Nehruvian state, with its instrumentalities of planning, nationalizing of key industries, and state-directed development projects, has been described as antimarket. The multitude of new legislation examined in this book suggests that instead of being crudely antimarket, the new state was attempting to create a new set of market norms and reshape networks of circulation, whether of goods (alcohol, beef, and cotton), capital, or bodies. The vision laid out in the Directive Principles of State Policy imagined a new governing logic for state and society. This transformation did not take place overnight, and the roots of this were laid in the late 1920s and 1930s with increasing electoral representation in municipal and provincial governments. Municipalities in the 1920s sought to expel prostitutes, whereas the first elected provincial governments in 1939 attempted to bring about prohibition.

The rights claims before the judiciary in the 1950s, unlike the rights claims today, were claims not for new rights but for continuing older practices that were now being challenged or forbidden by the new government. Therefore, the contest was not just between a totalitarian state imagination and an individual, or even the majority and a minority, although both of these were factors, but between the virtuous citizen (who practiced austerity, was sexually abstinent, didn't drink alcohol or consume beef, and didn't waste time or money) and those who fell outside this definition; the latter created a new kind of ethical agent, the litigious citizen. This book has pointed out, that although a claim of cultural autonomy to protect lifestyles could be made against a colonial state, it was harder to sustain in a democratic republic. The overrepresentation of minorities in litigation shows that they took seriously the promise of equality and the state's obligation to protect their rights. Despite minority rights in India having been largely understood through the realm of identity and culture, the claims made by minorities were for economic rights: the need to protect minority-owned businesses (Parsi liquor interests and Muslim butchers), to feed the poor (prostitutes' claims to welfare), or to reduce bureaucratic arbitrariness.

Constitutional law thus became the field in which citizens marked as deviant in the new order could recast themselves as virtuous constitutional actors. These citizens differed in the extent of their marginality—for instance, Marwari petty merchants were better placed than prostitutes and vegetable vendors. However, all their cases carved out rules and norms that benefited a larger populace.

Making themselves subject to the Constitution did not necessarily bind entreprising citizens to the hegemony of courts and judges. To return to the vegetable vendor, Mohammed Yasin, even before the Supreme Court arrived at a decision, Yasin and his friends hired Nanu, the local Dalit town crier, to beat his drum and announce across the town of Jalalabad that there was a case between the public and the town, and the public had won and the town had lost. The town committee was outraged and wrote to the Supreme Court urging that Yasin be charged with contempt, both for conflating his petition with the public and for putting out a false story. The judges just filed away the complaint. Clearly, as early as 1950, a popular language existed which would cause an individual's claim against the state to be translated as a public claim against the state. It starkly demonstrates that jurisgenesis, or the creation of legal meaning, is not only in the hands of legal elites.³⁵ Regardless of the court's judgments, people created and disseminated their own meanings of the Constitution, which may even be a successful insurgent and displace the elite conception of the law.³⁶ As citizens, historians, and lawyers, we should listen for Nanu's drumming as we look at the Constitution, reminding ourselves that constitutional narratives are forged both inside and outside courtrooms.

Indian Constitutionalism
Ambedkar University, Delhi (2019)

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**Course packet VI: Dr. Ambedkar, Democracy,
and the Constitution**

1. Dr. B. R. Ambedkar, speech on third reading of the Draft Constitution, *Constituent Assembly Debates* vol 11 (25 November 1949)
2. Ujjwal Kumar Singh and Anupama Rao, "B. R. Ambedkar and the Ideas of Constitutionalism and Constitutional Democracy," *Summerhill, IIAS Review*, XXIII:2 (Winter 2017)

The very motive seems to me to be behind the words "the State shall endeavour to" used in the articles under reference. The same thing can be said in regard to the provisions relating to prohibition. We have not put a complete stop to the slaughter of cows. The appointment of a Commission provided in article 340 to investigate the conditions of the backward classes, must be made within six months of the commencement of the Constitution for the problem is a serious one and unless they are brought at par with the advanced classes, the country can make no progress.

Lastly I would draw your attention, Sir, to the growing spirit of provincialism in the country. The bigger and more advanced Provinces want to devour the smaller and less advanced ones. For instance I may mention the case of Bihar. All the profit in respect of the mineral products of the Province is being drained away to Calcutta and Bombay. Something should be done to put a stop to it.]*

The Honourable Dr. B. R. Ambedkar : Sir, looking back on the work of the Constituent Assembly it will now be two years, eleven months and seventeen days since it first met on the 9th of December 1946. During this period the Constituent Assembly has altogether held eleven sessions. Out of these eleven sessions the first six were spent in passing the Objectives Resolution and the consideration of the Reports of Committees on Fundamental Rights, on Union Constitution, on Union Powers, on Provincial Constitution, on Minorities and on the Scheduled Areas and Scheduled Tribes. The seventh, eighth, ninth, tenth and the eleventh sessions were devoted to the consideration of the Draft Constitution. These eleven sessions of the Constituent Assembly have consumed 165 days. Out of these, the Assembly spent 114 days for the consideration of the Draft Constitution.

Coming to the Drafting Committee, it was elected by the Constituent Assembly on 29th August 1947. It held its first meeting on 30th August. Since August 30th it sat for 141 days during which it was engaged in the preparation of the Draft Constitution. The Draft Constitution as prepared by the Constitutional Adviser as a text for the Drafting Committee to work upon, consisted of 243 articles and 13 Schedules. The first Draft Constitution as presented by the Drafting Committee to the Constituent Assembly contained 315 articles and 8 Schedules. At the end of the consideration stage, the number of articles in the Draft Constitution increased to 386. In its final form, the Draft Constitution contains 395 articles and 8 Schedules. The total number of amendments to the Draft Constitution tabled was approximately 7,635. Of them, the total number of amendments actually moved in the House were 2,473.

I mention these facts because at one stage it was being said that the Assembly had taken too long a time to finish its work, that it was going on leisurely and wasting public money. It was said to be a case of Nero fiddling while Rome was burning. Is there any justification for this complaint? Let us note the time consumed by Constituent Assemblies in other countries appointed for framing their Constitutions. To take a few illustrations, the American Convention met on May 25th, 1787 and completed its work on September 17, 1787 *i.e.*, within four months. The Constitutional Convention of Canada met on the 10th October 1864 and the Constitution was passed into law in March 1867 involving a period of two years and five months. The Australian Constitutional Convention assembled in March 1891 and the Constitution became law on the 9th July 1900, consuming a period of nine years. The South African Convention met in October, 1908 and the Constitution became law on the 20th September 1909 involving one years labour. It is true that we have taken more time than what the American or South African Conventions did. But we have not taken more time than the Canadian Convention and much less than the

Australian Convention. In making comparisons on the basis of time consumed, two things must be remembered. One is that the Constitutions of America, Canada, South Africa and Australia are much smaller than ours. Our Constitution as I said contains 395 articles while the American has just seven articles, the first four of which are divided into sections which total up to 21, the Canadian has 147, Australian 128 and South African 153 sections. The second thing to be remembered is that the makers of the Constitutions of America, Canada, Australia and South Africa did not have to face the problem of amendments. They were passed as moved. On the other hand, this Constituent Assembly had to deal with as many as 2,473 amendments. Having regard to these facts the charge of dilatoriness seems to me quite unfounded and this Assembly may well congratulate itself for having accomplished so formidable a task in so short a time.

Turning to the quality of the work done by the Drafting Committee, Mr. Naziruddin Ahmed felt it his duty to condemn it outright. In his opinion, the work done by the Drafting Committee is not only not worthy of commendation, but is positively below par. Everybody has a right to have his opinion about the work done by the Drafting Committee and Mr. Naziruddin is welcome to have his own. Mr. Naziruddin Ahmed thinks he is a man of greater talents than any member of the Drafting Committee. The Drafting Committee does not wish to challenge his claim. On the other hand. The Drafting Committee would have welcomed him in their midst if the Assembly had thought him worthy of being appointed to it. If he had no place in the making of the Constitution it is certainly not the fault of the Drafting Committee.

Mr. Naziruddin Ahmed has coined a new name for the Drafting Committee evidently to show his contempt for it. He calls it a Drafting committee. Mr. Naziruddin must no doubt be pleased with his hit. But he evidently does not know that there is a difference between drift without mastery and drift with mastery. If the Drafting Committee was drifting, it was never without mastery over the situation. It was not merely angling with the off chance of catching a fish. It was searching in known waters to find the fish it was after. To be in search of something better is not the same as drifting. Although Mr. Naziruddin Ahmed did not mean it as a compliment to the Drafting committee. I take it as a compliment to the Drafting Committee. The Drafting Committee would have been guilty of gross dereliction of duty and of a false sense of dignity if had not shown the honesty and the courage to withdraw the amendments which it thought faulty and substitute what it thought was better. If it is a mistake, I am glad the Drafting Committee did not fight shy of admitting such mistakes and coming forward to correct them.

I am glad to find that with the exception of a solitary member, there is a general consensus of appreciation from the members of the Constituent Assembly of the work done by the Drafting Committee. I am sure the Drafting Committee feels happy to find this spontaneous recognition of its labours expressed in such generous terms. As to the compliments that have been showered upon me both by the members of the Assembly as well as by my colleagues of the Drafting Committee I feel so overwhelmed that I cannot find adequate words to express fully my gratitude to them. I came into the Constituent Assembly with no greater aspiration than to safeguard the interests of the Scheduled Castes. I had not the remotest idea that I would be called upon to undertake more responsible functions. I was therefore greatly surprised when the Assembly elected me to the Drafting Committee. I was more than surprised when the Drafting Committee elected me to be its Chairman. There were in the Drafting Committee men bigger, better and more competent than myself such as my friend Sir Alladi Krishnaswami Ayyar. I am grateful to the Constituent Assembly and the Drafting Committee for reposing in me so much trust and confidence and to have chosen me as their instrument and given me this

opportunity of serving the country. (*Cheers*)

The credit that is given to me does not really belong to me. It belongs partly to Sir B. N. Rau, the Constitutional Adviser to the Constituent Assembly who prepared a rough draft of the Constitution for the consideration of the Drafting Committee. A part of the credit must go to the members of the Drafting Committee who, as I have said, have sat for 141 days and without whose ingenuity of devise new formulae and capacity to tolerate and to accommodate different points of view, the task of framing the Constitution could not have come to so successful a conclusion. Much greater, share of the credit must go to Mr. S. N. Mukherjee, the Chief Draftsman of the Constitution. His ability to put the most intricate proposals in the simplest and clearest legal form can rarely be equalled, nor his capacity for hard work. He has been an acquisition to the Assembly. Without his help, this Assembly would have taken many more years to finalise the Constitution. I must not omit to mention the members of the staff working under Mr. Mukherjee. For, I know how hard they have worked and how long they have toiled sometimes even beyond midnight. I want to thank them all for their effort and their co-operation. (*Cheers*)

The task of the Drafting Committee would have been a very difficult one if this Constituent Assembly has been merely a motley crowd, a tasseled pavement without cement, a black stone here and a white stone there is which each member or each group was a law unto itself. There would have been nothing but chaos. This possibility of chaos was reduced to nil by the existence of the Congress Party inside the Assembly which brought into its proceedings a sense of order and discipline. It is because of the discipline of the Congress Party that the Drafting Committee was able to pilot the Constitution in the Assembly with the sure knowledge as to the fate of each article and each amendment. The Congress Party is, therefore, entitled to all the credit for the smooth sailing of the Draft Constitution in the Assembly.

The proceedings of this Constituent Assembly would have been very dull if all members had yielded to the rule of party discipline. Party discipline, in all its rigidity, would have converted this Assembly into a gathering of yes' men. Fortunately, there were rebels. They were Mr. Kamath, Dr. P. S. Deshmukh, Mr. Sidhva, Prof. Sen and Pandit Thakur Das Bhargava. Along with them I must mention Prof. K. T. Shah and Pandit Hriday Nath Kunzru. The points they raised were mostly ideological. That I was not prepared to accept their suggestions, does not diminish the value of their suggestions nor lessen the service they have rendered to the Assembly in enlivening its proceedings. I am grateful to them. But for them, I would not have had the opportunity which I got for expounding the principles underlying the Constitution which was more important than the mere mechanical work of passing the Constitution.

Finally, I must thank you Mr. President for the way in which you have conducted the proceedings of this Assembly. The courtesy and the consideration which you have shown to the Members of the Assembly can never be forgotten by those who have taken part in the proceedings of this Assembly. There were occasions when the amendments of the Drafting Committee were sought to be barred on grounds purely technical in their nature. Those were very anxious moments for me. I am, therefore, specially grateful to you for not permitting legalism to defeat the work of Constitution making.

As much defence as could be offered to the constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr. T. T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a

bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their purposes or will they prefer revolutionary methods of achieving them? If they adopt the prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to pay.

The condemnation of the Constitution largely comes from two quarters, the Communist Party and the Socialist Party. Why do they condemn the Constitution? Is it because it is really a bad Constitution? I venture to say no'. The Communist Party want a Constitution based upon the principle of the Dictatorship of the Proletariat. They condemn the Constitution because it is based upon parliamentary democracy. The Socialists want two things. The first thing they want is that if they come in power, the Constitution must give them the freedom to nationalize or socialize all private property without payment of compensation. The second thing that the Socialists want is that the Fundamental Rights mentioned in the Constitution must be absolute and without any limitations so that if their Party fails to come into power, they would have the unfettered freedom not merely to criticize, but also to overthrow the State.

These are the main grounds on which the Constitution is being condemned. I do not say that the principle of parliamentary democracy is the only ideal form of political democracy. I do not say that the principle of no acquisition of private property without compensation is so sacrosanct that there can be no departure from it. I do not say that Fundamental Rights can never be absolute and the limitations set upon them can never be lifted. What I do say is that the principles embodied in the Constitution are the views of the present generation or if you think this to be an over-statement, I say they are the views of the members of the Constituent Assembly. Why blame the Drafting Committee for embodying them in the Constitution? I say why blame even the Members of the Constituent Assembly? Jefferson, the great American statesman who played so great a part in the making of the American constitution, has expressed some very weighty views which makers of Constitution, can never afford to ignore. In one place he has said:-

"We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country."

In another place, he has said :

"The idea that institutions established for the use of the national cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead and not the living;"

I admit that what Jefferson has said is not merely true, but is absolutely true. There can be no question about it. Had the Constituent Assembly departed from this principle laid down by Jefferson it would certainly be liable to blame, even to condemnation. But I ask, has it? Quite the contrary. One has only to examine the provision relating to the

amendment of the Constitution. The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or Australia, but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution. If those who are dissatisfied with the Constitution have only to obtain a 2/3 majority and if they cannot obtain even a two-thirds majority in the parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public.

There is only one point of constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the Legislative and Executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. This is what Constitution does. The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our constitution. There can be no mistake about it. It is, therefore, wrong to say that the States have been placed under the Centre. Centre cannot by its own will alter the boundary of that partition. Nor can the Judiciary. For as has been well said:

"Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another."

The first charge of centralization defeating federalism must therefore fall.

The second charge is that the Centre has been given the power to override the States. This charge must be admitted. But before condemning the Constitution for containing such overriding powers, certain considerations must be borne in mind. The first is that these overriding powers do not form the normal feature of the constitution. Their use and operation are expressly confined to emergencies only. The second consideration is : Could we avoid giving overriding powers to the Centre when an emergency has arisen? Those who do not admit the justification for such overriding powers to the Centre even in an emergency, do not seem to have a clear idea of the problem which lies at the root of the matter. The problem is so clearly set out by a writer in that well-known magazine "The Round Table" in its issue of December 1935 that I offer no apology for quoting the following extract from it. Says the writer :

"Political systems are a complex of rights and duties resting ultimately on the question, to whom, or to what authority, does the citizen owe allegiance. In normal affairs the question is not present, for the law works smoothly, and a man, goes about his business obeying one authority in this set of matters and another authority in that. But in a moment of crisis, a conflict of claims may arise, and it is then apparent that ultimate allegiance cannot be divided. The issue of allegiance cannot be determined in the last resort by a juristic interpretation of statutes. The law must conform to the facts or so much the worse for the law. When all formalism is stripped away, the bare question is, what authority commands the residual loyalty of the citizen. Is it the Centre or the Constituent State ?"

The solution of this problem depends upon one's answer to this question which is the crux of the problem. There can be no doubt that in the opinion of the vast majority of the people, the residual loyalty of the citizen in an emergency must be to the Centre and not to the Constituent States. For it is only the Centre which can work for a common end and for the general interests of the country as a whole. Herein lies the justification for giving to all Centre certain overriding powers to be used in an emergency. And after all what is the obligation imposed upon the Constituent States by these emergency powers? No more than this – that in an emergency, they should take into consideration alongside their own local interests, the opinions and interests of the nation as a whole. Only those who have not understood the problem, can complain against it.

Here I could have ended. But my mind is so full of the future of our country that I feel I ought to take this occasion to give expression to some of my reflections thereon. On 26th January 1950, India will be an independent country (*Cheers*). What would happen to her independence? Will she maintain her independence or will she lose it again? This is the first thought that comes to my mind. It is not that India was never an independent country. The point is that she once lost the independence she had. Will she lost it a second time? It is this thought which makes me most anxious for the future. What perturbs me greatly is the fact that not only India has once before lost her independence, but she lost it by the infidelity and treachery of some of her own people. In the invasion of Sind by Mahommed-Bin-Kasim, the military commanders of King Dahar accepted bribes from the agents of Mahommed-Bin-Kasim and refused to fight on the side of their King. It was Jaichand who invited Mahommed Gohri to invade India and fight against Prithvi Raj and promised him the help of himself and the Solanki Kings. When Shivaji was fighting for the liberation of Hindus, the other Maratha noblemen and the Rajput Kings were fighting the battle on the side of Moghul Emperors. When the British were trying to destroy the Sikh Rulers, Gulab Singh, their principal commander sat silent and did not help to save the Sikh Kingdom. In 1857, when a large part of India had declared a war of independence against the British, the Sikhs stood and watched the event as silent spectators.

Will history repeat itself? It is this thought which fills me with anxiety. This anxiety is deepened by the realization of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indian place the country above their creed or will they place creed above country? I do not know. But this much is certain that if the parties place creed above country, our independence will be put in jeopardy a second time and probably be lost for ever. This eventuality we must all resolutely guard against. We must be determined to defend our independence with the last drop of our blood. (*Cheers*)

On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again. This is the second thought that comes to my mind and makes me as anxious as the first.

It is not that India did not know what is Democracy. There was a time when India was studded with republics, and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary Procedure. A study of the Buddhist Bhikshu Sanghas discloses that not only there were Parliaments-for the Sanghas were nothing but Parliaments – but the Sanghas knew and observed all the rules of Parliamentary Procedure known to modern times. They had rules regarding seating arrangements, rules regarding Motions, Resolutions, Quorum, Whip, Counting of Votes, Voting by Ballot, Censure Motion, Regularization, *Res Judicata*, etc. Although these rules of Parliamentary Procedure were applied by the Buddha to the meetings of the Sanghas, he must have borrowed them from the rules of the Political Assemblies functioning in the country in his time.

This democratic system India lost. Will she lost it a second time? I do not know. But it is quite possible in a country like India – where democracy from its long disuse must be regarded as something quite new – there is danger of democracy giving place to dictatorship. It is quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater.

If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.

The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions". There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel O'Connell, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.

The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual

initiative. Without fraternity, liberty equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up.

The second thing we are wanting in is recognition of the principle of fraternity. what does fraternity mean? Fraternity means a sense of common brotherhood of all Indians-if Indians being one people. It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve. How difficult it is, can be realized from the story related by James Bryce in his volume on American Commonwealth about the United States of America.

The story is- I propose to recount it in the words of Bryce himself- that-

"Some years ago the American Protestant Episcopal Church was occupied at its triennial Convention in revising its liturgy. It was thought desirable to introduce among the short sentence prayers a prayer for the whole people, and an eminent New England divine proposed the words 'O Lord, bless our nation'. Accepted one afternoon, on the spur of the moment, the sentence was brought up next day for reconsideration, when so many objections were raised by the laity to the word nation' as importing too definite a recognition of national unity, that it was dropped, and instead there were adopted the words 'O Lord, bless these United States.'"

There was so little solidarity in the U.S.A. at the time when this incident occurred that the people of America did not think that they were a nation. If the people of the United States could not feel that they were a nation, how difficult it is for Indians to think that they are a nation. I remember the days when politically-minded Indians, resented the expression "the people of India". They preferred the expression "the Indian nation." I am of opinion that in believing that we are a nation, we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realize that we are not as yet a nation in the social and psychological sense of the world, the better for us. For then only we shall realize the necessity of becoming a nation and seriously think of ways and means of realizing the goal. The realization of this goal is going to be very difficult – far more difficult than it has been in the United States. The United States has no caste problem. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are antinational also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity equality and liberty will be no deeper than coats of paint.

These are my reflections about the tasks that lie ahead of us. They may not be very pleasant to some. But there can be no gainsaying that political power in this country has too long been the monopoly of a few and the many are only beasts of burden, but also

beasts of prey. This monopoly has not merely deprived them of their chance of betterment, it has sapped them of what may be called the significance of life. These down-trodden classes are tired of being governed. They are impatient to govern themselves. This urge for self-realization in the down-trodden classes must not be allowed to devolve into a class struggle or class war. It would lead to a division of the House. That would indeed be a day of disaster. For, as has been well said by Abraham Lincoln, a House divided against itself cannot stand very long. Therefore the sooner room is made for the realization of their aspiration, the better for the few, the better for the country, the better for the maintenance for its independence and the better for the continuance of its democratic structure. This can only be done by the establishment of equality and fraternity in all spheres of life. That is why I have laid so much stresses on them.

I do not wish to weary the House any further. Independence is no doubt a matter of joy. But let us not forget that this independence has thrown on us great responsibilities. By independence, we have lost the excuse of blaming the British for anything going wrong. If hereafter things go wrong, we will have nobody to blame except ourselves. There is great danger of things going wrong. Times are fast changing. People including our own are being moved by new ideologies. They are getting tired of Government by the people. They are prepared to have Governments for the people and are indifferent whether it is Government of the people and by the people. If we wish to preserve the Constitution in which we have sought to enshrine the principle of Government of the people, for the people and by the people, let us resolve not to be tardy in the recognition of the evils that lie across our path and which induce people to prefer Government for the people to Government by the people, nor to be weak in our initiative to remove them. That is the only way to serve the country. I know of no better.

Mr. President : The House will adjourn till Ten of the clock tomorrow morning when we shall take up the voting on the motion which was moved by Dr. Ambedkar.

The Assembly then adjourned till Ten of the Clock on Saturday, the 26th November 1949.

[Translation of Hindustani speech.]

B. R. Ambedkar and the Ideas of Constitutionalism and Constitutional Democracy

UJJWAL KUMAR SINGH AND ANUPAMA ROY

In his address at the Poona District Law Library on 22 December 1952, nearly three years after the Indian Constitution had come into effect B. R. Ambedkar underscored the salience of constitutional democracy, and beginning with a minimal description of democracy as ‘a government by discussion’, citing Walter Bagehot, and as ‘a government of the people, by the people and for the people’, citing Abraham Lincoln. Ambedkar goes on, however, to propose a more emphatic statement of what *he* considered a democracy, that is, ‘a form and method of Government whereby revolutionary changes in the economic and social life of the people are brought about without bloodshed’.¹ Evidently, for Ambedkar, democracy may be said to exist, when those who were running the government could bring about fundamental changes in the social and economic life of the people, and the people accepted those changes without resorting to bloodshed.²

Indeed, fundamental, revolutionary changes were to be achieved through consent and without violence, and this was at the core of Ambedkar’s idea of democracy. The challenge, however, was putting in place enabling conditions, which would make revolutionary social and economic changes without bloodshed, possible. In a society where unequal social structures, buttressed by ritual and caste hierarchy, were deeply entrenched, and two centuries of colonial subjection had established institutions of government, which governed without representation, unconstrained by constitutionalism and rule of law, the task of devising rules to give institutional form to democratic government, was a humongous task. It was the enormity of this task which Ambedkar referred to when he moved a motion for discussion of the draft Constitution of India in

the Constituent Assembly on 04 November 1948. He made it clear that the structural conditions informed by deep-seated inequalities were not only a threat to democracy in India, but also made democracy ‘only a top dressing on an Indian soil which is essentially undemocratic’. It was important, therefore, to make the ‘unfamiliar’, i.e. democracy, work in Indian conditions, and also to make it durable. The burdens of the past – both recent and remote—the debilitating impact of colonial rule and the ritual authority of the caste system, had made India an unlikely candidate for durable democracy. It was this universal value of equality within the framework of constitutional democracy, which Ambedkar cherished, prompting him to declare in the Constituent Assembly on 25 November 1949, that he came to the Constituent Assembly with ‘no greater aspiration than to safeguard the interests of the Scheduled Castes’. He claimed that he did not have ‘the remotest idea’ that he would be called upon to undertake more responsible functions, and would be elected to the Drafting Committee and subsequently its Chairman. For Ambedkar, his election to the Drafting Committee and its chairpersonship, was the manifestation of the trust and confidence which had been reposed in him, and he saw himself in that role as being an instrument of change, and having the opportunity to serve the entire country.³

It is in response to the predicament of making the top-dressing consonant with the soil, that Ambedkar espoused constitutionalism as a democratic value and as a framework of legitimate political process, which would bring about social change. The idea of India which can be seen as congealing in the Constituent Assembly Debates (December 1946–November 1949), is replete with both the promise

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of a democratic future, but also the realization that the present is burdened with the past, which has the tendency to percolate into the future with tenacity, permeating into people's lives in both quotidian and spectacular ways. In the literature on constitutionalism, constitutions are seen not simply as normative texts, but also as emphatic and historic constituent moments of transformation. In the context of postcolonial constitutionalism in particular, constitutions have been seen as transformative in the sense that they manifest a conscious and meticulous sequestering from the past. This process of sequestering is a central motif of transformative constitutionalism.⁴ Indeed, it is the re-figuration of the relationship with the past, which distinguishes the 'temporal register'⁵ on which constitutions are etched, so much so, that constitutions come to embody the momentous present, from where a vision of a future, emphatically different from the past, may be professed.⁶ In this paper an attempt will be made to examine the components of the 'transformative' as they figure in B.R. Ambedkar's speeches in the Constituent Assembly and other public speeches, to see, how they articulate a vision of constitutionalism and democracy for a nation embarking on a journey towards constitutional democracy.

CONSTITUTIONALISM AND DEMOCRACY

The questions, what is constitutionalism and what is the relationship between constitutions, constitutionalism and democracy, are fraught with contests. The promise of constitutionalism in postcolonial societies was not simply one of self-rule, but also the installation of democratic government in which power was derived from the people and was constrained by the constitution, which embodied popular sovereignty. In other words, power could not be exercised arbitrarily, was bound by higher order rules, norms, and principles, and the rule of law, which had been sought and achieved through persistent struggles for democratization of power. Yet, the project of writing a constitution, which was the culmination of these struggles, also produced the legal and institutional ensemble with specific modes of governance and juridical norms, which are continually subjected to political scrutiny, and are, therefore, contested. The conception of constitution making as a contest over forms of power, is significant since it suggests that the commitment to constitutionalism is not a given, that it may weaken or strengthen over time, and may also become a conduit through which political power is expressed and becomes entrenched.

Studies of comparative constitutionalism have shown that constitution-making has taken place in successive waves.⁷ In the twentieth century, post-colonial, post-World-Wars, and post-conflict constitutions were made

with different outcomes, but the promise of democratic transition and consolidation had marked the birth of all of them. The promise was buttressed by the will of a historical collective to constitute itself into a state founded on a constitution. Constitutions have, therefore, also been seen as embodying 'the will to stateness'.⁸ Constitutionalism in India, as a product of the anti-colonial movement, was also inextricably tied to the nationalist project, which then became the source of the political identities of citizenship and constitutional patriotism.⁹ Yet, as Ambedkar admitted in his speech presenting the draft Constitution to Constituent Assembly for discussion, the constitutional text had borrowed from the Government of India Act of 1935, and continued to be, therefore, concerned overwhelmingly with administrative details and the structure of government:

As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution. What I am sorry about is that the provisions taken from the Government of India Act 1935, relate mostly to the details of administration. I agree administrative details should have no place in the Constitution. I wish very much that the Drafting Committee could see its way to avoid their inclusion in the Constitution.¹⁰

Even as he wishes that administrative details should find no place in constitutional texts, Ambedkar believes that they are necessary, and takes recourse to the Greek historian Grote's articulation of the idea of constitutional morality to outline the 'necessity' which justified their inclusion. According to Ambedkar the diffusion of constitutional morality was essential for the peaceful working and sustenance of a democratic constitution, an important and somewhat disputed and often misunderstood relationship, which will be discussed in the section which follows. It is, however, on the relationship between constitutional morality and the necessity of administrative details in constitutions that we shall turn our attention now. Broadly speaking constitutional morality in Grote (concurred to by Ambedkar) refers to 'a paramount reverence to the forms of the Constitution'.¹¹ Following from this, Ambedkar argues that there exists a close connection between the form of the Constitution and the form of administration, which would require that: 'The form of the administration must be appropriate to and in the same sense as the form of the Constitution'. In addition, he argued, it was, 'perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the constitution':

It follows that it is only where people are saturated with constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.¹²

Clearly, for Ambedkar, till the time constitutional morality had spread wide and deep among the Indian people and they were saturated with it, the legislatures could not be trusted with prescribing the form of administration. Even though Ambedkar does not elaborate on this, one can read in this his mistrust in the ability of the dominant caste and class to act autonomous of the hierarchically organised social structure marked with ascriptive inequalities, sustained by an unequal distribution of power and resources, entrenched feudal-brahmanical-ritual authority and their collusive dominance with the colonial regime which they expected to replace. Yet, even when the constitutional text was overwhelmed by the logic of government and the desire to establish a strong state, there existed alongside robust commitment to political and socio-economic rights, and adherence to the basic principles of federal design, distribution of powers, an autonomous judiciary, and constitutional innovations to ensure substantive equality through the recognition of diversity. In other words, postcolonial constitutionalism was inscribed in self-rule and shared-rule, which were to be achieved through specific modes of governance, which would usher in democracy within the framework of a republican constitution.

TRANSITION AND CONTRADICTIONS

Vilhena et.al., use the expression ‘aspirational’ to refer to the attempts by India, South Africa and Brazil, to transform their past and present (of colonialism, apartheid, and military regime) through a constitutional process to establish a durable moral order of rights, and the rule of law. If we agree with Vilhena, then the constitutional texts which emerged out of these efforts at transformation, can be seen primarily as normative texts, which lay down a framework for ensuring the ‘ambitious constitutional promises’, especially the universalization of human rights, entrenching thereby transformative constitutionalism in the texts of their own constitutions.¹³ The text of the Objectives Resolution, placed before the Constituent Assembly of India on 13 December 1946, may well be read as ‘aspirational’, or as Jawaharlal Nehru described it ‘in the nature of a pledge’. Indeed, the Objectives Resolution adopted in

the Constituent Assembly as guidelines construed the constitution as a promise and a pledge, and therefore, ‘something higher than the law’. Indeed, if one were to examine the words of the constitution like lawyers, one would ‘produce only a lifeless thing’, since the Resolution laying down the objectives of the Constitution of India was a moment of interlocution, marking the coalescent present. The members of the Constituent Assembly were then standing ‘midway between two eras’ – the old and fast changing old order, ‘yielding place to the new’. The reference by Nehru to a spatial and temporal location of the constituent moment as a promise for change, was followed a few months later by his historic speech on the eve of independence that alluded freedom as marking the end of an age, as the fulfilment of a promise made long ago. Terming the moment ‘a tryst with destiny’, yet again Nehru declares the moment of redemption of a pledge, when the soul of the nation, ‘long suppressed’, will ‘find utterance’.¹⁴

Unlike Nehru, who saw the constituent moment as a movement from one age to another—of assured transition and emphatic break from a colonial past to a future condition of freedom—Ambedkar’s speech in the Constituent Assembly on 25 November 1949, presenting the final draft of the Constitution for its adoption, portrayed the moment as one of contradiction. The contradiction, simply put, was between formal equality in the political domain, amidst a deeply unequal economic structure. This contradiction, if allowed to persist, Ambedkar cautioned, would imperil Indian democracy. The idea that the constituent moment in Ambedkar was not predominantly one of transition, but one which was riddled with contradiction nurtured within it an ethics of transformation. The ethics of transformation which was present at the constituent moment, made postcolonial constitutionalism emblematic of change, and at the same time produced sites of contest which kept alive the imagination and possibility of recreation of new life-worlds. The contradiction in such a reading may be seen as providing the site for constitutional insurgencies,¹⁵ opening up for the teeming multitudes the vocabulary for change, the constitution providing as it were the ‘code of just means’. Yet Ambedkar’s concerns were addressed to both the ‘insurgent’ and those who were entrusted with state power, and it was towards this that he directed his exhortation for constitutional morality and an expansive idea and practice of constitutional democracy.

THE IDEA OF CONSTITUTIONAL DEMOCRACY

On 17 December 1946, B.R. Ambedkar was asked by Rajendra Prasad to participate in the discussion which took place after the Objectives Resolution was moved in the Assembly by Nehru. M.R. Jayakar had moved an

amendment to postpone the passing of the resolution since the Muslim League was not present in Assembly. It was thus in a charged atmosphere that Prasad invited Ambedkar to speak on the Resolution. Ambedkar's speech was described by N.V. Gadgil, who was present at the discussion, as 'historic':

His speech was statesmanlike, so devoid of bitterness and so earnestly challenging that the whole of Assembly listened to it in rapt silence. The speech was greeted with tremendous ovation and he was smothered with congratulations in the lobby.¹⁶

Procedurally speaking, the speech led to the postponement of the consideration of the Objectives Resolution till the next session. For the purpose of this paper, however, the response of Ambedkar is important for taking us along the substantial questions of democracy against what he termed the 'pure pedantry' of the Resolution that he found disappointing. Ambedkar saw the Resolution as divided into a 'controversial' first part which spoke of the territorial and institutional organization of governmental power, federal arrangement and popular sovereignty and 'a non-controversial' second part comprising the various rights to equality and freedom, justice, and minority rights. Ambedkar, however, was dismissive as well of the non-controversial part, which he felt read as remnants of the 450-year-old Declaration of the Rights of Man and Citizen and archaic as 'the silent immaculate premise of our outlook'. Finding it unnecessary to 'proclaim them as forming a part of our creed',¹⁷ Ambedkar would have liked to wrest the rights, out of these archaic and obsolete premises, to articulate them in the form of 'remedies', without which rights were meaningless. Indeed, Ambedkar feared that the complete absence of remedies which recognized that rights and liberties may not be taken away without following the due process of law, while making all rights subject to law and morality, made the Resolution deficient:

Obviously what is law, what is morality will be determined by the Executive of the day and when the Executive may take one view and another Executive may take another view and we do not know what exactly would be the position with regard to fundamental rights if this matter is left to the Executive of the day.¹⁸

Ambedkar's preference for constitutional remedies to assure protection of fundamental freedoms of persons, resonated powerfully in his speech of 9 December 1948, when speaking in the Constituent Assembly, Ambedkar described constitutional remedies as 'the very soul of the Constitution and the very heart of it', indeed an Article (Article 32) so important that without it the Constitution would be 'a nullity'. There could be no rights in the absence of remedies:

It is the remedy that makes a right real. If there is no remedy there is no right at all and I am therefore, not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities, but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enunciating remedies than to have a lot of pious wishes embodied in the Constitution. I am very glad that this House has seen that the remedies that we have provided constitute a fundamental part of this Constitution.¹⁹

In his speech Ambedkar expresses his happiness at the inclusion of constitutional remedies in the Constitution, and concerns himself largely with the legal procedures pertaining to the writs constituting the remedies. He does not make the connection, which he only has hinted at in his Objectives Resolution response to executive decision-making and the possibility of arbitrary action. Indeed, the complex questions of executive power and authority remain absent as the legal question of protection by law takes precedence. Similarly, the ideas of rule of law and equal protection, which were so salient to the questions of social equalities and democracy, remain absent.

Evidently, in his response to the resolution, Ambedkar was animated by concerns not only for the 'ultimate' – the objectives and goals to be achieved, but also the 'difficulty with regard to the beginning'. It was this beginning of 'becoming willing friends' to 'induce every party, and every section of the country' to come together required 'an act of greatest statesmanship for the majority Party even to make concession to the prejudices of people who are not prepared to march together'.²⁰ While the immediate context of Ambedkar's reference to 'willing partnership' was the absence of the Muslim League in the Constituent Assembly, the idea of partnership had resonance with his idea of Indian polity and society, in particular the relationship between minority communities and the dominant majority. It is also in this context that Ambedkar's apprehensions about the uncertainty of executive decisions and mistrust of legislative power, amidst the absence of a thorough protection of people's rights, becomes significant. His desire is for people to march together as willing friends onto the road of the Republic. It is only then that sovereignty can be seen as drawn from the entire people and not the dominant sections.

Two years after his response to the Objectives Resolution, Ambedkar's speech on the occasion of the presentation of the first draft of the Constitution on 4 November 1948 and a year later on 25 November 1949, when the final draft of the Constitution was presented and adopted, reveal two fairly congealed tendencies. The first, resonating with his Objectives Resolution speech, addressed the question of protection of fundamental rights, in particular the rights

of minority communities, and the second, addressed the complex question of the conditions under which democracy, in particular its institutions which were built painstakingly, could be sustained. It was while addressing the second question that Ambedkar elaborated upon the idea of constitutional morality as indispensable for democracy.

On 4 November 1948, Ambedkar articulated his views on the constitutional safeguards for minorities. It is interesting that the safeguards provided to minorities was one of the several criticisms that had been made towards the first draft of the Constitution which had been in the public domain for eight months. Ambedkar considered it wrong for the majority to deny the existence of minorities, and likewise for minorities to perpetuate themselves as such. He concluded, therefore, that in India both the majority (in denying the presence of minorities) and minorities (in their quest for perpetuation) have followed the wrong path. The solution to this problem of denial and separate existence was to think of ways of living together – a solution which was also ultimately important for the holding the state together:

To diehards who have developed a kind of fanaticism against minority protection I would like to say two things. One is that minorities are an explosive force which, if it erupts, can blow up the whole fabric of the state. The history of Europe bears ample and appalling testimony to the fact. The other is that the minorities in India have agreed to place their existence in the hands of the majority.... It is for the majority to realise its duty not to discriminate against minorities. Whether the minorities will continue or vanish will depend upon this habit of the majority. The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish.²¹

In his speech in the Constituent Assembly on 25 November 1949, Ambedkar links up the quest for popular sovereignty in constitutional democracies and its elusiveness to the persistence of the rule by the dominant groups. He questions the idea that in a democracy power rests in the people, which would require that the source of political power and its legitimacy is drawn from the *entire* people. In actual practice, however, while this appears to be an attractive suggestion, it is flawed, since all democracies, Ambedkar reminds us, are governed through political regimes in which power rests in the *overwhelming* majority. In his 25 November 1949 speech, therefore, Ambedkar argues that democracy is about securing to all the people of India justice, equality and freedom, but providing in particular 'adequate safeguards' for minorities, backward and tribal areas, the depressed, and other backward classes.²²

TENETS FOR SAFEGUARDING CONSTITUTIONAL DEMOCRACY

The vast and erudite scholarship on constitutionalism, coming from diverse historical contexts and ideological traditions, shows multitudinous trajectories of constitutionalism. All of them, however, address a common question, which is – why have constitutions? To varying degrees, the responses may be seen as converging on the need to restrict power – modern states being excessively powerful, constitutions provide the basic and higher order rules which compel those who hold political power to govern according to the principles of rule of law. Constitutions are seen as marking the affirmation of popular sovereignty and the idea that power in democracies lies with the people. Moreover, as higher order, overarching and enduring rules, constitutions are expected to protect democracy from the excessively mercurial character of everyday politics.

Presenting the final draft of the Constitution for the consideration of the Constituent Assembly, Ambedkar declared that on 26 January 1950, India would be a democratic country, yet he had apprehensions about the future of constitutional democracy in India:

...What would happen to her democratic constitution? Will she be able to maintain it or will she lose it again. ... It is not that India did not know what is democracy. There was a time when India was studded with republics and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary procedure. A study of the Buddhist Bhikshu Sanghas discloses that rules of parliamentary procedure were known and observed there.... This democratic system India lost. Will she lose it a second time? It is quite possible that in a country like India—where democracy from its long disuse must be regarded as something quite new—there is a danger of democracy giving place to dictatorship. It is quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater.²³

Evidently, the question which animated Ambedkar when the draft Constitution was presented for the first time – pertaining to perversion of the Constitution and the need for constitutional morality – continues to be significant for him a year later. An overriding concern seems to be the 'loss' of democracy that the people of India suffered and an estrangement from democratic processes, which would make it an entirely new system. Yet, the danger of democracy sliding into dictatorship, could be mitigated, and Ambedkar ties this up to the question of social and economic change, which was for him imperative for creating enabling conditions for democracy in India. It is

in the pursuit of an answer to these questions that he takes recourse to an ethic of democratic action, which has *four components* of which constitutional morality, as a code of just means, was one.

(a) *Constitutional Morality*

Ambedkar asks a fundamental question – ‘If we wish to maintain democracy not merely in form, but also in fact, what must we do?’ There are according to him, three things that must be done. The first and foremost was the need to ‘hold fast to constitutional methods of achieving social and economic objectives’. Interestingly, however, holding on to constitutional means, would require the abandonment of ‘the methods of civil disobedience, non-cooperation and satyagraha’, all of which we must bear in mind, were inextricably part of non-violent political action against the colonial regime. These means, Ambedkar is quick to add, were justifiable when there was (as under colonial rule) no recourse available to constitutional means. We may construe this to mean that these actions were legitimate, when directed against the (colonial) state and its laws, which did not flow from constitutionalism and the rule of law, but were dictated by the logic of rule of colonial difference. Ambedkar claimed:

When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.²⁴

We may recall here the discussion initiated in the earlier section on the idea of constitutional morality in Ambedkar’s speech of 4 November 1948. In this speech Ambedkar following Grote had stressed the importance of the diffusion of constitutional morality, ‘not merely among the majority of any community but throughout the whole’, as an ‘indispensable condition for a Government at once free and peaceable’.²⁵

What was Constitutional morality, and how could it be achieved? Constitutional morality, as Grote explained it, and Ambedkar quoted him, was,

A paramount reverence for the forms of the Constitution enforcing obedience to authority, which meant working under and within these forms, yet combined with the habit of open speech of action, subject only to defined legal control, and unrestrained censure of those very authorities as to all their public acts, combined too, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contests that the forms of Constitution will not be less sacred in the eyes of his opponents than in his own.²⁶

The ‘unrestrained censure’ of those in authority, was, however subject to legal control, and eventually to the ‘preponderant sacredness of the constitution’. The exhortation to constitutional morality referred to an adherence to a mode of association, which was characterised by freedom and self-restraint, in which self-restraint was ‘a precondition for maintaining freedom under properly constituted conditions’. Indeed, self-restraint was an essential requirement to thwart revolution as a mode of social change, since freedom and democracy could be sustained through ‘constitutional methods’ of achieving the objectives of social and economic change.²⁷ Grote had prescribed, ‘nothing less than unanimity or so overwhelming a majority to be tantamount to unanimity’ on the respect for the forms of the constitution, to make possible the exposure of political authority to the ‘full license of pacific criticism’.²⁸ Following from the assertion that constitutional morality was not natural and had to be cultivated and diffused among the entire citizenry, Grote pointed out that the first creation of constitutional morality in any society ‘must be esteemed as interesting historical fact’. Through the ‘spirit of his reforms – equal, popular, and comprehensive, far beyond previous experiences’, the ruler secures what Grote calls ‘the hearty attachment of the body of citizens’.²⁹ There does not however, exist a ‘self-imposed limit to ambition’ and the means to eliminate beforehand any transgression of the limits must be thought of by the ruler, to avoid the necessity of suppressing it later ‘with all that bloodshed and reaction’, which would also require that the ‘free working of the constitution would be suspended at least, if not irrevocably extinguished’.³⁰ Interestingly, for Grote securing the Constitution and pacific criticism of the ruler, required the security which the ruler provided to ‘call in the positive judgment of the citizens’,³¹ who would guard against ‘momentary ferocious excitement’, against the forms of their own democracy ‘nor against the most sacred restraints of their habitual constitutional morality’.³²

(b) *Politics and Bhakti*

Closely related to constitutional morality is another form of morality, and this in Ambedkar is the second important mode for ensuring the preservation of democracy. Taking recourse this time to John Stuart Mill, Ambedkar cautions against what he called *Bhakti* in politics. Quoting Mill, who asked all those who were interested in the preservation of democracy, not ‘to lay down their liberties at the feet of even a great man or to trust him with powers that enable him to subvert their institutions’, Ambedkar distinguishes between expressing ‘gratefulness’ to those ‘great men’ who have ‘rendered life-long services to the nation’. But gratitude

could not be at the expense of honour, and no nation could remain grateful to the extent of surrendering its liberty. To safeguard the loss of liberty and regression into domestication and servitude, was for Ambedkar especially necessary for a country like India:

For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part unequalled in magnitude by the part it plays in politics in any other country in the world. Bhakti in religion, may be road to salvation of the soul, but in politics Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.³³

(c) *Fraternity*

With the articulation of the third mode of preservation of democracy, Ambedkar returns to the fundamental contradiction that he sees in Indian society – a contradiction, which he argued, if unresolved, would imperil Indian democracy. He, therefore, advises that mere political democracy, which is what India has set up with certitude with the Constitution, is not sufficient for democracy. India must strive for social democracy as well, which meant a way of life in which liberty, equality and fraternity, comprised the organizing principles of life, not separately, but as a union of trinity, since the separation of even one component of this trinity, would divest democracy of its substance:

We must make out political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality, and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate in a trinity. They form a union of trinity, in the sense that to divorce one from the other is to defeat the very purpose of democracy. Without equality, liberty would produce the supremacy of the few over the many. Equality, without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.³⁴

Making the trinity effective in India was, however, difficult since, argued Ambedkar, there was ‘complete absence of two things in India’ – equality and fraternity. Equality was absent on both the social and economic planes. On the social plane, Indian society was based on the principle of ‘graded inequality’, which meant ‘elevation for some and degradation for others’, and on the economic plane there existed an enormous and unbridgeable hiatus between those who had ‘immense wealth as against many who live in abject poverty’. This compelled Ambedkar to remark:

On 26th January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote one value. In our

social and economic life, we shall by reason of our social and economic structure continue to deny the principle of one man one value. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long we will so do only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment, or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.³⁵

In a speech delivered a couple of years later at the Poona District Law Library, discussed earlier, Ambedkar yet again underscores the importance of equality, indeed revolutionary but peaceful transformation of society, as essential for sustaining democracy. Ambedkar identifies five pre-conditions for an effective and sustainable democracy: There should be no glaring inequalities in society, there should exist an opposition to make democracy successful, there should be equality in law and administration, there should be observance of constitutional morality, there should be ‘public conscience’. A public conscience, ‘means conscience which becomes agitated at every wrong, no matter who is the sufferer, and it means that everybody, whether he suffers that particular wrong or not, is prepared to join him in order to get him relieved’.³⁶

(d) *Public Conscience*

Here we see Ambedkar’s notion of constitutional morality, characterised by the habit of ‘pacific criticism’ of the state under conditions of self-restraint, meet a different ethic of public action. Unlike constitutional morality, which was directed towards inculcating an attitude of respect and obedience towards constitutional principles and legal provisions which flowed from it, its objective being primarily to ensure the sustenance of the institutional edifice of democracy, public conscience enunciated the need for a moral order animated by human suffering. If reverence for law was given primacy in the moral order of constitutionalism, the moral order spawned by public conscience, demanded a bond of a different kind – one which was founded on a feeling of empathy. The moral order of empathy makes the alleviation of human suffering as a result of injustice its preponderant concern. While articulating the need for public conscience, Ambedkar recognizes the presence of injustice in society. What he emphasizes, however, is the uneven spread of injustice—there are some against whom the impact is small, for some it is great—‘And there are some who are *absolutely crushed* under the burden of injustice’.³⁷ Historical wrongs have occurred because a dominant class has been able to crush some, who have suffered in isolation. But when society is animated by a conscience which is public, it becomes

capable of becoming agitated at the wrongs suffered by another person or group, and eager to join those who have suffered to alleviate their suffering. Interestingly, in the example that Ambedkar sites of public conscience in contemporary times is South Africa and its regime of racial segregation, where he points out 'a large number of young boys and girls belonging to the white race are also joining the struggle of the Indians in South Africa. That is called public conscience'.³⁸ Ambedkar now dexterously raises the public conscience of his audience referring to South Africa in India:

We are talking about South Africa. I have been wondering within myself whether we who are talking so much against segregation and so on do not have South Africa in every village. There is; we have only to go and see. There is South Africa everywhere in the village and yet I have very seldom found anybody not belonging to the Scheduled Class taking up the cause of the Scheduled Class and fighting, and why? Because there is no public conscience.³⁹

It is here perhaps that one can identify the churnings of constitutional insurgency in Ambedkar which has the capacity to accommodate within it successive constituent moments. Yet, even when he talks about public conscience as a measure of the ability of people to act in contexts of extreme injustice, as an essential precondition for democracy, Ambedkar makes it compatible with constitutional morality. This is evident from his averment that the absence of public conscience, would develop a 'revolutionary mentality' which imperils democracy. There would appear, however, in Ambedkar a dissonance at this point between what he considers the essential conditions of democracy and the preservation of constitutional democracy. Yet, the dissonance is not substantial if we were to agree that for Ambedkar the conditions of achieving and sustaining democracy were consistent with its objectives – whereby revolutionary changes could be brought about in the lives of people without bloodshed and democracy would exist only when such changes could indeed be brought about by those entrusted with the task of governing. In such a system, socio-economic inequalities which existed along deeply entrenched caste hierarchies, to even think of a system of fraternity in nationhood was for Ambedkar a great delusion. It was in a fraternity, where caste hierarchies, which Ambedkar termed 'anti-national' were erased, that equality and liberty could be actualized. Without fraternity, they would be no more than coats of paint. These conditions were for Ambedkar, essential and integral to a moral order of democracy in which people could live as equal citizens.

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NOTES

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8. Baxi, 2002.
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37. 'English Address at Poona District Law Library, Pune', 22 December 1952, in Narendra Jadhav ed., *Ambedkar Speaks*, Vol.1, 2013, p. 293 (emphasis added).
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39. Ibid.