

The London School of Economics and Political Science

**IN THE SHADOW OF *SWARAJ*: CONSTITUENT POWER AND THE
INDIAN POLITICAL**

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DECLARATION

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ABSTRACT

My thesis presents India as an active intellectual agent rather than a passive sociological referent in the global intellectual history of constituent power. It does so by exploring the hitherto undertheorized field of its constitutional imagination. It was commonly recognized during the anticolonial movement and the emerging postcolonial context that constituent power, or the power of constitution making, ultimately vested in the people. But this did not imply a purely diffusionist reception of either the revolutionary or the constitutionalist tradition of imagining the concept, both of which had been in wide circulation across the globe since the late eighteenth century. I highlight the ruptures, breaks and discontinuities of the Indian political sensibility in respect of the global, and make a case for situating *swaraj* as a distinct indigenous expression for collective self rule within a non-Europeanist and non-globalist relational approach to constituent power.

The objective of this thesis however, is not to present a celebratory juridical account of an authentic nationalist self realization. Rather, it seeks to decentre formal constitutional principles and inter-institutional relations from discussions of constituent power, and anchors them instead in two fundamentally incompatible legal languages drawn from a philosophical history of the Indian political. It argues that the imaginary institution of society in modern India was marked by a constitutive dissensus between the social law of *dharma* and the political law of *dhamma*, and goes on to show how its development has been underpinned in the contemporary domain of constitutional thought in action by the mutual antagonism between these two symbolic lifeworlds. The thesis seeks to demonstrate that the persistent hegemony of a nationalist *dharma* threatens the very autonomy of the political, and it argues that only where this is effectively interrupted by the counter hegemony of a non-nationalist *dhamma* has the Indian political come close to realizing its full potential.

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INTRODUCTION

SITUATING INDIA IN THE GLOBAL INTELLECTUAL HISTORY OF CONSTITUENT POWER

In 1973, an unprecedented thirteen judge Constitution Bench of the Supreme Court of India was required to adjudicate upon the validity of certain constitutional amendments, enacted by a two-thirds supermajority of Parliament in purported exercise of its constituent power under Article 368 of the Constitution of India, 1950. Although there was no contemporary trend of the higher judiciary being thus approached anywhere else in the world, constitutional amendments in India had already been challenged thrice before since independence, with the Court either surrendering completely to Parliament's assertion of constituent power, or denying the juridical significance of the concept altogether by treating it merely as a species of ordinary legislative power. With *Kesavananda Bharati v State of Kerala*, the Court is generally believed to have turned a new leaf by bringing it back into judicial consideration, while at the same time holding that Parliament's amending power was nevertheless subject to the substantive principles of superlegality, encapsulated in what has globally come to be known as the basic structure doctrine.¹

The judicial review of constitutional amendments was justified in *Kesavananda Bharati* by distinguishing the Parliament as a constitutional creature from the constitution making capacity of the people of India, and casting aspersions on its credentials as their representational agent. To put this in J.M. Shelat and A.N. Grover, JJ.'s words,

'When a power to amend the Constitution is given to the people, its contents can be construed to be larger than when that power is given to a body constituted under that Constitution. Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of either House of Parliament. ... That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. ... Therefore the contention on behalf of the Union and the States that the two-thirds of the members in the two Houses of Parliament are always authorised to speak on behalf of the entire people of this country is unacceptable.'²

¹ AIR 1973 SC 1461.

² Id., para 692.

On the other hand, K.K. Mathew, J., emphasized in his judgment that far from being enacted by the people themselves, the constitutional text was actually framed by a rather unrepresentative Constituent Assembly:

‘The preamble to the Constitution of India says that "We the people of India...adopt, enact and give unto ourselves this Constitution". Every one knows that historically this is not a fact. The Constitution was framed by an assembly which was elected indirectly on a limited franchise and the assembly did not represent the vast majority of the people of the country. At best it could represent only 28.5 per cent of the adult population of the provinces, let alone the population of the Native States. And who would dare maintain that they alone constituted “people” of the country at the time of the framing of the Constitution?’³

Yet even if the fiction of a people authored constitution was to be pursued with, it could not come in the way of the proto sovereign Parliament’s exercise of a substantially uncircumscribed amending power:

‘the real sovereign, the hundred per cent sovereign—the people—can frame a Constitution, but that sovereign can come into existence thereafter, unless otherwise provided, only by revolution. It exhausts itself by creation of minor and lesser sovereigns who can give any command. And, under the Indian Constitution, the original sovereign—the people—created, by the amending clause of the Constitution, a lesser sovereign, almost coextensive in power with itself.’⁴

With a thin majority of seven to six, the Court eventually decided that Parliament was free to amend any provision of the Constitution, without however abrogating or damaging the essential features of its basic structure. Violating the basic structure was unconstitutional because this amounted to destroying the very identity of the Constitution itself, which was believed to have been sourced from the constituent power of the people, expressed through their representatives in the Constituent Assembly at the so called founding moment of India as a sovereign democratic republic. Thus in H.R. Khanna, J.’s famous opinion,

‘The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the

³ Id., para 1665.

⁴ Id., para 1677.

retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution.’⁵

That constituent power or the power of constitution making ultimately vested in the people themselves was widely understood in the emerging postcolonial context within which the Assembly operated. Shri Krishna Sinha, the then Chief Minister of Bihar, invoked the term ‘constituent power’ to describe the goal of the anticolonial freedom movement, while endorsing Prime Minister Jawaharlal Nehru’s objectives resolution on the floor of the house. ‘It was for the assertion of this basic right of a people’, Sinha pronounced, ‘that hundreds mounted the scaffold, thousands faced bullets and men, in lakhs swarmed the jails. The country was ‘moved from one end to the other’, with its millions rallying in revolt under a banner raised by Mohandas Gandhi in 1921, and subsequently consumed by a ‘spirit of rebellion’ in 1942, only for the sake of such a long yearned achievement.’⁶ While his may have been a rare direct reference to constituent power, it can hardly be disputed that with the exception of princely aristocracies hitherto accustomed to enjoying varying degrees of sovereign entitlements under British paramountcy, most others were gradually attuning themselves to the inescapable reality of a ruptural transition from conditions of coloniality to a postcolonial state form, with at least the symbolic centrality of the people secured herein.

Nehru for instance, recognized that the Assembly’s strength resided in the people at large, and urged his colleagues ‘to keep in mind the passions that lie in the hearts of the masses...and try to fulfil them’. The collective responsibility that lay before the House, of ushering India with a ‘mighty past of five thousand years’ into an even ‘mightier future’ could indeed be overwhelming, but at the commencement of such a momentous reconstructive undertaking, he drew sustenance from the ‘various Constituent Assemblies that have gone before’—the ‘making of the great American nation’ through a ‘constitution which has stood the test of so many years’, the Constituent Assembly of the ‘mighty French Revolution’ which met to frame a constitution in spite of difficulties posed by the monarch and other authorities, ‘and did not disperse till they finished the task they had undertaken’, and the Russian Revolution ‘out of which has arisen .. another mighty country which is playing a tremendous part in the world.’⁷ By connecting the work of the Indian Constituent Assembly with the great political revolutions of the West and their constitution making legacies, Nehru was alluding to people’s constituent

⁵ Id., para 1480.

⁶ Sinha (CADs, Vol. I: 16 December 1946).

⁷ Nehru (CADs, Vol. I: 9 December 1946).

power as the originating source of the constitution, the fundamental aspects of which were sought to be protected in *Kesavananda Bharati* from Parliamentary incursion. Amending power was after all derivative of original constituent power, and therefore thought to be limited by explicit and implicit terms of its delegation.

This standard narrative about a limited amending power will serve as the point of departure for my thesis on the nature of constituent power in colonial and postcolonial India. In spite of having become the chief theoretical cornerstone of a well established legal and constitutional orthodoxy, I find such an account inadequate and unconvincing, as the originary concept of constituent power is only presupposed herein, without being intellectually engaged with in terms drawn from India's own collective self imagination as a political society. The over emphasis on establishing or discrediting the normative legitimacy of basic structure constitutionalism has meant that scholarly focus has rarely shifted from an examination of the contours of amending power, to a deeper juridical investigation of the constituting postulates of the fundamental law of the political that have underpinned and influenced constitutional thought in action at every juncture of the anticolonial national movement leading up to formal independence, and the subsequent foundation and augmentation of the new postcolonial legal order.

I should point out that the fundamental decisions of the Constituent Assembly which are sought to be protected by the superlegality of basic structure review, cannot be understood exclusively in terms of the legal mythology of an autonomous constitution making exercise giving itself its own law. The Assembly after all was constituted in accordance with the British Cabinet Mission Plan of 1946 and the Indian Independence Act of 1947, and saw itself as striving to actualize the various democratic constituent possibilities that had generated around the anticolonial national movement. Yet even though the Assembly claimed to speak in the constituent voice of the people themselves, its members were either elected by Provincial Legislatures or nominated by Princely States based on property and community qualifications, and were thus at least in an empirical sense not as widely representative of the entire population as future Parliaments have been under India's universal adult franchise democracy.

My objective however, is not to abandon the democratic mythology of a 'We the people of India' coming together to 'give to ourselves this Constitution'. But if it is to be persisted with, we must necessarily ponder upon the following questions: Who are the constitution authoring

people in India and how do they get constituted themselves? In what way can they be said to have pre-existed the framing of the constitution, when it was through the Preamble that they were first officially institutionalized? How can the association of people's constituent power with specific constituted authorities like the Constituent Assembly, Government in Parliament and Supreme Court, be squared with its resistance to all forms of institutionalized representation?

These and many other germinal questions of fundamental law are treated differently in the three rival thought traditions of constitutionalist, revolutionary and relational constituent power which have succeeded in capturing the political imagination of much of the modern world. In the remainder of this introduction therefore, I shall respond to them by attempting to situate India in the global intellectual history of constituent power. I will argue that the Indian career of constituent power can neither be placed within the constitutionalist nor the revolutionary thought traditions, and instead proceed to interpret the early twentieth century Indic concept of *swaraj* or self-rule as a distinct local articulation of a less appreciated yet enormously influential relational concept of constituent power. While doing so however, the endeavour will be to move beyond the constricting debate between diffusionist universalism and exceptionalist particularism, and prepare the ground for distinguishing the Indian political from globally circulating constitutional paradigms in the rest of the thesis.

India and constitutionalist constituent power

Nehru's reference to the great modern political revolutions and their constitution making legacies in the Indian Constituent Assembly was however conspicuously silent about the two conflicting interpretations of constitutionalist and revolutionary constituent power emerging in their aftermath. I would in fact argue that in spite of some attempts to the contrary, it is not possible to discuss India's case strictly under either of these accounts which have dominated much of Euro American constitutional thought engaging with the concept in the last two and a half centuries.

Constitutionalist interpretations of constituent power distinguish constitution making from ordinary law and politics, but owing to anxieties about authoritarian implications of command centric conceptions of popular sovereignty, conceive of it primarily as a normativist exercise in collective self legislation. Normativity here obtains from the semantic meaning of the Latin

expression constitute or to constitute, that is the 'act of founding together, founding in concert, or creating jointly'.⁸ Even if constituent power cannot be juridically contained by ordinary legality, legitimacy none the less demands conformity with rational principles inherently associated with the concept such as reciprocity, deliberation, inclusion and participation, so that as Jurgen Habermas's stipulates, citizens are able to recognize themselves not merely as addressees of the constitution, but also as its very authors. His highly influential co-originality thesis commends this course, for in it lies a possible reconciliation of seemingly contradictory ideas such as democracy and constitutionalism, popular sovereignty and human rights, and public and private autonomy.⁹

Although not precisely in this form, a limited constituent power may actually be traced to Abbe Sieyes, its most well known exponent at the brink of the French Revolution. While highlighting the supremacy of the will of the Third Estate as nation over positive law, Sieyes qualified its operationalization by the circumscription of natural right, which in his scheme was above and prior to the nation.¹⁰ Furthermore, in what has been read as the bringing together of Rousseau on sovereignty and Montesquieu on separation of powers, his prioritization of constituent over constituted power went hand in hand with a preference for representative government. This meant that it could be exercised only by extraordinary representatives of the nation assembled in the Constituent Assembly and not otherwise.¹¹

The concept has received a similar treatment in most assessments of the American Revolution and its aftermath. In spite of being indisputably recognized as the locus of sovereignty, people have by and large been viewed here as wholly constitutionalized, either according to Federalists like James Madison in official constitutional conventions and the Article V formal amendment mechanism,¹² or in Bruce Ackerman's framework, exclusively in dramatic constitutional moments of higher law making, still subject to normative criteria of an institution oriented procedural democracy.¹³ These restrictions have led critics to charge that constitutionalist

⁸ Kalyvas, 2005: 235.

⁹ Habermas (1996); Habermas (2001).

¹⁰ 'The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation, there is only natural law.' Sieyes, 2003 [1789]: 136.

¹¹ See Zweig (1909) cited in Kelly (2014).

¹² Madison (1788).

¹³ Ackerman (1991); Ackerman (2000); Ackerman (2014).

readings of constituent power end up assimilating it to constituted power, as a result of which its revolutionary potential is severely curtailed.¹⁴

Some attempts have been made to place India's experience with constituent power in this constitutionalist style of thought, especially by scholars supportive of the basic structure doctrine. Dietrich Conrad, commonly acclaimed for being its most influential advocate, perceived original constituent power exercised by the Constituent Assembly in consonance with aforementioned normative principles and so justly attributable to the whole of the people, as a means to obviate revolutionary violence in the same way as derived amending power was devised so as to obviate an easy resort to constituent power.¹⁵ Such a convenient bifurcation continues to hold the field even today. It resonates with some recent works which seek to posit India as a dualist democracy by borrowing theoretical insights from Ackerman and other republican constitutionalists, mostly in the Anglo American world. Sarbani Sen's celebratory narrative about a prior period of prolonged popular engagement with the anticolonial struggle culminating in the post-independence constitutional moment of reasoned deliberation and choice, comes across as a nuanced expression of original constituent power in Conrad's sense.¹⁶ This has subsequently been supplemented by Sudhir Krishnaswamy's endorsement of basic structure review as a legitimate interpretive limitation upon amending power, dedicated to the task of protecting the constitutional core from vagaries of passing legislative supermajorities. It is of course presented in such a way that the path to radical constitutional change by the people themselves cannot be hindered, provided they arrive upon it through democratic deliberation, as was supposedly the case in the Constituent Assembly.¹⁷

I have two major disagreements with the way in which these accounts envisage the so called founding moment. First, if we go back to the question of origins, it would be noticed that constitution making in India was deeply imbricated in violence, a critical point which theorists of constitutionalist constituent power generally end up shielding from juridical enquiry by providing an entirely normative picture of the interaction between law and democracy. The constitution-violence interface could not remain concealed because political sovereignty

¹⁴ Carl Schmitt affirmatively quoted R. Redslob who remarked thus about Sieyesean constituent power in the French Revolution: '...the will of the people cannot be represented without democracy transforming itself into an aristocracy. Nonetheless, democracy was not at issue in 1789. It was, rather, a constitution of a liberal, bourgeois Rechtsstaat.' Schmitt (2008/1928: 128-9).

¹⁵ Conrad (1999: 88, 96, 99).

¹⁶ Sen (2007).

¹⁷ Krishnaswamy (2009).

acquired through colonial conquest, although supported by ideological justifications of improvement and protection of native society, always ran the risk of turning into outright domination whenever confronted by prospects of anticolonial resistance. Coupled with this, there were numerous indigenous registers of Indo Islamic violence which also impressed upon legal and political imagination of the period in subtle or obvious ways. Illustratively, the millennial forms of injustice sponsored by what B.R. Ambedkar referred to as the ‘lawless laws’ of the Hindu caste system characterizing the Indian social, insidiously threatened to engulf the political arena, since most protagonists leading the freedom movement were deploying an overarchingly spiritual and cultural vocabulary for their emancipatory imaginations. More apparently visible were the gruesome hostilities associated with the partition of British India, producing the largest ever mass migration and displacement in world history, with at least one million people being killed and another twelve to twenty million left to languish as refugees in the newly independent India and Pakistan. Finally, intensifying peasant and labour unrest in different parts of the country around the time of independence meant that the Constituent Assembly was very much interested in finding a constitutional solution to the spectre of insurgency haunting the unity and integrity of a nation state yet to be brought into existence.

So if at all, the talk of constitutionalist constituent power might have sounded appealing only in a context where a normatively driven constitution making enterprise had already been preceded by the relegation of violence from within the body politic to its peripheral borders. While this was arguably true to an extent for European models of modern state formation, the kind of socio-political conditions which framed the work of constitution making in postcolonial India meant, as Aditya Nigam has shown, that the Constituent Assembly could hardly be regarded as a Habermasian terrain of rational-critical discourse committed to the establishment of a consensual single will.¹⁸

The second reason for my discomfiture with constitutionalist constituent power in the Indian context is its construal by Conrad and others as a juridical category operating in lieu of revolution. We must remember here that it has usually been enunciated in order to counter the disruptive ideology of permanent revolution, and instead affirm an elitist rendering of a specifically Euro American historical sequence, where revolutionary upheavals of the

¹⁸ Nigam (2004).

eighteenth and nineteenth centuries were followed by normatively orientated projects of collective action, aimed at stabilizing their perceivably fragile achievements in constitutional form. But this sequence of events was not necessarily shared by constitutional experiences elsewhere in other time-spaces, not so especially by the mid twentieth century colonial setting of India gearing up for transition to a transformative postcolonial state and society. As is evident from Granville Austin's important biography of the founding moment, a social revolution was less a cause and more the telos of the anticolonial movement, which the Constituent Assembly strove to inscribe in the letter and spirit of the new constitution.¹⁹ Or to draw upon Uday Singh Mehta's insightful observation, unlike the classical bourgeois revolutions of the West producing a largely preservative constitutional imagination of their own, in India, more than the struggle for liberation from colonial rule, it was through the performative act of constitution making that a fundamental break was first inaugurated by unlocking India from the waiting room of historical time.²⁰

Hence, for a ruptural moment of such a magnitude, constitutionalist constituent power does not serve as an appropriate referent. Even if its normative dimension could have been ignored to bring into sharper focus the crucial element of original violence discussed earlier, republican India's constitutional founding and post-founding cannot be analogized to a chronological distinction between higher and ordinary law making temporalities respectively.

India and revolutionary constituent power

References to original violence and fundamental break in the previous section may lead one to surmise that constitution making in India can perhaps be better contextualized within revolutionary interpretations of constituent power. Here constituent power is not only categorically distinguished from constituted power, but is more importantly also accorded absolute priority over established constitutional forms and their normative prescriptions.

This is no doubt a variegated thought tradition, but there have been few clearer articulations of its driving force besides the prescient distinction drawn by Maximillion Robespierre between revolutionary government and constitutional government. According to Robespierre, the goal of the former was to establish and not merely to conserve the republic, as was the case with the

¹⁹ Austin (1966).

²⁰ Mehta, US (2010B). The nationalist abolition of the imaginary 'waiting room of history' metaphor is drawn from Dipesh Chakrabarty. Chakrabarty (2000: 8-9).

latter. So, contrary to a constitutionalist government predominantly interested in protecting individuals from abuses of public power, in a revolutionary government, public power was obliged to defend itself from factions and dangers seeking its dissolution from within or without. To use his famous words, it was ‘the despotism of liberty over tyranny’ aimed at nothing less than ‘the salvation of the people’.²¹ Such a valorization of revolution has been read as a concretized expression of Rousseau’s metaphysical general will, wherein an unrepresentable people asserting real sovereignty has little patience for institutional limitations of a mixed constitution and a contestatory citizenry vigilantly controlling public power.²²

With time, many divergent conceptions of revolutionary constituent power emerged in the nineteenth and twentieth centuries to counter the hegemony of bourgeois liberal constitutionalism and the tame apolitical culture associated with it. They have ranged in antistatist thinking mostly affiliated to the left, from Karl Marx’s espousal of a proletarian dictatorship committed to abolishing the capitalist system and its constitutive social classes,²³ to Antonio Negri’s championing of the boundless creative strength of the multitude as absolute process.²⁴ Among communist and conservative revolutionary perspectives tethered to the modern state form, I may point respectively to Vladimir Lenin’s presentation of the Soviet Bolshevik Party in a vanguard role vis-à-vis workers and peasants,²⁵ and Carl Schmitt’s enthusiastic nomination of the Reich President as bearer of people’s constituent power in Weimar Germany.²⁶

The common concern uniting different political enterprises inspired by these positions is to ascertain who should hold public power, rather than ruminating over the specific form it ought to take. Constituted authority is either disregarded altogether or viewed sceptically as a hurdle on the path to emancipation. As a result, revolutionary constituent power has in turn been held responsible for contributing significantly to devastations wrought by episodes such as the Jacobin reign of terror, Stalinist purges and Nazi holocaust.²⁷

²¹ Robespierre (1794) cited in Jennings (2011: 10).

²² For the Rousseau inspired voluntarist drive to unity in French constitutional thought and practice, see Rosanvallon (2006: 79-116).

²³ Marx (1977/1843).

²⁴ Negri (1999/1992).

²⁵ Lenin (1917).

²⁶ Schmitt (2008/1928); Schmitt (2004/1932); Schmitt (2005/1922).

²⁷ Hannah Arendt therefore understood a successful revolution as one which also sought to enact a new constitution: ‘[O]nly where change occurs in the sense of a new beginning ... to bring about the formation of a

An emergent elitist consensus in favour of democratic constitutionalism at the time of constitution making in post-independence India meant that no talk of an antilegal revolution could have actually taken centre stage. But trappings of a revolutionary rhetoric were unavoidable for a national leadership committed to government sponsored growth and development, and compelled by circumstances of colonial and indigenous exploitation to privilege social transformation over bourgeois liberal rights in case of any conflict between the two. Without getting embroiled in the difficult task of laying out its precise parameters, I wish to argue however that this transformative constitutional project cannot be affiliated to the revolutionary tradition of constituent power mainly for two reasons.

First, my reference to the founding moment as a fundamental break in the previous section should not lead us to ignore its pervasive continuities with the colonial past. Contrary to what one might come to expect from a total revolution, the Constitution of India did not do away entirely with the hitherto operational British legal system. In fact, it retained all prevailing laws in force thus far, and left the question of their validity to be ascertained by the wisdom of future authorities.²⁸ I am aware that a complete juridical disjuncture from the previous regime may be placing too high a definitional demand upon political revolutions, for they need not necessarily be interested in altering existing private law arrangements dealing with civic obligations in a given society.²⁹ But India's lack of fit with revolutionary constituent power is attributable more basically to the colonial lineages of its positive public law framework regulating the government. Instead of beginning on a clean slate, its Constituent Assembly largely chose to retain and improvise upon already existing legislative, administrative and judicial apparatuses of rule that had been gradually institutionalized over several decades by the British through various constitutional enactments and measures ultimately traceable to London.³⁰

This is not to suggest that constitution making in India was not a momentous occasion, or that the only thing it helped accomplish was a transfer of political power from colonial elites to their native counterparts. All I want to convey, by adapting a Schmittian distinction, is that

new body politic, where the liberation from oppression aims at least at the constitution of freedom can we speak of revolution.' Arendt (2006/1963: 25).

²⁸ Art. 372, Constitution of India, 1950.

²⁹ Loughlin (2004: 2, fn. 5).

³⁰ B.R. Ambedkar, who was the Chairman of the Drafting Committee of the Constituent Assembly, acknowledged that some two hundred and fifty clauses had been directly incorporated into the Constitution from the previous Government of India Act, 1935. Cited in Mukherjee (2010: 203).

India's transition to democracy was undoubtedly brought about by the annihilation of the colonial constitution of state, but without a simultaneous elimination of its constitution of government.³¹ While on one hand, the colonial state was resented with varying degrees of vehemence in nationalist thought for having historically suppressed the people's constituent voice, whereas on the other, there was also a mostly unabiding respect for its modes of governance, which were only partially modified and redeployed in the constitutional pursuit of social transformation. As a result, two apparently antithetical logics of break and continuity with the colonial past had to be adopted as equally crucial and mutually reinforcing elements under the new Constitution.³²

A second related reason disconnecting India from revolutionary constituent power was the absence of an uncontentionally recognized collective constitutional subject capable of expressing a unified will of the people as a whole. In order to grasp this point, we must look beyond a triumphal nationalist narrative about the freedom struggle's stagist progression from roughly the establishment of Indian National Congress in 1885, followed by programmatic disagreements over methods and goals between moderates and extremists in its early decades, which were later synthesized harmoniously under Gandhi's mass based leadership, culminating finally in complete independence and an unanimously endorsed republican constitution. What such an iteration sought to conceal intentionally or otherwise, was a socio political climate characterized at every juncture of its evolution by deep-seated constitutive divisions in terms of religion, caste, class and so on, implying thus that conflict and exclusion had to be as integral facets of the constitution making exercise as were consensus and accommodation.

Among the many competing constituent possibilities emerging in this period, some no doubt found a home in the newly created state of Pakistan, whose complicated intellectual history I do not intend to engage with in this project. But as far as India was concerned, the national bourgeoisie now at the helm of an interventionist governmental regime, strove to acquire control over those which remained unrealized or were to germinate in future, a phenomenon which has been theorized in the Antonio Gramsci inspired subaltern scholarship of Ranajit Guha, Sudipta Kaviraj and Partha Chatterjee either as a dominance without hegemony or a passive revolution.³³ For Guha, dominance of postcolonial elites could not be translated into

³¹ See Schmitt (2008/1928: 140-146).

³² Dasgupta (2014).

³³ Guha (1997); Kaviraj (1988); Chatterjee (1986).

overall hegemony because, as evidenced by the continuation of rule through coercion more than persuasion, they were unable to bridge the gap separating their particular class interests from the general interest of society at large. Even if force gave way to consent at least virtually if not effectively with India's transition to a democratic state form, Kaviraj and Chatterjee associate it with transformism rather than expansive hegemony in Gramsci's sense. That is, under conditions of passive revolution prevalent here, national elites endeavoured to integrate the masses merely through a system of absorption and neutralization, as opposed to the creation of an active and direct consensus on the basis of a popular mobilization and a genuine adoption of their interests while enacting the constitution in the name of the people.³⁴

India and relational constituent power

That India's constitutional experience cannot be adequately captured through constitutionalist or revolutionary accounts of constituent power should not surprise, given its historical specificity as a postcolonial democracy. But the general sway of normative thought in constitutional theory across the world is such that much of the celebratory scholarship on this subject is simply contented by and has yet not been able to look beyond conveniently placing India in the club of modern liberal constitutionalism. What is more, those who critique the Constitution or at least some of its provisions, do so primarily for lacking or possessing a liberal character which is otherwise commonly taken to be an integral feature of the constitutional form. Even the relatively new postcolonial version of political decisionism retains this touchstone, albeit as an oppositional anchor while drawing a sharp binary distinction between liberal norms and democratic exceptions, with the former rendered open enough to being departed from if necessitated by the latter, but never to be fundamentally altered or abandoned. Owing to this widely prevalent tendency to proceed with a priori theoretical suppositions, it has not been possible to undertake a non-ideological investigation of India's founding constitutional precepts in their own conceptual terms. In order to prepare the ground for such an exercise, we must turn our attention to theorizing constitutional practices by appreciating their distinct circumstances of evolution in proper context, rather than merely reinterpreting them in the light of deductively derived ideal type theoretical models. Therefore, my enquiry on the nature of Indian constituent power cannot remain confined to tracing resonances and dissonances with constitutionalist and revolutionary thought traditions, and will instead

³⁴ For the Gramscian distinction between transformism and expansive hegemony, see Mouffe (1979: 182).

commence by examining the Indic expression *swaraj* or self rule, which served as its most hegemonic conceptual signifier after being revived and considerably improvised upon during the freedom movement.

Even if the concept of constituent power may have rarely been invoked explicitly in and around the Assembly, I wish to argue that its work of representing the most democratic conviction of the modern age, which being that the ultimate source of legitimate authority in a political system resided in the people, was performed by *swaraj*. As the ligature of two morphemes—*swa* and *raj*, meaning self and rule respectively, *swaraj* came to be recognized as a potent symbol of the emerging aspiration for home rule from the turn of the twentieth century. But unlike other new indigenous coinages of the period for republic or democracy such as *ganatantra* or *lokatantra*, it pre-existed British rule by a long duration and could in fact be traced to India's ancient Vedantic literature. In modern times, it was first drawn upon politically by the moderate leader Dadabhai Naoroji at the 1906 Calcutta Congress, although Shyamji Krishnavarma, the radical nationalist, pointed out that the term had been used much earlier as titles of two weekly Anglo vernacular papers published from Bombay.³⁵ It then became the clarion cry of extremists such as Bal Gangadhar Tilak and Aurobindo Ghose, and under Gandhi, the chief cornerstone of anticolonial politics until independence and the making of the Constitution.³⁶

In spite of its central importance to the constitutional imagination of a free India, my attempt at drawing a connection between *swaraj* and constituent power may meet with two possible objections. First, it may be argued that *swaraj* essentially encapsulated the national desire for liberation from the British, and not that of freedom to co-institute constitutional arrangements for government and society, a feature necessary for any conceptualization of constituent power. Second, sovereignty is key to constituent power, with constitution making seen as carried out by a people unhindered by legislative and even constitutional restraints, whereas *swaraj* entailed a principle of nonsovereignty, given its fashioning of the self not only as the subject of rule but more importantly, also as its very object. Let me deal with these objections, and establish a conceptual equivalence between the two at least in so far as both can be shown to speak to collective self constitution, while remaining mindful of the fact that notwithstanding

³⁵ Naoroji (1906); Krishnavarma (1907: 11).

³⁶ Gandhi's most famous political tract is itself entitled 'Hind Swaraj' or 'Indian Home Rule'. See Gandhi (1909).

this point of intersection, *swaraj* could at once be concerned with more and less than what constituent power encompassed.

We cannot deny that *swaraj* was usually invoked during the anticolonial movement in discussions pertaining to the nature of desired constitutional relations with the British, that is in debates about the pros and cons of greater autonomy, dominion status and complete independence. But as is clear from wide ranging discussions around imperial legislations dealing with colonial government, and multiple indigenous constitutional proposals made from time to time, this struggle was not about achieving liberation from foreign rule alone, but also extended to the generation of constituent power appropriate for the new postcolonial state form.³⁷ That *swaraj* also alluded to the realization of internal freedom is further corroborated by a closer look at its etymological antecedents. The original Vedantic expression *svarajya* is actually an abstract noun which refers not just to self rule, but relatedly along with it to a state of *svarat* or self luminosity. Specifically with respect to British colonialism, *swaraj* helped produce a non-liberal or anti-liberal politics of collective selfhood, while at the same time serving as the guide-post for different imaginations of a free and enlightened constitutional state to be actualized in future.³⁸

Approaching *swaraj* in terms of internal freedom takes us to the principle of nonsovereignty, which supplies the second possible objection to its equation with constituent power. We may in fact notice that *swaraj* is an ambiguous expression, with self rule simultaneously capable of bearing two meanings—rule of the self, and rule over the self. While the former, that is the self conceived as subject of rule was in sync with modern sovereignty, the latter, that is the self as object of rule appeared to have little to do with it, particularly so in Gandhi's exemplary fidelity to those governmental technologies of the self which were creatively fashioned by him to negotiate with the depredations of modern civilization.³⁹ But this ethical interpretation of the concept was not necessarily antipolitical, and in fact resonated with interpretations of sovereignty in relational accounts of constituent power in the Euro American public law tradition, even if constitutionalist and revolutionary constituent power were not comparable enough reference points for reasons highlighted above.

³⁷ Mantena (2016: 297-316).

³⁸ For *swaraj* and the non-liberal or anti-liberal politics of selfhood, see Kapila (2007: 109-127).

³⁹ Godrej (2017: 894-922).

Sovereignty here is understood not as a property possessed by an absolutist or populist agent and exercised from on high, but rather as a preeminent political relationship established among the rulers and the ruled, consequently upon a symbolic representation of the people as vested with constituent power.⁴⁰ *Swaraj* can in this sense be read as supplying a conceptual frame for constituent power in the Indian context, with its ambiguous nature analogizable to the irresolvable paradox of constituent power involving the reflexive constitution both by and of a collective selfhood.⁴¹ When invoked to refer to the rule of the self, it gestured to the constitution of a legal order by a political unity, that is to the authority acquired by the Constituent Assembly to enact a positive constitutional document in the name of the people at the time of independence. However more fundamentally, as connoted by the rule over the self dimension of *swaraj*, this was accompanied by the notionally prior constitution of India as a political unity in consonance with the fundamental law of *rajadharma*, approximately translatable into *droit politique*, *jus politicum*, political right and other similar European variations of public law.

The primacy of *rajadharma* in nationalist imagination can be gleaned from these remarks of Dr. Sarvapalli Radhakrishnan, the famous philosopher and second President of India: ‘*Dharma*, righteousness, is the king of kings. ... It is the ruler of both the people and the rulers themselves. It is the sovereignty of the law which we have asserted.’⁴² That such a sovereignty of law was political in nature and thus not identical to the constitutionalist notion of rule of law, was made even more evident by Radhakrishnan explaining its meaning and significance on another occasion through imperial and theological imageries of the Buddhist *dhammachakra* or wheel of law popularized by the ancient ruler Asoka and the *sanatan dharma* or eternal religion of Vedantic Hinduism:

‘The Ashoka’s wheel represents to us the wheel of the Law, the wheel of the *Dharma*. Truth can be gained only by the pursuit of the path of *Dharma*, by the practise of virtue. It also tells us that *Dharma* is something which is perpetually moving. ... This wheel, which is a rotating thing, indicates to us that there is death in stagnation. There is life in movement. Our *Dharma* is *Sanatana*, eternal, not in the sense that it is a fixed deposit but in the sense that it is perpetually changing. Its uninterrupted continuity is the *Sanatana* character.’⁴³

⁴⁰ Loughlin (2015: 1-25); Lefort (1988: 213-255); Ricoeur (1960: 196-207).

⁴¹ Lindahl (2008: 9-24).

⁴² Radhakrishnan (CADs, Vol. II: 20 January 1947).

⁴³ Radhakrishnan (1947) cited in Rao (1966: Vol I, 504).

However, as I enter India's postcolonial constitutional field and investigate the constitutive conditions of possibility producing the symbolic centrality of *swaraj* for the new political community, what strikes me immediately is that the fundamental law of *dharma* is not easily graftable onto some of the key categorical distinctions between the theological and the secular, the private and the public, and the social and the political, which have been so critical to the foundations of modern Euro American public law and its global circulation. The foundation and augmentation of the constitutional order in independent India has not necessarily been accompanied by a concomitant depoliticization of the theological, the private and the social, a phenomenon which would come across as threatening to compromise the very autonomy of the political in standard Western accounts of relational constituent power. Its survival as a sovereign democratic republic even after seventy years of not conforming with some pregiven global constitutional script may either be read as an aberration or oddity, or as a successful model worthy of emulation in the global South as well as in the global North, especially in the contemporary period when the different conceptual building blocks of modern public law are separated from one another only by wavering lines and fuzzy boundaries. I shall pursue neither of these two options, and instead highlight the ruptures of the Indian political from the global model of relational constituent power, primarily with a view to bring its own internal contradictions into sharper focus. Radhakrishnan's observations on *dharma* after all, were indicative of a nationalist attempt at subsuming and sublating what was its rival, conflicting and irreconcilable ethical lifeworld of non-nationalist *dhamma*.⁴⁴ It is this intellectual antagonism between the hegemony of *dharma* and the counter hegemony of *dhamma* that my thesis will explicate by engaging with the modern career of constituent power in colonial and postcolonial India.

Thesis outline

The thesis will situate the modern Indian political in, and distinguish its own inner contradictions from the Euro American and global thought tradition of relational constituent power in the next five chapters. Each chapter will take up one pair of apparently oppositional concepts associated with the collective self institution of society, the determination of its normative point of joint action, and the identification of an authoritative agent for the

⁴⁴ This miscasting of *dhamma* as *dharma* is also noted by Ranajit Guha quoting from D.D. Kosambi's work on the cultural history of ancient India. Guha (1997: 35); Kosambi (1972: 165).

articulation, monitoring and enforcement of this normative point. These pairs include the tension between an inside and an outside, law and subjectivity, universalistic homogeneity and particularistic heterogeneity, functionalist duties and normativist rights, and reason of state and public reason. Apart from their open, provisional and dynamic reconciliation in influential accounts of relational constituent power, the Indian experience is characterized by another more fundamental irreconciliation that no constituted authority has been able to tame or defuse completely.

In chapter one, I will show how this antagonism was manifested in the philosophical history of the Indian political in two conflicting understandings of fundamental law, originarily associated either with the inner domain of the domestic householder, or with the outer domain of the wandering ascetic.

Chapter two will turn to the intellectual exchange between Gandhi and Ambedkar during the anticolonial national movement, and pull out from their constitutional debate two concepts of *swaraj* anchored in competing social and political conceptions of law and subjectivity, premised upon the negative externality of the colonial legal order on the one hand, and the Hindu caste order on the other.

I will next move to the making of the collective constitutional subject in chapter three, and establish that the divergent views on minority entitlements in colonial India leading up to the institutionalization of affirmative action on grounds of backwardness in postcolonial India were in fact attributable to two contrasting ideas of national sovereignty based on social familiarity and political contract.

Chapter four will then intellectualize the postcolonial project of transformative constitutionalism elaborated in Parts III and IV of the Constitution, and contend that its endeavour to arrange sovereignty and governmentality as well as democracy and constitutionalism in a more manageable relationship had to grapple with two irresolvably incompatible discourses of social duties and political rights, not only at the founding moment but also in the contemporary age of populist reason.

Finally in chapter five, I will return to the judiciary once again, and by connecting the basic structure doctrine to the constitutional jurisprudence on public interest litigation, caste and

religion, bring out how the Supreme Court's legitimacy as an agent of constituent power has been dependent on its ability to deploy two strikingly different justificatory logics of social reason associated with the positive theology of being, and political reason associated with the negative theology of becoming, which is reducible neither to being nor to non-being.

The conclusion will bring these conflicting elements together to argue that the autonomy of the Indian political is equally threatened by the hegemony of both antagonistic languages of fundamental law, and make a case for imagining the people and the constitution as empty signifiers of its sovereignty.

CHAPTER I

THE PLACE OF LAW IN THE INDIAN POLITICAL

Introduction

The legal imagination of postcolonial India has undisputedly been fashioned around the primacy of public law over private law, much more so than is the case in most other constitutional societies in the world today. Its republican constitution of 1950 has inaugurated an unprecedented era of political absolutism, in which apart from the procedural checks and balances of modern constitutionalism, there are potentially no substantive limits on the ever increasing politicization of different facets of extant social life.⁴⁵

Over the years, two contrasting intellectual positions have emerged on the precise relationship between public law and politics in the eventful career of India's constitutional enterprise. While on the one hand, normativist thinkers treat the formal constitution as an aspect of applied moral philosophy, and seek to promote and strengthen the rule of law ideal in order to tame unregulated ordinary politics,⁴⁶ decisionist thinkers on the other hand harp upon the material constitution envisaged as an empirical arena of competitive politics, where law is simply treated as an instrument of coercion and domination in service of ruling ideologies.⁴⁷ Notwithstanding their other divergences however, both of these perspectives commonly construe politics in narrow terms as an activity pertaining to the sharing and distribution of power understood as a monopoly over the legitimate exercise of force,⁴⁸ and the constitutional text and its official and nonofficial interpretations as objective articulations of supreme positive law.⁴⁹

When approached in this manner, public law and politics can only be thought of as belonging to two entirely separate domains which are mutually incompatible and struggling for supremacy with one another. What gets neglected as a consequence of focusing excessively on

⁴⁵ Mehta, US (2010B: 23-27).

⁴⁶ See for example, Khosla (2012); Krishnaswamy (2009).

⁴⁷ See Chatterjee (2011A); Chatterjee (2004).

⁴⁸ The point is famously associated with Max Weber. See Weber (1946: 26-45).

⁴⁹ Constitutional judicial review is traceable to the landmark United States case of *Marbury v. Madison*, 5 U.S. (1803).

the legal regulation of politics is a more foundational concept of the political, which gestures to the collective self institution of society as a whole, where law is neither equated with norm nor reduced to decision, but is rather viewed in a fundamental sense as being constitutive of the imaginary field of symbolic power from which all ordinary and extraordinary constitutional actions derive their very meaning.⁵⁰

Although the discipline of Indian constitutional studies has produced its fair share of normativist and decisionist scholarship like anywhere else in the modern world, much less attention has been devoted over here to the institutional approach to law, which is the only legal theory that requires a thorough appreciation of the workings of the political.⁵¹ The Indian political itself has hardly been engaged with in a sustained manner, perhaps because the postcolonial constitutional regime does not share some of the most essential features marking the European experience of the political, which have unavoidably served as influential signposts in the global journey of the concept thus far. Unlike many Western countries where the political was premised upon modern state sovereignty and its subsequent transition into governmentality, the establishment of colonial governmentality in India long preceded the acquisition of a rather unstable, insecure and deeply contentious national sovereignty, where the state does not even possess the monopoly over violence and has to share this most sovereign of all entitlements with other powerful forces in society. In other words, conflict has been at the heart of the postcolonial constitution of state, and therefore cannot be left exclusively upon its constitution of government to manage, as is arguably possible today in the European context. Nevertheless, these differences must not lead us to jettison the concept of the political altogether; the dissensus underpinning its formation, deformation and reformation must instead be examined carefully so as to come up with a fresh reconstruction of India's constitutional enterprise.

This dissensus is expressed not only in violence and politics, but has also been articulated in debates about the meaning of fundamental law governing the generation and acquisition of political authority, above, within and besides the constitution.⁵² India's moment of arrival into the postcolonial was in fact marked by an irreconcilable conflict between two radically antagonistic concepts of law, jostling for hegemony in the project of fashioning a new

⁵⁰ Castoriadis (1987).

⁵¹ Schmitt (2004/1934).

⁵² On the three modes of constituent power, see Spang (2014).

collective constitutional subjectivity. There existed over here a dormant precolonial constitutional tradition marked by the autonomy of the political from the social, which was disrupted by colonial rule and waiting to be revived through the prioritization of the concept of political law. However, it was up against the concept of social law which had made a strong case for capturing the space of the political in the name of a vibrant social sphere activated afresh during the anticolonial movement. One can notice an obvious preference for the latter approach, strictly going by the original intention of those party to a fragile post-partition nationalist consensus in the country. Yet no seemingly definitive response could durably colonize the whole of the political, without at the same time damaging the very conditions of its own possibility. Therefore, to the extent that this founding problematic of the first order Indian political continues to remain relevant even today, no intellectual study of the constitutional project can afford to ignore the second order constitutive antinomy between social law and political law, and the philosophical history underpinning its development at every stage.⁵³

I shall commence my thesis on the intellectual career of constituent power in colonial and postcolonial India by bringing together in this first chapter the legal, historical and philosophical scholarship on the two conflicting concepts of fundamental law into a coherent narrative about their place in the Indian political. The chapter is divided into three sections. Section one will conceptualize the Indian political by contrasting its distinctive trajectory of development with the widely circulating twentieth century debate on the European concept of the political. My argument will be that unlike the most influential European renditions of the concept, the inside-outside distinction constitutive of the constitutional order in precolonial India was internal and symbolic rather than external and real, and thus produced an ineliminable fundamental antagonism between two languages of social law and political law associated with the different cultures of theological sovereignty in Hinduism, Buddhism and Islam. In section two, I will move to the period of British colonialism, and respond to the diverging views of postcolonial theorists and legal pluralists on the nature of colonial law, by borrowing insights from the general jurisprudence of law as a species of authorized collective action. The objective will be to show how colonial rule sought to depoliticize the Indian political through the institutionalization of a liberal constitutionalism premised upon a relationship of abstract estrangement between the colonizer and the colonized. Finally, section

⁵³ On the idea of doing a philosophical history of the political, see Rosanvallon (2006: 59-78).

three will theorize the changing indigenous attitudes towards the colonial constitutional paradigm, ranging from an initial acceptance and domestication at least among the elite intelligentsia in the first half of the nineteenth century, followed by scepticism and subsequent rejection, coupled with a politics of collective selfhood from its second half onwards. This turn to repoliticization will be explained by drawing short sketches from the constitutional thought of Raja Rammohan Roy, Swami Vivekananda and Jawaharlal Nehru. With the eventual reoccupation of the space of the political however, my suggestion will be that the focus must shift now to the investigation of its own unresolved inner contradictions.

1 The Indian political and its two concepts of fundamental law

In an important essay, Samuel Moyn has carefully distinguished between two alternative approaches to thinking about the concept of the political in twentieth century Europe, broadly associated with the intellectual imagination of Carl Schmitt and Claude Lefort.⁵⁴ Briefly put, the European debate on the political was focused on the signification involved in breaking away from the transcendental theological to a largely immanent mode of constitutional thought triggered by post-enlightenment processes of secularization, modernization and democratization. For Schmitt on the one hand, even if this may have resulted in the replacement of god or king by the people as a new constituent subject, there was no concomitant change to the theologically inspired structure of constituent power. A distinctly identifiable entity of the demos remained in charge of a normatively unrestrained sovereignty through its representation in a presidential dictator.⁵⁵ Lefort on the other hand, read into the new political a more profound rupture in the symbolic order of representation itself. According to him, modern democracies had brought about an opening up of the symbolic centre of society by construing power as an empty place, incapable of being substantialized in any entity—divine, princely or popular.⁵⁶ Furthermore, while both Schmitt and Lefort understood that the political was inconceivable without some distinction between an inside and an outside, they diverged from one another over whether it was to be defined in real or in symbolic terms. In Schmitt's account, the political emerged as a precondition of the modern state form, and became a contrastive autonomous domain separable from morality, economics and aesthetics, based on potentially intensive

⁵⁴ Moyn (2016A: 291-311).

⁵⁵ Schmitt's thesis was that the central concepts of modern state theory were nothing but secularized theological concepts. See Schmitt (2005/1922). On his theorization of dictatorship, see Schmitt (2014/2006).

⁵⁶ Lefort (1988: 213-235).

nationalist feelings of friendship for one's own and enmity for the other.⁵⁷ Many who subscribed to Schmitt's thrust on the primacy of the political, gradually improvised upon or completely rejected most or all of its features, given the problematic consequences of his temporary Nazi affiliation.⁵⁸ Moving beyond this fruitful yet troubling legacy, a rival tradition of French thought lead by Lefort alternatively interpreted it as a phenomenon deemed foundational to all aspects of social life, and not just the governmental sphere of everyday partisan politics alone. Such a comprehensive understanding of the political, gesturing to principles generating different forms of society from ancient to contemporary times, could make do with symbolic externality for constitutive purposes, and thereby render the need for real enmity entirely redundant.⁵⁹

These two theoretical positions may have proved invaluable in capturing the distinctiveness of the European experience, but it is not clear how they can be unreflexively extended to other political societies elsewhere in the world, whose pathways of being and becoming do not necessarily match the one described herein above. I would like to suggest that when decoupled from European historical specificities, what still remains relevant of the political in a generalized sense under global conditions of modern secular democracy is the vanishing mythology of transcendental sovereignty and the inside-outside distinction. However, these ingredients are not easily graftable in their exact European or global form onto the markedly different background conditions in which the Indian political can be said to have originated. Although the idea of a transcendental order in precolonial India may well have resonated with premodern European imagination, it did not have an equivalent institutional locus of theological sovereignty, akin to what the church and state had fought to occupy in the famed religious wars of medieval Europe. Rather, the more fundamental conflict in India was between two altogether different modalities of sovereignty, one of which was oriented to the inner domain of the domestic householder, and the other to the outer domain of the wandering ascetic. As a result, the constitutive distinction between the inside and the outside was internal to India's own political society, and could not be sufficiently externalized even after the establishment of nation state sovereignty in the country. This has produced over here an irreconcilable antagonism between the two symbolic lifeworlds of social law and political law,

⁵⁷ Schmitt (1996/1932).

⁵⁸ See for example, Mouffe (1993); Mouffe (2005); Kahn (2004); Kahn (2011A).

⁵⁹ Lefort (1988: 216-217); Rosanvallon (2006: 31-58).

whose conceptual entailments I shall now proceed to elucidate, in the historical context of their emergence and development up until the colonial period.

1.1 *Dharma, dhamma, niti*

The legal culture of ancient and medieval India has most commonly been understood as an exemplary instantiation of a distinctly social constitutional paradigm. Its chaotic pluriverse of human and nonhuman life was presented in classical Hindu thought as an immanent expression of an eternally existing transcendental cosmos, which was meant to be governed in accordance with what can be referred to as the social law of *dharma*. The term *dharma* was derived from the Sanskrit root '*dhr*', meaning 'to support', 'to hold', 'to nourish', and alluded to a transcendental order that was sustained by norms of proper behavioural conduct, sourced from Vedic *srutis* and *smritis*, *sadachar* or good conduct of the cultured elite, and the customary laws of temporally and geographically dispersed communities.⁶⁰ These norms sought to organize society on the basis of different logics of inclusion and exclusion, and were theologically believed to be determined by the *varna* or class and *asrama* or stage of life to which a person belonged.

According to the Brahminical mythology espoused in the *Manusmriti*, the most well known legal treatise of the *Dharmasastra* tradition, four ideal type social classes or castes emanated from the sacrificial dismemberment of the primordial cosmic man *purusa*, and assumed their respective *svadharma* or own duties from the place they occupied in the divinely sanctioned hierarchy.⁶¹ This *purusa* gave birth to Brahmin priests and teachers from his mouth, Kshatriya rulers and nobles from his arms, Vaisya farmers and merchants from his thighs, and Sudra servants and labourers from his feet. Atisudra untouchables were assigned the most scorned occupations connected with death, products from dead animals and trash, along with other forms of unskilled labour, and deemed so low and polluted that they did not even find a position in the caste hierarchy. Finally there was the category of *mlecchas* or barbarian foreigners, who were completely outside the juridical purview of the caste order, unless conquered and brought within its fold at the lowest rungs of society.⁶²

⁶⁰ The most authoritative juristic treatment of *dharma* is to be found in P.V. Kane's encyclopaedic work published in five volumes. Kane (1962-1975, V Vols.). Particularly on the meaning of *dharma*, see Kane (1962, Vol I: 1-6). On the sources of *dharma*, see Olivelle (2018B: 49-59).

⁶¹ For a recent translation of *Manusmriti*, see Olivelle (2005A).

⁶² Actor (2018: 60-77).

This caste order was to be preserved and maintained by a coalitional arrangement among its upper echelons, with the rulers in particular required to follow their *rajadharma*, that is the ‘law(s) for kings’ or the ‘Whole Duty of the king’, pertaining to war and punishment, protection of subjects and creatures, and enforcement of *dharma* of all the other social segments.⁶³ But although *rajadharma* may have defined the duties of a king as per his Kshatriya *varna* in classical Hinduism (second to sixth century AD), its intellectual antecedents traceable to the Vedic period (fifteenth to sixth century BC) takes us to the concept of *dharma* understood in a more fundamental sense as *satrasya ksatram*, that is the ‘ruling power of the ruling power’, or the cosmic power behind royal power. In the Vedic period in fact, *dharma* as a category had little significance in social life, apart from its association with royal rituals such as the royal consecration (*rajasuya*) and the horse sacrifice (*asvamedha*), and royal guardianship of the moral order. What made *dharma*’s transformation from a marginal regal to a general social concept possible, was its Buddhist ethicization in the Pali language as the political law of *dhamma*, which subsequently went on to assume a central place in the Mauryan ruler Asoka’s imperial theology in the third century BC.

Dhamma was invoked by the Buddha in its originary sense as political law along with other royal symbols as the key legitimizing principle of his new ascetic religion.⁶⁴ The Buddha was born as Siddhartha Gautama, himself an heir apparent to the throne of the Sakya kingdom, who renounced familial and regal life to set out in quest as a wandering mendicant, and famously attained enlightenment at the age of thirty five. In spite of having given up on kingship, he was now portrayed as the world conquering universal emperor propagating the new truth in the language of *dhamma*, with his very first sermon recorded as the *Dhammacakkappavattana Sutta*, or the *Sutra* that set the ‘wheel of law’ in motion. With this Buddhist appropriation therefore, *dhamma* became an ethical signifier of a good and righteous life lived in consonance with the truth discovered by ‘the enlightened one’.

It was during Asoka’s reign that *dhamma* was popularized as an integral feature of imperial theology, after his conversion to Buddhism in the wake of the bloody battle of Kalinga in 262 BC. Rather than the hierarchical arrangement of society on the basis of the subjective status of *varna*, his royal edicts gestured to an alternative social ordering grounded in a twofold

⁶³ McClish (2018: 257-272); Derrett (1976: 597-609).

⁶⁴ Olivelle (2005B: 120-135).

horizontal spatial distinction between the *pravrajitas* who had wandered forth from home to the homeless state, and the *grhasthas* who opted to stay at home, while belonging to and following the tenets of their respective *pasandas* or communities.⁶⁵ Four major *pasandas* mentioned by name were the Brahmanas, the Buddhists, the Jains and the Ajivikas, all of which were in turn composed of both ascetics as well as householders. While Asoka disparaged the ritualism of domestic householders, he not only patronized various ascetic institutions but also sought to draw legitimacy from them, with an undeniable partiality for the Buddhist Sangha. His prioritization of an ascetic mode of life, especially by downgrading if not abolishing animal sacrifice altogether, curtailed the exceptional status of the Brahmanas as custodians of the ritual economy of the royal function in Hindu theological imagination, and in effect brought them at par with other Sramana communities in the realm.⁶⁶

With the decline of Buddhism as a political religion however, Brahminical Hinduism returned to the fore once again, gave up on the primacy of Vedic ritual sacrifices, and reconceptualized *dharma* as social law in consonance with its householder centric lifeworld. The prioritization of *grhastha* over *pravasti* was accomplished not by disavowing asceticism altogether, but by domesticating it into the *asrama* system of the four life-stages of the Vedic student, the married householder, the forest hermit and the wandering mendicant.⁶⁷ In this way, the alternative pathways of religious life available in society came to be fused into a singular temporal sequence, premised upon the normative superiority of the married householder brought about by the supplementation of the major *sanskaras* or rites of passage with the ritualization of normal daily family life as a whole.⁶⁸ What is more, to the extent that the four *asramas* were only open to the first three *varnas* who were known as the *dvijas* or the twice born after their initiation into Vedic learning, this system effectively reinstated the supremacy of the Brahmin in coalition with the other upper castes, and relegated the Sudras, Atisudras and other heretical *pasandas* to the margins of society.⁶⁹

⁶⁵ On the distinction between *pravrajita* and *grhastha* in ancient Buddhist and Hindu legal thought, see Olivelle (2018A: 15-29); Olivelle (2018B: 78-85).

⁶⁶ For a purely normative reading of Asoka's *dhamma* as premised upon a transcendental morality of principled coexistence with others, in contrast with the self regarding transcendentalism of contemporary Brahminical theology, see Bhargava (2014: 173-202). For a historical overview of the Asokan period, see generally Thapar (2012/1961).

⁶⁷ Jamison (2018: 125-136); Olivelle (2018D: 236-244).

⁶⁸ Michaels (2018: 86-97).

⁶⁹ Olivelle (2018B).

There were no further fundamental challenges to the primacy of *dharma* in the language of political law and sovereignty from within a purely Indic imagination in the post-Buddhist period. But it did encounter another competitor in the form of a rival *rajaniti* tradition, concerned not so much with the preservation and maintenance of a transcendental cosmic order, and more with the immanent politics and policy of statecraft and governmentality. As is evident from Kautilya's *Arthasastra*, the most famous treatise of this genre composed in around the first century BC, the *niti* tradition was not as interested in the soteriological question of the king's salvation, as it was in the material question of consolidating and expanding his worldly rule.⁷⁰ *Arthasastra*'s ambivalence towards theological sovereignty however, left open the possibility of its subsequent integration into the *dharma* tradition during the classical age of Brahminical Hinduism, extending up to the reign of the Gupta empire from the fourth to the sixth centuries AD.⁷¹ Later on, from around the twelfth to the fifteenth centuries, *niti* is shown to have broken free from the logic of *dharma* and become relatively autonomous once again, particularly so in the vernacularized political milieu of the Kakatiya and Vijayanagara kingdoms of the South.⁷²

1.2 *Shariah, fiqh, siyasah*

It is easy to work with the presupposition that this complicated culture of conflict and contestation was radically altered under Muslim rule from the thirteenth to the nineteenth centuries, given the Islamicate emphasis on a monotheistic imagination of theological sovereignty much like in premodern Europe. However, precolonial Islam shared with Indic religions much more so than its Judaeo-Christian cousins elsewhere, the absence of an established church representing the sovereignty of God on earth, and supplying to imperial and kingly monarchs a model worth replicating or breaking away from. So instead of the struggle to occupy the space of sovereignty, its legal culture of *shari'ah* was bifurcated into two competing articulations of *fiqh* and *siyasah*, which can in fact be broadly mapped onto the irreconcilable distinction between social law and political law in Hinduism and Buddhism. *Fiqh* was the juristic enterprise of understanding divine law through an exegetical interpretation

⁷⁰ McClish and Olivelle (Eds.) (2012).

⁷¹ McClish (2018: 257-272). This explains the dominant tendency among contemporary political theorists to read *rajaniti* within a broadly *rajadharma* paradigm. See Kaviraj (2013: 24-39). But for a different view on the autonomy of *niti* from *dharma*, see Chatterjee (2011A: 53-74).

⁷² Rao and Subrahmanyam (2008: 396-423); Rao and Subrahmanyam (2009: 175-210). For a different view about the falling into obscurity of the *rajaniti* tradition in medieval India, see Pollock (2005).

of the Qur'an, Hadiths and so on, which gradually came to be superseded by *siyasah*, where the rulers themselves made laws (*kanun*) for their subjects in consonance with higher theologico philosophical principles of justice (*adl*) and welfare (*maslahah*).⁷³ The *siyasah* tradition came to India during the reign of the Delhi Sultanate and the Mughal empire set up successively in 1206 and 1526, most noticeably through Nasir-al-Din Tusi's *Akhlaq-I Nasiri* (thirteenth century AD), authored first whilst in service of a heretical Isma'ili ruler of Northern Iran and finally completed at the court of the pagan Mongol conqueror Hulegu Khan. Tusi's work was then adapted and ingeniously deployed in an Indian setting by Muslim monarchs to normatively govern an overwhelmingly large body of *zimmi* and *kafir* subjects who did not belong to the fold of Islam.⁷⁴

Following the ascendancy of *siyasah*, the *fuqaha* or jurists of the doctrinal *shari'ah* came to be displaced by ascetical mystics from the various Sufi orders as the criteria of legitimacy for Muslim rulers in India. The more powerful emperors in fact, went on to internalize this legitimacy unto themselves by sacralising their sovereignty in the manner of Sufi saints and holy saviours, as was best exemplified in Akbar's (r. 1556-1605) portrayal of himself as the messianic 'millennial sovereign', who was supposed to usher in a new temporality of peace and justice (*Sulh-I kul*) at the turn of Islam's first millennium. Inviting accusations of heresy from the orthodox intelligentsia, Akbar instituted a devotional order of imperial discipleship known as *Din-I Ilahi* or the Divine Religion, and thus fashioned himself both as a material lord as well as a spiritual guide to all his subjects regardless of caste, creed, religion and ethnicity.⁷⁵ Consequently, there emerged in India a political culture of constitutional neutrality in which the sovereign ruler could remain Muslim only in a nondenominational sense. In 1857, this is precisely what encouraged rebel sepoys of the British Indian Army, cutting across otherwise inefaceable religious and regional divides, to see the last Mughal Emperor Bahadur Shah Zafar (r. 1837-1857) as vested with enormous *de jure* power, even though actual *de facto* authority at his command was virtually non-existent.⁷⁶ So at least ninety years before the institutionalization of adult franchise democracy in the post-independence constitution, sovereignty here was conveniently being imagined as akin to an empty place of power. But the

⁷³ On the deeply entangled relationship between *fiqh* and *siyasah* in the historical age of the 'Balkans to Bengal complex', see Ahmed (2016: 453-492).

⁷⁴ On this displacement of *fiqh* by *siyasah* in medieval India, see Alam (2004).

⁷⁵ On Akbar as a millennial sovereign, see Moin (2012).

⁷⁶ On constitutional neutrality and the Sepoy Mutiny, see Devji (2012: 9-40).

replacement of the figure of the monarch at its symbolic centre by that of the people would have to wait until the arrival and departure of an alien colonizer.

2 Colonial depoliticization of the Indian political

We may argue whether a decisive break from the extant Mughal state form was made immediately after the British victory in the Battle of Plassey in 1757 and the subsequent grant of *diwani* in 1765, with the Cornwallis reforms of 1793, the Charter Acts of 1813 and 1833, or only when Queen Victoria at last formally assumed charge as Empress of India in 1858. But there is little doubt that a markedly distinct regime of modern governmentality was stutteringly put in place since the initial years of East India Company rule itself, although the chief guiding motivations then were largely commercial and military in nature.

To be sure, colonial governmentality could never envelop the whole of society, or require a complete overhaul of social law at any stage of development, even as they were both increasingly being recast in order to cater to colonial priorities. However, the pervasive presence of a primitive social law was used as justification for a more decisively antipolitical project of hollowing the premodern crown, and denying its claim to sovereign power in respect of making legislative enactments.⁷⁷ While the authoritarian and arbitrary dimensions of political law were conveniently read in consonance with occidental mythology about oriental despotism,⁷⁸ its ethical components were curiously translated into moral tales applicable to all and prescribed for study in school curricula.⁷⁹ As a result of these orientalist moves, a long and complicated history of frequent struggles for supremacy between *dharma* and *dhamma*, *shari'ah* and *siyasah*, was sought to be reduced to one unalterably defined by the primacy of the social, and a concomitant absence of an autonomous political. It is this depoliticization of the Indian political that I now explain, by responding to an intellectual disagreement between postcolonial theorists and legal pluralists over the role of law in establishing and furthering colonial rule.

⁷⁷ On the colonial hollowing of the medieval crown, see Dirks (1987); For an orientalist contrast between the Western culture of positive legality and the classical Hindu culture of transcendental authority, see Lingat (1998).

⁷⁸ Montesquieu (1989/1748).

⁷⁹ Rao and Subrahmanyam (2008: 420-421); Rao and Subrahmanyam (2009: 208-209).

2.1 Postcolonial theory versus legal pluralism

Notwithstanding the immensity of violence involved in its foundation and maintenance, colonial domination was couched in the rhetoric of rule of law, and presented as a corrective antidote to primitivism and despotism assumed to be characterizing an oriental society like precolonial India. Hence the role of law in propelling the British to a position of paramountcy has generated considerable scholarly curiosity over the years. Broadly speaking, two opposing positions on the subject are in circulation at present: the first approaches colonial rule through a norm-exception dialectic open to the withholding of ordinary laws if the task of subordination so required, while the second stresses upon a vibrant culture of legal pluralism playing out under conditions of imperial sovereignty.

Many theorists and historians who identify themselves either with subaltern or postcolonial studies often draw a contrast between metropolitan norms of natural and positive law, and their temporary or permanent suspension in multiple zones of colonial exceptionality. They readily admit that a modern legal order was indeed introduced in India by the British, but go on to show how its formation was continuously shaped by colonial concerns regarding the regulation of a seemingly immature, inscrutable and heterogeneous subject population, and the management and suppression of anticolonial resistance. To deal with such troublesome matters, various innovative techniques and modalities were deployed by administrators and judges which had no comparable precedents in the metropole, and were in fact even exported there from colonial fields whenever required. These included but were not limited to the following: the ‘rule of colonial difference’ motivating the setting up of separate legal practices and procedures for British and native subjects based exclusively on a racial marker, and thereafter becoming integral to the physical and systemic infliction of ‘white violence’;⁸⁰ the policy of ‘define and rule’ essentializing individuals and groups for governmental purposes according to fixed and enumerable criteria of race, religion, caste and tribe;⁸¹ and the colonial ‘jurisprudence of emergency’ mediating the tension between the government’s prerogative to exercise force and its commitment to an established legal order through the manoeuvre of suspending the rule of law.⁸²

⁸⁰ Chatterjee (1993: 14-34); Kolsky (2010).

⁸¹ Mamdani (2012).

⁸² Hussain (2003).

All of these critical formulations are in different ways indebted to Ranajit Guha's instructive theorization of colonial autocracy as a 'dominance without hegemony', or in other words as one where the element of coercion far outweighed that of persuasion.⁸³ Guha noticed that the ruling bourgeoisie certainly attempted to portray the newly instituted order as grounded in consent rather than conquest, by presenting its own sectional interests as general interests of its Indian subjects. But this façade gave way under colonial conditions of a truncated liberal universalism, and a relentless socio-economic and epistemic exploitation of the masses. Governmental practices here remained imbricated in an irresistible extraterritorial urge for capitalist expansion and reproduction. All that they could contribute to under the circumstances, was the further exacerbation of unequal relations of domination and subordination existing between the rulers and the ruled, as well as those prevalent within society at large.

In an orthodox Marxian vein, Guha construed law purely as an epiphenomenal aspect of colonial expropriation.⁸⁴ He made the structuralist claim that along with other trappings of alien and indigenous elite cultures, the massive infrastructure of laws put in place over a span of two centuries rarely ever had a meaningful impact on an autonomous domain of subaltern agency. Thus whenever threatened by local insurrections, there was nothing to prevent the bourgeois aspiration for hegemony laid out in an inefficacious legal order from turning into outright domination. That is, no lofty claim to political legitimacy could conceal this bare fact that its foremost objective always remained the protection of the colonial state's acquired sovereignty in India.

While the norm-exception framework is critiqued by liberal political philosophers in general, its use in the study of colonial law has eminently been challenged by the Lauren Benton initiated legal pluralism approach towards imperial sovereignty.⁸⁵ As a comparative legal historian of modern world empires, Benton attributed the growing appeal of this analytical framework to the unitary model of state sovereignty which became globally ascendant only in the late nineteenth century, and argued against its easy extension to older historical time-spaces. According to her, in the early modern period in fact, a spatially elastic and territorially unbound notion of imperial sovereignty was more widely prevalent, where exceptional zones

⁸³ Guha (1997).

⁸⁴ *Id.*, at 66-72.

⁸⁵ Benton (2004); Benton (2010).

of normlessness were practically inconceivable. It was largely in metropolitan high theory discourses that a contrast came to be drawn between European normative legality and non-European lawless externality. On the ground however, imperial sovereignty was elaborated through divided, shared and layered systems of jurisdictional authority, which rendered the search for exceptionality a largely futile enterprise. Far from offering us a top down ruling regime that resorted to law only as a tactical instrument of command and control, she contended that it actually spawned and oversaw a pluralistic culture of legal contests among officials, subjects and conquered populations, spread across differentiated, fragmented and uneven colonial territories. This therefore implied that the tension between norms and exceptions was not what drove legal and political developments under conditions of imperial sovereignty. Rather, more active here were competitions between myriad articulations of a multiplicity of laws which remained obdurately present even after their purported formal suspension by government.⁸⁶

In making her case for adopting an imperial sovereignty approach, Benton specifically disapproved Guha's repudiation of E.P. Thompson's celebration of the rule of law as a 'cultural achievement of universal significance'.⁸⁷ Even as Guha was willing to concede the centrality of this bourgeois ideology to the building of a metropolitan state hegemony, he refused to countenance the possibility of it having ever been materialized in colonial India for reasons briefly alluded to herein above. In order to counter his position, Benton fruitfully combined poststructuralist insights on identity and difference with a Thompsonian reading of law as custom. This enabled her to think about the rule of law not as a reified ideological concept but a dynamic contingent construct, one which was continuously shaped by complexities of interactional legal politics constituting imperial sovereignty. Working with such an understanding, she strove to sketch a convincing picture of different interpenetrating grids of mutually recognizable laws in action coming together in British India and other colonial spaces. It was only with the growing influence of modern state sovereignty that these variegated practices and the pluralistic legal cultures within which they were embedded, came to be haltingly and incompletely superseded around the late nineteenth century.⁸⁸

⁸⁶ Benton (2010: 279-300).

⁸⁷ Thompson (1975: 265).

⁸⁸ Benton (2004: 253-266).

Benton productively deployed a practice centric methodology to bring out various pluralistic facets of imperial legal cultures that had hitherto remained underexplored. What had possibly caused this neglect was a simplistic reduction of their complicated histories to the norm-exception dialectic. Particularly with respect to British India, she showed how state law had for a considerably long period coexisted and intersected here with a multiplicity of complementary and competing forms of non-state law. By doing so, she was able to offer a crucial corrective to Guha's narrowly defined statist legal positivism, which could not envisage people's law formations as law proper unless backed by sponsorship of the colonial state.⁸⁹ This polychromatic past mapped so competently by her, has in fact still not been completely wiped out from postcolonial India's legal landscape even after seventy years of functioning under nation state sovereignty. Its traces can most noticeably be observed today, in an officially sanctioned regime of separate personal family laws for different religious communities.⁹⁰

But I would like to argue that the detailed nuances and refinements supplied to colonial law by Benton, should not lead us to infer that imperial sovereignty was operationalized as a spatially unlimited concept. A boundary distinction between the inside and the outside was as integral to its workings as to any other form of law understood as authoritative collective action. Such a distinction came to be institutionalized under a colonial liberal constitutionalism premised upon a relationship of abstract estrangement between the colonizer and the colonized, which in effect paved the way for the thorough depoliticization of the Indian political.

2.2 Abstract estrangement

For moving beyond the unresolvable impasse between norm-exception and legal pluralism approaches towards the study of colonial law, let me draw upon Hans Lindahl's stimulating general theory of legal order as a first-person plural concept. Very briefly, according to Lindahl, no concrete legal unity is imaginable in the absence of boundaries, limits and fault lines within which the who, what, when and where dimensions of human behaviour come to be normatively regulated.⁹¹ The distinction between domestic and foreign legal spaces that Benton and others have done much to decentre in their historical investigations, is for Lindahl only a contingent feature associated with the modern territorial state. It is rather a derivative instantiation of a

⁸⁹ Baxi (1992: 247-264 at 249-256).

⁹⁰ Menski (2017).

⁹¹ Lindahl (2013).

more fundamental distinction between inside and outside, which remains a necessary element in the constitution of all legal orders in general. By combining insights from analytical philosophies of collective intentionality and phenomenology of the alien or strange, he perceptively suggests that this inside-outside distinction is primordially manifested in a divide between familiar spaces which a legal collective can call its own, and strange indeterminate spaces of a-legality which are discontinuous with its order of legality and illegality. In other words, without reference to a closure separating the own inside from the strange outside, it is not possible to envisage an open order of (il)legality where the normative point of joint action could then be realized.⁹²

What all of this implies for British India both under Company as well as Crown rule, is that even if imperial sovereignty might not have insisted on a strict geographical bifurcation of territories into metropolitan and colonial spaces, an intrinsic distinction between own and strange spaces was nevertheless critical to the workings of the colonial state all throughout its extensive career. A domain of the own, comprising official and non-official Britons along with their native collaborators, came together here in a colonial civil society, which sought to govern over, but was at the same time cordoned off from a radically diverse indigenous society of strangers made up of people belonging to different aristocratic lineages, religions, castes, tribes, genders and so on. There was certainly an enormous variation in forms of colonial law, but this does not take away from the underlying logic of ownness and estrangement giving it concrete shape as a legal unity.

To be sure, the idea of including the own and excluding the strange from social and political collectivities was by no means unknown to India's precolonial juridical imagination. But the various techniques and strategies deployed for this purpose were imbricated in concrete relations of familiarity and unfamiliarity among the rulers and the ruled, reflected either in a face-to-face reciprocity or an ethical compact envisaging India as an empire of social distinctions. What distinguished British rule in my opinion, was that governmental relations between state and society came to be defined under its jurisdiction by a novel phenomenon of abstract estrangement. We may debate as to whether this was causally produced by the anxious search for semantic coherence in a colonial project of dominating an incomprehensible alien

⁹² Id., at 4, 39-43, 262-267.

population,⁹³ or could instead be sourced to socially mediating abstractions of liberal capitalism germinating in the metropole itself in the late sixteenth and early seventeenth centuries.⁹⁴ Nevertheless, there is consensus on at least this point that it was for the first time that proximity and distance understood in a physical sense gave way to an estrangement which was more reflexive and conceptual in nature.

The transition from concrete ownness to abstract estrangement in India's symbolic constitution had begun under Company rule from the mid eighteenth century onwards, as can be gaged from Ghulam Hussain Tabatabai's 1788 historical work *Sair al-Mutakakhirin*. Tabatabai metaphorically described the treatment of Bengal's populous by British officials as 'pictures set against a wall', that is as static objects available for detached governmental scrutiny from a position of externality.⁹⁵ The process of transition was complete by 1858, with Queen Victoria being proclaimed Empress of India after a brutal suppression of the 1857 military rebellion.

In an important essay, Bernard Cohn has vividly portrayed how this transition was brought about by departing from a sacral notion of monarchy, and its replacement with one heuristically grounded in a European style social contract.⁹⁶ According to Cohn, loyal imperial subjects high enough in rank and status were in an earlier period symbolically incorporated into bodies of Mughal sovereigns and other Indian rulers through reciprocal acts of prestation and present giving, signifying loyalty and lordship respectively. There was then an intimate albeit hierarchical bond of affection between these subjects and the person of the monarch, who not only outranked but could at the same time also encompass everyone under his rule. When the British took over, Cohn observed that this relationship was radically altered, with older ritual idioms of incorporation being reinvented and redeployed merely as contractualist forms of economic exchange. It remained hierarchical as before, but was now governed by two distinct colonial sociologies of feudalism and community interests, which were in turn mediated by abstract conceptions of labour, rent and property unknown to concrete intersubjective intertwinements of precolonial India. As a result, what were previously regarded as thick ethical obligations of the rulers and the ruled towards their common realm, now came to be

⁹³ Wilson (2008).

⁹⁴ Sartori (2014).

⁹⁵ Tabatabai (1902/1788 Vol. III: 191) cited in Wilson (2008: 5).

⁹⁶ Cohn, B. (1983: 165-209).

conceived as thin contractual promises relating to the preservation of life, liberty and property, in return for explicit or implicit native consent to colonial occupation.

2.3 Colonial liberal constitutionalism

The governmental operationalization of this new public culture of abstract estrangement did not necessarily have to be oriented to an antinormative project of suppressing colonial exceptionality at every possible occasion. Ordinarily in fact, it was institutionalized in a modern regime of liberal constitutionalism, with distinct interventionist and noninterventionist variations developed specifically for the purpose of governing a heterogeneous colonial society.

Although a strict periodization is not possible here, we may still roughly say that the early nineteenth century saw the emergence of a relatively active government which pursued a civilizing mission of improvement by intruding in society's internal affairs on grounds of utilitarian or evangelical principles.⁹⁷ This aggressive posture towards tradition was given up after the events of 1857, in favour of a more indirect form of colonial rule through indigenous institutions with the discovery of a new 'alibi of empire', that being the protection of society from destructive consequences of an unregulated modernity.⁹⁸ Subsequently, around the beginning of the twentieth century, an improvement oriented governmental attitude was revived once again in response to the rising tide of anticolonial nationalism, as could be discerned from the incremental expansion of franchise and the enactment of other progressive legislations.

Such inner divergences notwithstanding, the three phases in the colonial constitution of society were united in their normative preference for the rational, adult, bourgeois individual, whose inevitable arrival on the stage of universal history was taken for granted. A major question separating them instead pertained to how this liberal constitutional subject was to be specifically anticipated. While interventionists like Bentham and the Mills espoused an indefinite period of enlightened hypermasculine despotism to create conditions for eventual self government,⁹⁹ noninterventionists such as Maine left this project of transition to be sorted

⁹⁷ Stokes (1959); Mehta (1999); Mani (1998).

⁹⁸ Mantena (2010).

⁹⁹ Bentham (1988/1789); Mill (1990/1817); Mill (1975).

out by social processes on their own without government interference, through a gradual evolution from customary relations of status to modern relations of contract.¹⁰⁰

Which one among these two ordering criteria came to be selected in a particular situation would no doubt have been determined by strategic and circumstantial necessities confronting the ruling regime at that moment.¹⁰¹ Yet although both of them were instrumental in sustaining a highly exploitative governmental relationship for nearly two centuries, I must at least point out that British colonial domination in India had never been juridically committed to the assimilation or annihilation of indigenous strangeness, as was the case with many other European colonial adventures elsewhere.¹⁰² To this extent, colonial liberal constitutionalism may be read adapting Lindahl's formulation as institutionalized exercises in collective self restraint while responding to a strong dimension of a-legality challenging the practical possibilities of British India as a (il)legal unity.¹⁰³

If there was nothing more to add to liberal constitutionalism under conditions of colonial estrangement, it would have at best been only an alternative version of the archetypal modern form of the metropolitan constitutional state. Both certainly shared a common abstract constitutional language, articulating individual or group based principles of a liberal public culture. However, one substantial distinction separating the two begins to surface if we go back to the concept of the exception, which remains an ineliminable feature of all modern ruling regimes, be it the imperial, the metropolitan or the colonial, even if not going on to supply to them their very essence.

Crucial here is not the more familiar who decided upon the exception question, but rather in respect of whom it was actually exercised. Metropolitan constitutional jurisdictions generally witnessed exceptions being made to ordinary normative legality in the name of a sovereign political unity of their own people taken as a whole. But as we have seen already, regardless of whether British India is construed today as a colonial or imperial constitutional setting, the sphere of the own comprised only a small civil society, and excluded a much larger multitude of indigenous strangers from its associational purview. This therefore implied that the resort to

¹⁰⁰ Maine (1986/1861).

¹⁰¹ Chatterjee (2011B: 687-696).

¹⁰² Arendt (1958/1951: 127-130).

¹⁰³ See Lindahl (2013: 239-260).

exceptional powers in such a case could not move beyond a narrow concern for preserving and stabilizing imperial-colonial rule threatened by insurrectionary outbreaks, and simultaneously cover a wider field of *salus populi* or people's health, safety, welfare, salvation and so on, which had remained a chief guiding precept informing the (il)legal and a-legal workings of the modern European state.

In other words, my contention is that exceptions did not invite attention to India's own political unity as the source of governmental authority, but merely alluded to British domination as being ultimately founded on an originary act of conquest. Thus as a consequence of colonial occupation that was concealed by a liberal constitutionalism based on rights and obligations of strangers, and revealed more clearly in exercises of exceptional prerogatives in relation to them, the pre-existing precolonial space of the Indian political was thoroughly depoliticized. Its revival and democratization had to wait for the emergence of an anticolonial movement, to which I turn in the next and final section of this chapter.

3 Anticolonial repoliticization of the Indian political

British colonialism in India expectedly generated a flurry of indigenous responses across different time-spaces, ranging from the uncritically adulatory to the outrightly hostile. While some subjectivities welcomed it for opening up many new roads to escape millennial forms of traditional civilizational injustice, others who noticed its oppressive operationalization from close quarters remained wary of all emancipatory promises made in order to justify alien domination. But here I wish to move beyond sectional particularities and their varied experiences of the beneficial and destructive aspects associated with colonial rule, and focus instead on how they received its depoliticization of the Indian political as a collective unity. Although a plurality of voices could be heard in this regard as well, these claimed to transcend specificities of ordinary partisan politics, and could be read as expressive of different attitudes towards a foundational and more holistic first order concept of the political, understood as a project pertaining to the collective self constitution of society and the field of symbolic power surrounding it.

Pursuing such a unified approach, we may be able to trace at least two distinct stages to the indigenous reception of colonial depoliticization, beginning with its affirmative domestication in the former half of the nineteenth century, followed by a counter repoliticization in the latter.

Subsequently, it was the repoliticization of the Indian political which created the conditions of possibility for collective freedom, and eventually paved the way for formal independence and a republican constitution in the mid twentieth century. Let me elaborate upon this journey towards repoliticization by providing some vignettes from the constitutional thought of Raja Rammohan Roy, Swami Vivekananda and Jawaharlal Nehru.

3.1 Rammohan's domestication of colonial depoliticization

The unprecedented transformations wrought by colonial modernity discussed in the previous section were not restricted to the sphere of government alone, but also began to reconfigure indigenous social life from the early nineteenth century. We should remember that in the precolonial period, most Indic languages unsurprisingly lacked an expression denoting the modern concept of society as a whole, and there was no perceptible need for one either. The traditional social order was viewed as a cumulative amalgamation of different fuzzy unenumerated communities, with each one of them being referred to as a separate *samaj* (society) in their own right. But as was the fate of older coinages in post-enlightenment Europe, the semantic range of this Sanskrit term was considerably altered and expanded in nineteenth century India so as to be made into an interchangeable equivalent for society as an abstract field of mutual cooperation among all its participants.¹⁰⁴

A variety of indigenous civil social associations sprang up over here, organized for the first time on contractual principles, and devoted to the modernist pursuit of rational, scientific, economic and reformative enterprises. What distinguished at least this formative stage, was a genuine desire of the elite intelligentsia who set up such associations, to belong to an emerging colonial civil society as equal members alongside nonofficial European and Eurasian counterparts. In order to realize their aspirations, they did not hesitate to collaborate with these foreigners to demand from the Company administration a climate of free trade and free public debate, which could hopefully contribute to the creation of an open public sphere unmarked by criteria of race or nationality.

This trend was best exemplified in Raja Rammohan Roy (1774-1833), the pioneering socio religious reformer, publicist, and India's first global thinker of liberalism. Although

¹⁰⁴ Majumdar (2013: 165-188).

Rammohan began his intellectual career by engaging with Islamic and Brahmanical theological debates, and acquired proficiency in European enlightenment ideas only later on, he finished as an inaugural figure of sorts, marking a decisive shift from being a late Mughal official to a fervent champion of liberal constitutionalism on a global scale.¹⁰⁵ His liberal constitutionalism was not defined by a negative concern for absence of coercion, but entailed an espousal of civic republican virtues and a mixed constitutional government without necessarily giving up on popular monarchy. Consequently, he was a vocal supporter of contemporary constitutional revolutions in Iberia, Latin America and France, as well as of legislations for parliamentary reform in Britain.

Rammohan domesticated European discourses on checks and balances and separation of powers by translating them in the language of Hindu mythology to make a case for the regeneration of India's moribund ancient constitution.¹⁰⁶ This constitution had come about at an early age of civilization, when the 'arbitrary and despotic' rule of Rajput Kshatriyas was ended by way of a violent rebellion under the leadership of the mythical Brahmin hero Parashurama, who avenged his father's murder at their hands by defeating the royalists and cruelly putting to death almost all male members of that caste. Henceforth according to Rammohan, a kind of caste based division of powers was established, with Brahmins and Rajputs exercising 'legislative authority' and 'executive authority' respectively, resulting in India enjoying many centuries of 'peace and harmony'. But once again, an 'absolute form of government' gradually began to prevail two thousand years later, as Brahmins abandoned their legislative function and started hankering for executive offices. They thereby became entirely dependent on Rajputs, who now exercised the whole of legislative and executive power all by themselves for a thousand years. This 'tyranny and oppression' of hundreds of petty princes detested by their respective subjects, made it possible for destructive Muslim invaders to conquer a divided country and introduce their own system of tyrannical government. Although Rammohan did entertain a hope of future quiet and happiness with the British takeover of imperial power, he blamed the Company for perpetuating despotism by allowing for the consolidation of executive and judicial authority in a single office of the revenue collector. But believing in the providential nature of British rule, he desisted from calling for a representative

¹⁰⁵ Bayly (2007: 25-41).

¹⁰⁶ Ray (1999: 147-155).

government at the local level, or the early separation of India from the empire, two causes which only a minority of radical voices were interested in discussing at this stage.

The ideal constitutional arrangement for India in Rammohan's scheme, included an imperial parliament with indigenous representation acting as its legislative guardian, working alongside a company government playing the role of its executive protector. Both in effect took up positions which were respectively held by Brahmins and Kshatriyas in the ancient constitution.¹⁰⁷ This was to be supplemented by Indian participation in local juries, and the operation of a free press dedicated to the public expansion of knowledge in civil society and the scrutiny of governmental conduct.¹⁰⁸ So he did seek to envisage an Indian public after all, or at least one in the making, but although supposedly bearing distinctively liberal characteristics, it was largely disinclined from engaging with political questions of collective selfhood and collective freedom for the time being.

3.2 Vivekananda's theologization of collective selfhood

However as discussed in the previous section, the pervasive presence of racial discrimination in colonial civil society, often even manifesting in violent action, meant that far from recognition of Indian subjects as equal citizens of empire, there was a more fundamental failure to exercise self restraint whilst negotiating with an undoubtedly ineradicable distinction between the own and the strange. This in turn produced a counter response of disidentification with colonial rule, leading eventually to the repoliticization of the Indian political from the late nineteenth century onwards.

When approached from a first person plural perspective of emerging indigenous subjectivities, the depoliticized colonial state- civil society is what appeared as a strange inaccessible space, in contrast with an own space of a revived Indian political under conception. The idea of repoliticization though, did not cohere well enough with a dominant conception of society as an abstract field for mutual cooperation among strangers, which had thus far characterized the colonial regime of liberal constitutionalism. Nor could there be a simple reversion to an autochthonous fantasy of a primordial social order with its fuzzy sense of community

¹⁰⁷ Bayly (2007: 32).

¹⁰⁸ Id., at 35-39.

allegiance, as this was being rendered increasingly unrealizable under conditions of an inescapable modernity. What made the Indian political possible in my opinion, was a society conceived as a field of collective intentionality, providing space for the performative enactment of different notions of constitutional identity as collective selfhood.¹⁰⁹ That such collective voices were undeniably modern in outlook, could be discerned from their novel regard for reflexivity in imaginations of the people as a political unity.¹¹⁰ As was the case with European discourses of constituent power, this feature then became an essential precondition for subsequent exercises of collective freedom in India, resulting in formal liberation from British rule in 1947 and a republican constitution in 1950.

There are many elite and popular examples which help explain this transition from liberalist or indigenist forms of society to a society understood as an expression of collective selfhood. To illustrate my point, I draw upon the Hindu ascetic icon Swami Vivekananda (1863-1902), whose political theology approach gestured to the imminent oncoming of people's sovereignty more emphatically than most others in the late nineteenth and early twentieth centuries.

Vivekananda is recognized globally for being at the forefront of Hinduism's transformation into a world religion, and specifically for his idealist reconstruction of Advaita (non-dualist) Vedanta by extending its application to a newly germinating modern social sphere in India.¹¹¹ During the high noon of colonialism, a Hinduism sanitized of all perceived impurities was in general being considered a progenitor of Hegelian idealism. This was more so the case with the eighth century sage Adi Sankaracharya's *advaita*, for its monistic insight that the illusory diversity of the phenomenal world merely cloaked the transcendental, unchanging and undifferentiated reality of the noumenal world, that is in essence, *atman* or individual self was the same as *Brahman* or divine godhead. Vivekananda's revised neo Vedanta converted the erstwhile immediacy of such a relationship of identity between the individual and the divine into an immanent abstraction, which was now reflected in the mediating institution of society as a collective unity. The individual's existence here, was inconceivable independently of

¹⁰⁹ On the nonliberal and antiliberal politics of selfhood in the early twentieth century, see Kapila (2007: 109-127).

¹¹⁰ On the reflexive nature of India's distinctive modernity, see Kaviraj (2005: 522-525).

¹¹¹ For Vivekananda's role in transforming Hinduism into a world religion, see Bayly (2014); on the conceptual structure of late nineteenth century indigenous nationalism, see Sartori (2008: 136-175).

society as a whole, with social work coming to be regarded as the highest form of self realization in his intellectual imagination.¹¹²

Vivekananda's preoccupation with the social whole made him speak about the disappearance of vain and sleeping gods, and their replacement by the substantialist all encompassing figure of *Virat* as the embodiment of theological sovereignty, and the only God awake and worthy of worship. His *Virat* though was nothing other than the collective unity of the people themselves:

'This is the only God that is awake, our own race, everywhere His hands, everywhere His feet, everywhere His ears, He covers everything. All other Gods are sleeping. What vain Gods shall we go after and yet cannot worship the God that we see all around us, the *Virat*?...These are all our Gods, — men and animals, and the first Gods we have to worship, instead of being jealous of each other and fighting each other.'¹¹³

These innovations were a far cry from Vivekananda's preceptor, the charismatic mystic Ramakrishna Paramhansa's (1836-1886) ecstatic love and mad longing for Kali as a personal goddess, and disdain for charity and philanthropy undertaken arrogantly or hubristically as potential forms of worldly attachment.¹¹⁴ Yet in spite of having remoulded Hinduism into a scientific and rational religion more commensurable with its modern Semitic counterparts in the West, the Vivekananda moment cannot be read simply as a particular episode in a universalizing story of the European political. We must not forget that the immanent monism of Advaita Vedanta was rather at odds with transcendental underpinnings of sovereignty in both Schmitt and Lefort discussed in section two. However, far from ushering in an age of depoliticization as was perceivably the case with Europe's movement from transcendence to immanence in the nineteenth century, it would not be an exaggeration to state that Vivekananda in fact turned out to be inaugural for the anticolonial Indian political in many respects. The image of a renouncer working dedicatedly for collective social well being, captivated future nationalists and non-nationalists alike, especially under conditions of colonial subordination and even subsequently thereafter.¹¹⁵

¹¹² Sartori (2008: 149-155).

¹¹³ Vivekananda (1932 Vol. III: 300-301).

¹¹⁴ For an intellectual critique of Vivekananda as a founding figure of modern Hindu nationalism, see Sharma (2013).

¹¹⁵ On the Vivekananda moment and the Indian political, see Banerjee (2014: 323-339).

3.3 Nehru's secularization of popular sovereignty

This is not to suggest that the return of theological sovereignty took away from the ruptural nature of secularization, modernization and democratization in India. It was neither possible under the new circumstances to institutionalize a hierarchical constitutional order exclusively on the basis of caste, nor could anyone think of enthroning a descendant of the deposed last Mughal emperor on the seat of sovereignty in Delhi. But I believe that even if the detailed contents of precolonial constitutional discourses may no longer be of much relevance, their structural features as conflicting concepts of fundamental law have continued to shape the formation, deformation and reformation of the Indian political at every juncture of its development.

That sovereignty could not be decoupled from the theological context within which it was historically and philosophically nested, can best be grasped from the thinking of as modern and secular a statesman-politician as Jawaharlal Nehru (1889-1964), India's charismatic first Prime Minister and a chief protagonist of the founding moment. In spite of his personal atheism, Nehru did express an intellectual appreciation for the nondualistic monism of Advaita Vedanta, even though he confessed not to have understood it in all its depth and intricacy.¹¹⁶ He proceeded to secularize an immanentist theological sovereignty in a manner akin to the modernist rendition of Advaita Vedanta by famously casting the people in the substantialist image of *Bharat Mata* or Mother India:

‘Sometimes as I reached a gathering, a great roar of welcome would greet me: Bharat Mata ki Jai—‘Victory to Mother India.’ I would ask them unexpectedly what they meant by that cry, who was this Bharat Mata, Mother India, whose victory they wanted? . . . The mountains and the rivers of India, and the forests and the broad fields, which gave us food, were all dear to us, but what counted ultimately were the people of India, people like them and me, who were spread out all over this vast land. Bharat Mata, Mother India, was essentially these millions of people, and victory to her meant victory to these people. You are parts of this Bharat Mata, I told them, you are in a manner yourselves Bharat Mata, and as this idea slowly soaked into their brains, their eyes would light up as if they had made a great discovery.’¹¹⁷

From the whole of India's ancient and medieval past, Nehru was attracted most to the monarchical figures of Asoka and Akbar, not only because they could be portrayed as secular

¹¹⁶ Nehru (1989/1946: 27).

¹¹⁷ Id., at 59.

icons of toleration and pluralism, but also because of their association with the establishment of vast, expansive and lasting regimes of imperial sovereignty which he aspired to nationalize under his leadership in postcolonial India.¹¹⁸ While no distinctly Indo-Islamic symbols of sovereignty were incorporated into the new state form after the partial externalization of the Muslim question with the creation of Pakistan, the Buddhist *Dhammachakra* or ‘Wheel of Law’ was placed at the centre of the Indian political, both in its national flag called the *Tiranga* or Tricolour, as well as its national emblem which was an adaptation of the Asokan Lion Capital at Sarnath, with the additional inscription of the Hindu Upanisadic motto *Satyameva Jayate* or the ‘Truth alone triumphs’. This selection was no doubt inspired by Nehru, who saw in the Asokan symbology a convenient way for modern India to connect with its venerable ancient culture and build towards a prosperous future free from conflict:

‘[W]hat type of wheel should we have? Our minds went back to many wheels but notably our famous wheel, which had appeared in many places and which all of us have seen, the one at the top of the Asoka column and in many other places. . . . For my part, I am exceedingly happy that we have associated with our flag not only this emblem but in a sense the name of Asoka, one of the most magnificent names in India’s history and the world. It is well that at this moment of strife, conflict, and intolerance, our minds should go back towards what India stood for in the ancient days and what, I hope and believe, it has essentially stood for throughout the ages in spite of mistakes and errors and degradations from time to time.’¹¹⁹

While simultaneously resorting to Vedantic Hinduism and Asokan Buddhism, Nehru however quietly passed over the irreconcilable antagonism between their respective symbolic languages of fundamental law. Such may have been the case since nationalist constituent power was just like modern Vedanta an integrative enterprise, which sought to unify all the disparate sections of society into a singular collective, in the same manner as Vivekananda had attempted to bring together the different schools of dualism, qualified monism and non-dualism into the universal religion of Advaita Vedanta and its abstract immanent monism.¹²⁰ But although nationalist thought was only following a trajectory familiar from the mainstream of Hindu intellectual history in aspiring to appropriate or domesticate Buddhism and other heterodox imaginations, this could not ensure the elimination or externalization of a dissensus which has in fact remained internal to and constitutive of the Indian political itself. The conflict though is not

¹¹⁸ On Nehru’s nationalization of imperial sovereignty, see Vajpeyi (2012: 168-207); for a sociological reduction of his nationalist thought in terms of the ideology of a passive revolution, see Chatterjee (1986: 131-166).

¹¹⁹ Nehru (1947 Vol IV).

¹²⁰ For the intellectual history of conflict in medieval Hindu theology and philosophy, see Nicholson (2010).

sectarian but comprehensive in nature, whose conceptual entailments will further be investigated in the rest of the thesis by engaging with the career of constituent power in colonial and postcolonial India.

Conclusion

I have argued in this chapter about the fundamental incompatibility between two concepts of social law and political law, originarily associated with the rival symbolic languages of Hindu *dharma* and Buddhist *dhmma* respectively. Their irreconcilability can be attributed to a germinal spatial distinction between the inside and the outside, which has in fact been internal to the constitution of the Indian political for much of its philosophical history, including even the Indo-Islamicate period and the distinction between *fiqh* and *siyasah* within the legal culture of *shari'ah*. Its depoliticization by British colonial rulers coincided with the externalization of this distinction into one between their own civil society and a society of indigenous strangers. The subsequent repoliticization of the Indian political in turn involved a complete inversion of the two categories, with the own inside of anticolonial nationalism now up against the strange outside of colonial liberal constitutionalism. As the space of the political was being reoccupied however, the inner contradictions of India's own constitutional imagination began to surface once again, with the hegemonic conceptual vocabulary of social law facing powerful resistance from other counter hegemonic understandings of fundamental law.

In spite of the undeniable supremacy of *dharma*, P.V. Kane, the eminent jurist of ancient Hindu law, paradoxically faulted the 1950 Constitution for breaking away from it altogether. Kane criticized the constitutional text for focusing excessively on rights, without simultaneously providing for the traditional idea of duties. In a largely illiterate and uneducated democracy that independent India was, he apprehended that rights without obligations engendered a feeling among its masses that they could 'give the force of law and justice to their own ideas and norms formed in their own cottages and tea shops'.¹²¹ This may seem surprising, as *dharma* and popular sovereignty do not necessarily make an antinomous conceptual pairing under conditions of modern democracy. Nevertheless, Kane's discomfort with a populace rising to power suggestively indicates that the postcolonial constitutional field was a more open space than might have been the case if it were merely a concretization of a *dharmic* imaginary. Since

¹²¹ Kane (1962, Vol V Pt 2: 1662-1670 at 1665).

the constitution was enacted even in the name of those who were not tutored in or refused to subscribe to the nationalist myth of founding, the language of social law and subjectivity alone could not have bound it into a sustainable political unity. How it came to be challenged by an alternative language of political law and subjectivity drawn from the counter imaginary of *dhamma*, will be elaborated in the next chapter with specific reference to the constitutional thought of M.K. Gandhi and B.R. Ambedkar.

CHAPTER II

RELATIONAL CONSTITUENT POWER AND THE TWO CONCEPTS OF *SWARAJ*

Introduction

In the previous chapter, I reconstructed the social law of *dharma* and the political law of *dhamma* as providing two rival languages of constituent power to the modern Indian political. But they have received little scholarly attention in legal and constitutional studies thus far. This is hardly surprising, given a widely prevailing lawyerly tendency to juridically contain different assertions of constituent power within established forms of constituted power. Intriguing however, is their relative neglect even among those perspectives which explicitly or implicitly strive to move beyond the constitution of government, and stress upon more fundamental questions pertaining to the constitution of state instead.¹²² What explains such intellectual indifference towards *dharma* and *dhamma*, in spite of their germinal role in shaping a distinct anticolonial and postcolonial constitutional politics? A clue may perhaps lie in the conceptual career of *swaraj*, and the way it has come to be received as the most widely accepted symbolic signifier of constituent power in India.

Swaraj or self-rule is a composite expression of Sanskrit derivation, sharing an etymological affinity with the Latin term ‘*suum regnum*’ or ‘one’s own rule’.¹²³ As a ligature binding the two morphemes *swa* and *raj*, it points to the indissociable inseparability of individual and communal notions of selfhood from modalities of rule necessary for their free flourishing. That one cannot be pursued entirely at the cost of the other is clear from the irreducible ambiguity of the coinage itself, which gestures to the ‘rule of the self’ as well as the ‘rule over the self’ simultaneously. But curiously enough, this deeply entangled relationship is hardly ever drawn upon as a guiding framework of reference in the study of India’s nation state enterprise. In fact, imagining the nation’s constitutional identity and fashioning a constitutional form appropriate for the state have generally been treated as discrete isolated endeavours in legal, political and

¹²² For an exception, see Chatterjee (2011A: 53-74).

¹²³ Krishnavarma, (1907: 11), as cited in Kapila (2007: 109-127, at 116).

historical scholarship, as though the two dimensions of *swa* and *raj* were entirely disconnected from one another.¹²⁴

This decoupling has forced upon the concept of *swaraj* an untenable disjunctive bifurcation between law and subjectivity. When translated in constitutional language, it can conveniently be mapped onto well known Euro American debates regarding the nature of collective autonomy between proponents of revolutionary and constitutionalist constituent power. While for the former, autonomy usually eludes to self-mastery and self-realization through liberation of the collective subject from exploitation in all spheres of life, the latter generally invoke it to mean the collective freedom to institutionalize normative principles of modern constitutionalism in a self governing political society.¹²⁵ To make a broad generalization here, the revolutionary tradition sees law as derived from the will of a preconstituted autonomous subject, whereas in the constitutionalist tradition, the subject is constituted through the reason inherent in the idea of a co-instituting higher law.¹²⁶

So on one hand, we have Indian thinkers of liberation who begin with different subjectivities defined in nationalist, economic or cultural terms, and venture to construe the postcolonial constitutional project as either furthering or hindering their respective emancipatory struggles against colonial rule and its persisting vestiges.¹²⁷ Thinkers of freedom on the other hand, start with the presupposition that law has a separate life of its own independent of governors and governed, and proceed to fashion therefrom a distinctive liberal or republican subjectivity consonant with constitutional morality.¹²⁸ Thus in effect, these oppositional positions seek to

¹²⁴ In her philosophically and historically oriented musings on *swaraj*, Vajpeyi (2012) too focused exclusively on the *swa* dimension to counterbalance the excessive focus on *raj* in legal and political scholarship thus far.

¹²⁵ The distinction between liberation and freedom is drawn from Arendt (1963: 32F), but cannot be strictly equated with the one made by Berlin (1969) between negative and positive conceptions of liberty. Unlike Berlin, I am interested in liberty as a collective concept, and so in my scheme, the best articulations of collective liberation can be found in the revolutionary thought of Marx and Negri, and that of collective freedom in the constitutionalist thought of Arendt herself, Habermas and Pettit.

¹²⁶ For a sophisticated treatment of the distinction between will based and reason based theories of law, see Kahn (1989: 449-517) and Kahn (2003: 2677:2705).

¹²⁷ For a largely celebratory account of the framing of India's Constitution, see Austin (1963); for Marxist critiques, see Chaube (1973), Datta Gupta (1979); for critiques drawing upon a Gramscian-subaltern framework of passive revolution, see Kaviraj (1988), Menon (2008) and Dasgupta unpublished (2014); for a helpful summarization of various critiques of Indian constitutionalism from leftist, Gandhian, neo-Gandhian, Hindutva and indigenous tribal perspectives, see Baxi (2002: 31-63).

¹²⁸ Although the two concepts are not categorically distinguished from one another in these accounts, for a broadly liberal readings of various aspects of India's constitutional text and tradition, see Khilnani (1997), Mahajan (1998), Sarkar (2001), Guha (2007), Mehta (2010), Bajpai (2011); for a broadly republican reading, see Sen (2007), Krishnaswamy (2009), Khosla (2012) and De (2018).

disentangle law and subjectivity by individually prioritizing either one of the two, and concomitantly working with a largely derivative understanding of the other.

However, the capaciousness of *swaraj* as a symbolic signifier suggests that the productive tension between law and subjectivity can be brought together in a more unified field of intellectual enquiry. It is possible to do so by moving beyond the liberation versus freedom debate in theories of revolutionary and constitutionalist constituent power, and emphasizing instead on their mutual entwinement, as was the case for most protagonists of India's anticolonial and postcolonial constitutional imagination. One may easily discern in this imbrication a clear resemblance with Euro American theorizations of relational constituent power.¹²⁹ But my intention here is not to merely write about the local enactment of an already predetermined global script of constitutional dialectics. By bringing liberation and freedom, law and subjectivity in closer proximity, what I wish to do in fact, is to make space for the study of a more irresolvable and deep-seated conflict between the social and political conceptions of *swaraj*.

To be sure, these two oppositional categories are by no means unknown to Euro American constitutional experiences. But most influential interpretations of relational constituent power tend to be premised on the autonomy of the political from the social.¹³⁰ Even when politicization of the social question is actively encouraged, this phenomenon is understood to refer only to the fresh imagination of more inclusive and less elitist collective subjectivities at best.¹³¹ What makes India's original constitutional model distinctive, is that the social and political modalities of *swaraj* here were reflective not merely of rival subjectivities and their competing expectations, but more importantly also of diverging formulations of fundamental law grounded in *dharma* and *dhamma* respectively.

This chapter will engage with the tension between *dharma* and *dhamma* through the constitutional thought of Mohandas Gandhi and B.R. Ambedkar, and is divided into four sections. Section one lays down the most widely accepted view about the tension between Gandhi as a thinker of political independence and Ambedkar as a thinker of social justice. It shows that this is premised on a disjunctive view of subjectivity and law. Sections two and

¹²⁹ Loughlin (2014: 218-237); also Rosenfeld (2009).

¹³⁰ For the most definitive statement, see Arendt (1963: 49-105), and more recently, Loughlin (2011: 461-466).

¹³¹ Pitkin (1981: 327-352), Wolin (1983: 3-19), Honig (1993: 119-124).

three challenge this disjunctive view by establishing that both Gandhi and Ambedkar in their constitutional thought appreciated the relational and deeply entangled nature of these concepts. The final section puts forth another more irreconcilable tension between Gandhi as a thinker of social *dharma* and Ambedkar as a thinker of political *dhamma* as being constitutive of the modern Indian political.

1 Political independence and social justice

India's national movement, which began in the latter half of the nineteenth century and culminated with formal independence and the framing of a new republican constitution in 1950, did not take place in a homogenous anticolonial field of mutual consensus and reciprocity. In order to explain why this was the case, I must begin by pointing out that although the idea of Hindustan had become juridically and politically salient during the precolonial period, its constituting elements were bound together within a shared and layered system of sovereignty only as a loose imperial unity.¹³² The self reflexive project of unifying them in a territorial and geographical sense was actively undertaken for the first time perhaps by the Indian National Congress as a response to the depredations of British colonialism, and more particularly its dangerous yet highly effective unofficial policy of divide and rule. But whatever limited success this enormously ambitious integrative enterprise could manage to achieve, was undercut at every stage by the most profound intellectual disagreements among different contending participants over the future course of collective action. We must remember here that they were confronting not just the mightiest colonial regime of their times, but also a radically diverse indigenous society comprising a plurality of resilient lifeworlds with millennial histories of injustice. Their variegated responses to these challenges were so sharply polarizing, that apart from a nominal acceptance of *swaraj* as the normative goal of the movement, it is post facto difficult to identify a common ground of jointly held presuppositions over which everyone could be said to have unarguably converged. India's founding moment then, was suffused with a multiplicity of conflicting constituent possibilities, and must therefore be thought of as agonistic in the strongest sense of the term.¹³³

¹³² Bose (2006: 25).

¹³³ I borrow this idea of a strong form of political agonism where political struggle is ineluctable and irreducible vis-à-vis an established legal order from Lindahl (2009: 57-70). For an alternative argument about anticolonial nationalism in India being marked by a weak political agonism centred around the idea of civilization, see Chakrabarty (2012: 138-152).

Among the numerous rivalries influencing anticolonial and postcolonial constitutional imagination in India, it can safely be surmised with the advantage of hindsight that the dissensus between political independence and social justice has proved to be of most consequence. To briefly recall from the previous chapter, after initially embracing colonial liberal constitutionalism, the native elite intelligentsia were compelled by its exclusionary logic to vacate the depoliticized space of the precolonial Indian political, and turn inward to their own society as a potential site for initiating an autonomous politics of collective selfhood. However, the project of repoliticizing the Indian political was always marked by an irreconcilable tension, one which would only become more intensified as this new politics gradually began to expand and sought to bring the ordinary masses within its purview from the early years of the twentieth century. On one side of the unbridgeable divide, were those who gave priority to challenging the colonial state and winning back political sovereignty for the colonized self. They in turn faced opposition from others who were more invested in probing India's hierarchical and inequalitarian social order, and making a case for its fresh reconstruction. To be sure, the two incompatible positions were much more varied and complicated than what my crude generalization might suggest. But instead of a broad brush elaboration of this conflict, I wish to turn specifically to the adversarial constitutional imagination of Mohandas Karamchand Gandhi (1869-1948) and Bhimrao Ramji Ambedkar (1891-1956) as its most generative iteration in modern India thus far.

The powerful intellectual antagonism between Gandhi and Ambedkar is yet to be tamed, in spite of several well intentioned attempts to bring them closer in dialogue with one another, or supply to their divergent constitutional projects some unity of purpose.¹³⁴ In 1932, they had famously clashed with one another on the issue of separate electorates as a special form of voting entitlements for India's untouchable communities, officially known then as the Depressed Classes. At that time, Ambedkar was forced to give up on this brave demand by Gandhi's coercive fast unto death, and instead accept a watered down scheme of legislative reservations under the terms of the Poona Pact. He resented the new compromise solution deeply, and slowly became the most acerbic unrelenting critic of the Gandhian enterprise as a whole. That this remained for Ambedkar a lifelong animosity is clear from his harsh assessment of Gandhi even in 1955, a good seven years after the latter's assassination:

¹³⁴ The boldest and most stimulating attempt thus far has been made by Nagaraj (2010). See also Palshikar (1996: 2070-2072), Guha (2001), Panthem (2009: 179-208). For a critique of this reconciliatory enterprise, see Rathore (2017: 168-192).

'as I met Mr. Gandhi in the capacity of an opponent, I have a feeling that I know him better than most other people, because he had opened his real fangs to me. And I could see the inside of the man, while others who generally went there as devotees saw nothing of him except the external appearance which he had put up as a Mahatma. But I saw him in his human capacity, the bare man in him. . . . He was never a Mahatma. . . . He doesn't deserve that title. Not even from the point of view of his morality.'¹³⁵

Gandhi too continued suspecting Ambedkar's machinations until the very end, and therefore did not find it worthwhile to negotiate power sharing arrangements with him when the British were finally about to leave:

'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, Muslim or Sikh and then be reconverted according to his convenience. . . . To my mind it is all a snare.'¹³⁶

To be sure, I am not interested here in capturing specific details of this engrossing adversarial relationship, but only in figuring out what it might have to contribute to our understanding of *swaraj* as a constitutional concept. At this fundamental level, we find that while Gandhi is generally regarded as an anticolonial thinker of liberationary subjectivity, Ambedkar is treated as a postcolonial thinker of freedom through law. Gandhi and Ambedkar are in fact seen as having prioritized political independence and social justice respectively, and therefore as occupying opposing positions in the founding debate of Indian constitutional imagination.¹³⁷ Although later parts of the chapter would go on to problematize this neat formulation of their complicated intellectual rivalry, it is necessary first to lay down what the two are generally taken to be standing for on the question of constitutional self rule.

Gandhi did not only become the undisputed leader of the largest mass movement against colonial rule in the world, but was also one of the foremost thinkers of anticolonial liberation in the twentieth century. He was born in the Modh Bania community of Hindu Vaishnava merchants, studied law in England, and began his career as a practicing lawyer and activist in

¹³⁵ Ambedkar interview to the British Broadcasting Company (1955).).

¹³⁶ Gandhi (1946, Vol. 91: 393-394).

¹³⁷ For a recent formulation of the Gandhi Ambedkar debate in these terms, though with a view to bring the two in closer proximity, see Gandhi (2015: 35).

South Africa. It was in South Africa that he fashioned *satyagraha* or truth force as a nonviolent form of civil resistance, which later became the most powerful technique of mass mobilization in India's anticolonial movement.

Gandhi thought about liberation entirely in terms of *swaraj*, and managed to turn it into the most popular signifier of the collective aspiration for political independence. In his own understanding however, *swaraj* was not merely identical with indigenous demands for the expulsion of the British and the concomitant institutional transfer of power from one set of governing elites to another. He famously observed in his political manifesto *Hind Swaraj* that this was simply akin to wanting 'English rule without the Englishmen', or 'the tiger's nature, but not the tiger'; that is to say, you would make India English. And when it becomes English, it will be called not Hindustan but Englistan. This is not the *Swaraj* that I want.¹³⁸

By *swaraj*, Gandhi instead meant a sense of individual and collective 'self-reliance', which neither he, nor the Viceroy and not even God could grant or take away from the people. It was instead 'in the palm of our hands', and had 'to be experienced by each one for himself.'¹³⁹ As Gandhi strove to show in his own conduct, this required taking complete control over one's bodily desires and appetites, through a disciplined engagement with different practices and technologies of the self, such as spinning *khadi*, fasting, celibacy and reduction of consumption to the barest minimum.¹⁴⁰

However, such a novel reformulation of *swaraj* did not lead to its conversion into a purely moral concept of high philosophy. Gandhi deployed it effectively in defying the historicist and developmental logic underlying the British promise to make India a self governing entity in an unspecified distant future, after a necessary period of colonial tutelage.¹⁴¹ As Faisal Devji has argued, by placing the agential subject at the centre stage of the national movement, he in fact opened up the possibility of realizing *swaraj* in the immediate present itself, for anyone who was fearless enough to accept death and suffering in the process of withdrawing cooperation from, and civilly disobeying an illegitimate antipolitical regime.¹⁴²

¹³⁸ Gandhi (1909, Vol. 10: 255).

¹³⁹ Id., 282.

¹⁴⁰ Godrej (2017: 894-922).

¹⁴¹ That is, by breaking open the liberal colonial waiting room of history, to use Dipesh Chakrabarty's famous formulation. Chakrabarty (2000: 8).

¹⁴² Devji (2012: 6).

Furthermore, although Gandhi had sought to secure imperial citizenship and dominion status for a long part of his political career, when the idea of complete independence did seize him eventually, he did not hesitate in militantly calling for the British to leave India immediately: 'Leave India to God. If that is too much, then leave her to anarchy.'¹⁴³ For the sake of India's liberation, he did not even mind risking the possibility of 'complete lawlessness' in the country: 'For Heaven's sake leave India alone. Let us breathe the air of freedom. It may choke us, suffocate us, as it did the slaves on their emancipation. But I want the present sham to end.'¹⁴⁴ Anticolonial liberation was thus a lifelong preoccupation with Gandhi as a thinker. But once he gets pigeonholed into such a category, the only question left for a theorist of constituent power to ask in relation to his work is: who was to be liberated from the colonial state's constituted authority?

This question about the subject of emancipation has unsurprisingly generated many different interpretative responses in the large corpus of Gandhi scholarship over the years. At the broadest level of generalization, it can be seen that his critique of modern Western civilization accompanied by liberal capitalism and the nation state form, has either been read as developed from the vantage point of an authentic Indic cultural selfhood, or as flowing from an unabiding concern for the plurality and multiplicity of unalienated everyday life.¹⁴⁵ My intention here is not to engage with this rich literature, but only to make the argument that as a result of its pervasive hold, Gandhi's understanding of law has come to be treated as entirely derivative of his more originary insistence on subjectivity.

Gandhi is either read as an antilegal thinker who deplored modern law for its abstract nature and distance from the subject, or as someone who made a case for its replacement by a reconstructed traditional law, which was supposedly more concrete and much nearer to the subject's own lifeworld. It is well known that he made various constitutional proposals for postcolonial India to adopt: the panchayat or the council of village elders, the trusteeship model of property relations, and the idea of a decentralized peasant democracy, composed of non-hierarchically organized self sufficient village republics as basic units of government, with the

¹⁴³ Gandhi (1942, Vol. 82: 283).

¹⁴⁴ Gandhi (1942, Vol. 82: 377).

¹⁴⁵ For the former approach, see Rudolph and Rudolph (1967); for the latter, see Mehta, US (2010C: 355-371), Bilgrami (2014: 122-174); and for a combination of the two, see Nandy (1983).

self ruling individual at their centre. These are all read in the literature as Gandhi's prescriptions for negating colonial modernity, and creating conditions for a more thorough liberation of the colonized subject than would be possible under modern constitutionalism.¹⁴⁶

If Gandhi indeed was essentially a thinker of anticolonial liberation, it is not difficult to see why Ambedkar was so deeply hostile to his constitutional imagination. Ambedkar was one of twentieth century's most formidable thinkers of postcolonial freedom, who helped author the Constitution of independent India from 1946 to 1950, as Chairman of the Drafting Committee of its Constituent Assembly. He was born in the Mahar community of untouchable Dalits, which had for centuries been condemned by India's hierarchical caste system to the margins of social existence. After obtaining doctorate degrees from Columbia University and the London School of Economics, he returned to India and went on to become a distinguished lawyer, jurist, economist, scholar of religion and a radical anticaste activist and intellectual. As the leader of sixty million untouchables, Ambedkar's approach to the struggle for political independence could not but be very different from his upper caste counterparts, who had enthusiastically positioned themselves at its forefront.

Ambedkar was deeply sceptical of the emerging anticolonial discourse on *swaraj*, and especially its prioritization of national liberation over the social question. Thus while responding to the political extremist Bal Gangadhar Tilak's clamouring for *swaraj*, Ambedkar remarked: 'If Tilak had been born among the untouchables, he would not have raised the slogan "*Swaraj* is my birthright", but he would have [instead] raised the slogan "Annihilation of untouchability is my birthright".'¹⁴⁷ In fact, from a superficial reading of the large corpus of Ambedkar's collected works, one may even get an impression that he regarded the pursuit of *swaraj* as antithetical to the more pressing national cause of the annihilation of caste:

'In the fight for *Swaraj* you fight with the whole nation on your side. In this [annihilation of caste] you have to fight against the whole nation and that too, your own. But it is more important than *Swaraj*. . . . only when the Hindu Society becomes a casteless society that it can hope to have strength enough to defend itself. Without such internal strength, *Swaraj* for Hindus may turn out to be only a step towards slavery.'¹⁴⁸

¹⁴⁶ Dasgupta (2017: 647-662).

¹⁴⁷ As cited in Keer (1962/1954: 80-81).

¹⁴⁸ Ambedkar (1979/1936, Vol. 1: 80).

However, a more careful investigation reveals that he was not as uncomfortable with the concept of *swaraj*, as he was with the absence of a sincere commitment to social reform and social democracy in its dominant nationalist renderings.¹⁴⁹ The *swaraj* of his imagination was premised on the destruction of the power of India's traditional governing classes, and their replacement by a government of the people, by the people and for the people as its reason d'être and only justification.¹⁵⁰

So, the postcolonial constitutional project was for Ambedkar less a culmination of a successful anticolonial struggle for liberation, and more an opportunity to make a new beginning by reconstituting society as a whole in consonance with the notion of collective freedom. But once his constitutional thought is construed entirely in these terms, the only pertinent question left for a theorist of constituent power to address is: what was this freedom to constitute composed of?

It can be stated uncontentionally that Ambedkar was an arch modernist, who envisaged for India a society which would recognize the inseparable union of liberty, equality and fraternity as the foundational postulate of its democratic life. As in Gandhi's constitutional model, the individual was the basic unit of society for him too, but without in any way being anchored in a hierarchically organized caste ridden village community. Ambedkar in fact denounced the village as 'a sink of localism, a den of ignorance, narrow-mindedness and communalism', and held it responsible for bringing upon the 'ruination of India'. Furthermore, contrary to the 'ridiculous' idea of trusteeship which only showed how class structure was Gandhism's 'living faith' and 'official doctrine', he worked towards securing property entitlements for the servile classes so as to make space for them in capitalist modernity and facilitate their transition into citizenship. Finally, he advocated a strong centralized state for India, with a distant and abstract institutional apparatus of rule, capable enough of intervening positively on behalf of the underprivileged in what according to him was a highly unjust society.

All of this and much else in Ambedkar's constitutional work has generally been interpreted in terms of various liberal and republican values, such as individual and group rights, non-

¹⁴⁹ For a similar view, see Rathore (2017: 192-206).

¹⁵⁰ Ambedkar (1990/1944, Vol. 8: 366).

discrimination and nondomination, and constitutional morality and public reason.¹⁵¹ For most commentators, he was able to innovatively readapt these globally circulating normative principles to cater to India's unique circumstances, without needing to move beyond them for much of his life.¹⁵² They highlight his firm commitment to the law of modern constitutionalism implicit in the idea of a constitutional democracy, even whilst striving to found a new social order. This reading would lead us to the conclusion that Ambedkar was reluctant to concede authorial space to any prior existing collective subject, but more importantly, also that he saw it as being constitutively grounded in the higher principles of normative democracy.¹⁵³ Therefore, his constitutional imagination could not be any further from Gandhi's, who as we have seen earlier, is regarded primarily as a thinker of a liberatory anticolonial subjectivity, and only secondarily as a thinker of constitutional law.

I have tried to develop here a conceptual framework within which dominant scholarly assessments generally receive Gandhi and Ambedkar as antagonistic constitutional thinkers. In the next two parts of the chapter, I engage with the two separately, and show that distinctions between subjectivity and law, and liberation and freedom, end up supplying inadequate and even somewhat misguided explanatory glosses to their complicated intellectual rivalry. To say the least, they both were certainly aware of the deeply imbricated and entangled relationship between these concepts during India's moment of transition from the anticolonial to the postcolonial.

2 Gandhi and relational constituent power

I shall make a case for reading Gandhi as a thinker of relational constituent power in this section, by connecting his motivation to work for the liberation of the anticolonial subject with his seemingly paradoxical endorsement of the modern law of postcolonial freedom. In order to do so, the following subsections take up his engagement with violence and power, civil disobedience and modern constitutionalism, and renunciative liberation and constitution making as constructive *satyagraha*.

¹⁵¹ See Omvedt (1993), Mehta, PB (2010), Chakrabarty (2016: 133-148), Nussbaum (2016: 295-336), Bhatia (2016).

¹⁵² Bayly (2012: 297-307); Bajpai (2011: 53-76).

¹⁵³ See Mukherjee (2010: 345-370).

2.1 Violence and power

In her famous essay on violence, Hannah Arendt contended that Gandhi's enormously powerful and successful campaign of nonviolent resistance was possible in India only because it was up against England, and not Stalin's Russia, Hitler's Germany, or even pre-war Japan. Had any of these been the enemy, Arendt speculated that the 'outcome would not have been decolonization, but massacre and submission'.¹⁵⁴ This observation was based on her highly generative conceptual distinction between power and violence: while power stemmed from the human ability to act in concert and participate in public affairs, violence referred to the instrumental use of tools and implements to increase and multiply natural strength for the purpose of realizing particular ends. She claimed that the 'rule by sheer violence' came into play only when power was being lost, and reckoned that colonial rule in India, backed by restraints endemic to a constitutional government, was simply too powerful to resort to the kind of totalitarian violence that Stalin and Hitler had pursued.¹⁵⁵

While crediting British forbearance for Gandhi's success, Arendt might well have underestimated the immensity of violence inflicted by the colonial state upon an alien population at every juncture of its ruling enterprise. There is evidence in Gandhi's writings which suggests that the difference between colonialism on the one hand, and Nazism and Fascism on the other, was for him 'only one of degree', since 'Messrs. Hitler and company' had merely perfected and reduced 'to a science the unscientific violence their predecessors had developed for exploiting the so-called backward races for their own material gain'.¹⁵⁶ Yet in spite of his refusal to distinguish British colonialism from other forms of rule by violence in qualitative terms, I wish to argue that Gandhi would certainly have agreed with Arendt in so far as he believed that whatever power it was able to generate, depended entirely upon the conscious or unconscious, voluntary or forced cooperation of the people in India. According to Gandhi, India was not conquered or retained 'with the power of the sword', 'but by employing the strength of our own people'.¹⁵⁷ The English did not take or hold onto India with arms and ammunitions, and were instead kept here by the people themselves in their 'base self-

¹⁵⁴ Arendt (1970).

¹⁵⁵ Id.

¹⁵⁶ Gandhi (1939, Vol. 75: 248).

¹⁵⁷ Gandhi (1909, Vol. 9: 293).

interest': 'We like their commerce; they please us by their subtle methods and get what they want from us. To blame them for this is to perpetuate their power.'¹⁵⁸

This is not to suggest that Gandhi wanted to downplay the role and contribution of British strength in colonizing India. But as Ajay Skaria has pointed out, assumption of sole or absolute responsibility was the crux of his politics. So even if British strength may have also been responsible for their conquest and retention of India, this did not in any way diminish the responsibility of those Indians who colluded with them, and thereby made colonial rule possible.¹⁵⁹ By making the people bear complete responsibility for India's occupation in such a manner, what Gandhi strove to establish was that all regimes—even the most tyrannical or despotic—required for their support, collaboration from the many, and could never be sustained on the basis of physical force alone. The only way then to delegitimize any ruling regime was the withdrawal of this consent on a mass scale, which however did not necessarily include the mounting of a counter anticolonial violence against its authority.

To be sure, Gandhi was ready to permit violence when cowardice were the only other alternative left, for unlike the archetypal pacifist, he valued courage and sacrifice over everything else.¹⁶⁰ However, as Faisal Devji has argued, he believed that it was possible to dissociate these virtues from their purely instrumental use in revolutionary violence, and instead make them the basis of a heroic and self-sacrificing nonviolence which prioritized the 'will to die' over the 'will to kill' as the 'highest form of bravery' imaginable.¹⁶¹ When put to work in the context of India's national movement, Gandhi's ideas thus produced an ethical politics that sought a disciplined disruption of the power of the colonial state, by performatively enacting the 'power of the people' through a nonviolent civil resistance.

2.2 Civil disobedience and modern constitutionalism

We may be tempted to situate Gandhian *satyagraha* within the rich discourse on civil disobedience in liberal and republican constitutional thought.¹⁶² Gandhi's attention was in fact drawn to their possible convergence by a questioner who suggested to him that 'the nonviolent

¹⁵⁸ Gandhi (1909, Vol. 10: 262-263).

¹⁵⁹ Skaria (2016).

¹⁶⁰ Mehta, US (2013).

¹⁶¹ Devji (2012: 5-6).

¹⁶² See Rawls (1971: sections 55-59); Dworkin (1968); Arendt (1972).

spirit of selfless love for all' could only succeed if it found expression in 'a liberal, democratic and constitutional form of government', in which laws were promulgated by a majority decision after public discussion, and enforced not by war but by police when persuasion and example did not suffice. But in response, Gandhi distinguished his idea of nonviolence from the enthronement of violence as law in all modern constitutions, regardless of whether they were democratic or nondemocratic. He believed that a society deliberately constructed in accordance with the 'law of nonviolence' would be structurally different from what it was at present, but could not anticipate in advance what a wholly nonviolent government might look like. All he was able to say was that nonviolence had to be recognized as 'a living force, and inviolable creed, not a mere policy', or in other words, as the necessary precondition of a democratic constitutional government, and not simply as its object or telos.¹⁶³

This response must be appreciated in light of Gandhi's radical critique of modern constitutionalism. Gandhi's anticolonialism did not take the British as its political enemy, but was instead premised on a profound scepticism towards the particular form of rule which they administered in India. He was in a sense uninterested in the 'who rules' question of sovereignty, and so his quarrel was not as much with the colonial rulers themselves, as it was with their governing methods.

In *Hind Swaraj*, Gandhi railed against the entire institutional apparatus of rule associated with modern governmentality. He idiosyncratically likened the English Parliament to a 'sterile woman', which 'had of its own accord not done a single good thing', and 'a prostitute' 'without a real master', which was 'under the control of ministers who change[d] from time to time.' What was done by the Parliament on one day could be undone on another, and it was 'not possible to recall a single instance in which finality [could] be predicted for its work.' According to him, the English nation would have occupied a much higher platform if only 'the money and the time wasted by Parliament were entrusted to a few good men'.¹⁶⁴ Gandhi was rather ambivalent towards majoritarian democracy:

'It is a superstition and an ungodly thing to believe that an act of a majority binds a minority. Many examples can be given in which acts of majorities will be found to have

¹⁶³ Gandhi (1939, Vol. 75: 46-49).

¹⁶⁴ Gandhi (1909, Vol. 10: 256-257).

been wrong, and those of minorities to have been right. All reforms owe their origin to the initiation of minorities in opposition to majorities.’¹⁶⁵

Finally, he was most scathing in his assessment of the legal profession, and held lawyers to have been principally responsible for India’s enslavement, the accentuation of Hindu-Mahomedan dissensions, and the confirmation of English authority. Motivated exclusively by a desire to become rich and wealthy, lawyers were as a rule interested only in advancing quarrels instead of working to repress them. The settlement of disputes either by fighting or by asking one’s relatives to decide was for him less unmanly and cowardly than resorting to courts of law: ‘Surely, the decision of a third party is not always right. The parties alone know who is right. We, in our simplicity and ignorance, imagine that a stranger, by taking our money, gives us justice.’¹⁶⁶

Reading all of these reflections together, it becomes clear that Gandhi did not believe in making too sharp a conceptual distinction between power and violence. As has been discussed above, he postulated that both metropolitan as well as colonial versions of the modern state could generate power only through their people’s consent. But a powerful state was not necessarily a nonviolent one. For Gandhi in fact, the state represented ‘violence in a concentrated and organized form’; it was a ‘soulless machine’ which could never be weaned from violence to which it owed its very existence.¹⁶⁷ This violence though, must not be conflated with the physical force required for every successful taking and retaking of a spatial territory by a conquering sovereign, for he was not as uncomfortable with the fact of India’s colonial occupation as most other revolutionaries and nationalists in his times were. What disturbed Gandhi more deeply was the structural violence underpinning the materialist modern civilization of extractive industrial capitalism that had degraded and ruined much of the world including England, and the strong possibility of its replication in India as well, irrespective of whether the country was being governed by a colonial or a postcolonial regime. As long as this civilization remained a dominant pace-setter in political society, exploitation of the weak by the strong was for him ineliminable from the conceptual universe of modern constitutionalism, even if its governing institutions were to operate in the name of the people themselves.¹⁶⁸

¹⁶⁵ Id., at 294.

¹⁶⁶ Id., at 276.

¹⁶⁷ Gandhi (1934, Vol. 65: 318).

¹⁶⁸ This resonates somewhat with Tully’s (2008: 315-338) critique of modern constitutionalism and modern public law. But unlike Tully (1995), Gandhi was not invested in anything like a normative model of deliberative democracy governed by the immanent principle of reciprocity. As Ajay Skaria (2002: 955-986, at 973) puts it,

2.3 Renunciative liberation and constitution making as constructive *satyagraha*

It is more productive to place Gandhi's constitutional project within the Indic tradition of renunciative liberation, in so far as he sought to take leave of or exit the modern state form altogether.¹⁶⁹ Rather than being associated with negative and positive entitlements of the citizen subject or the national community, this conception of liberty, derived from Sanskrit and Prakrit terms such as *sanyasa*, *moksha*, *mukti* and *nirvana*, was genealogically connected with Hindu, Buddhist and Jain spiritual discourses pertaining to the renunciation of the world, and their respective ascetic and meditative practices. Gandhi identified himself as an orthodox *sanatani* [eternalist] Hindu belonging to the Vaishnava sect, and unambiguously declared that the aspiration for *moksha* was behind all his activities including the pursuit of *swaraj*.¹⁷⁰ *Moksha* could only be achieved by reducing the self to 'zero' and becoming a 'cipher'. 'In English', Gandhi pithily remarked in his lectures on the Gita, 'I' is a vertical line with a dot above it. Only when this 'I' is done away with can one attain self realization.'¹⁷¹ It was his firm conviction that only through such a renunciation of the self could a politics be established which was grounded entirely in nonviolence.

As colonial modernity took roots in India, anticolonial nationalist thinkers imaginatively abstracted from the renunciative tradition and refashioned it as a distinctly 'this worldly' phenomenon, wherein a person could continue to engage with the world and yet not be of it.¹⁷² Gandhi followed in their footsteps reverentially, but made two crucial modifications to this exemplary figure of a detached this-worldly activist who was obliged to intervene in state politics for the benefit of all. First, unlike the post-enlightenment idea of worldly asceticism which was developed to counter Christian and Hindu priestcraft in Europe and South Asia, Gandhi more ambitiously sought to establish some kind of equivalence between the charlatanism of 'selfish and false religious teachers' and the hypnotism induced by the social scientific knowledge apparatus of British colonialism. He consequently made it a mission for himself to 'fight' the 'humbug' and 'superstition' of both religious as well as secular ruling

Gandhi's politics of nonviolence sought to institute protocols for absolute antagonisms to encounter one another, without being mediated by a middle term.

¹⁶⁹ I take my cue here from Mukherjee (2010: 150-180) and Barton Scott (2015: Conclusion).

¹⁷⁰ Gandhi (1929, Vol. 44: 90).

¹⁷¹ Gandhi (1926, Vol. 37: 87).

¹⁷² Barton Scott (2015) took up this idea from Weber's (2002) theorization of the Protestant ethic.

ideologies at the same time.¹⁷³ Second, contrary to the nationalist cannon wherein the *Gita*'s idea of detachment towards the fruit of action was interpreted as enabling any desireless action in general, Gandhi clarified that it could only be read as enjoining the performance of ethically right action under all circumstances, be they normal or exceptional. This enabled him to remain detached even from a 'good cause' like the goal of winning *swaraj*, for only then 'will our means remain pure and our actions too.'¹⁷⁴

Attachment to truth or *satya* as ethically right action is what gave Gandhian politics much of its meaning. For Gandhi, truth was not an abstract or cognitive notion which purported to describe the world in objective terms; it was rather a concrete and experiential capacity of revelation, which could bring to surface and make visible the hidden and invisible relations ordering the practical world.¹⁷⁵ Contrary to what the legal theorist Chhatrapati Singh averred, it did not inhere in synthetic and a priori propositions of practical reason, and so could not be regarded as the source of law in the same way as in antipositivist normative thought.¹⁷⁶ Gandhi in fact, was a conventional legal positivist at least in so far as he implicitly believed in the dictum that 'authority, and not truth makes the law.' When truth was mobilized in *satyagraha* to withdraw the power of consent and thereby expose the bare violence underpinning modern constitutionalism, the object was not to negate the law altogether or institute something completely new in its place. Instead of ceasing to invoke the lawyerly vocabulary of interest, mediation, contract and rights, what Gandhi sought to do was to limit its influence in human society by concomitantly expanding the influence of an alternative supplementary vocabulary of disinterest, direct encounter, voluntary sacrifice and duties, and thus transform already existing legal categories and institutions in creative ways.¹⁷⁷

This explains why Gandhi did not find it contradictory to devote his 'corporate activity' as the leader of the national movement to the 'attainment of Parliamentary *swaraj* in accordance with the wishes of the people', without necessarily backtracking from his stinging critique of modern constitutionalism discussed herein above.¹⁷⁸ As a 'practical idealist', he did not struggle to come to terms with the fact that the people actually wanted in India a Parliament

¹⁷³ Gandhi (1909, Vol. 10: 265, 272). See the conclusion in Scott (2015) for this formulation.

¹⁷⁴ Gandhi (1926, Vol. 37: 105). See the place of Gandhi in Bandyopadhyay's (2016: 123-146) brilliant intellectual biographic work on the *Gita*.

¹⁷⁵ Kapila (2010: 431-448 at 442).

¹⁷⁶ Singh, C. (1985: 232).

¹⁷⁷ Devji (2017).

¹⁷⁸ As clarified in the preface to a new edition of *Hind Swaraj* in 1921. Gandhi (1921, Vol. 22: 259-260).

chosen by them ‘with the fullest power over the finance, the police, the military, the navy, the courts and the educational institutions.’¹⁷⁹ In 1931, Gandhi actively influenced the drafting of Congress’s Karachi Resolution on Fundamental Rights and Economic Change, which went on to become the chief inspiration behind Parts III and IV of the Indian Constitution. Later that year, while participating in the Second Round Table Conference, he alluded to the need for an interventionist national government which would move beyond the recognition of negative non-discrimination and fulfil the positive duty to ‘equalize conditions’ by ‘passing legislation in order to raise the down-trodden, and the fallen, from the mire into which they have been sunk by the capitalists, by the landlords, by the so-called higher classes, and then, subsequently and scientifically, by the British rulers.’¹⁸⁰ Finally, even though the entire nationalist leadership had in effect rejected his constitutional scheme for village *swaraj*, Gandhi never the less enthusiastically welcomed the setting up of the Constituent Assembly in 1946 as an arena for the potential performance of ‘constructive satyagraha’. It was true that the Assembly had many defects, but a satyagrahi whom he likened to a soldier, had to fight to get them removed, because ‘A satyagrahi knows no defeat.’ Better alternatives were available no doubt, but they could only have been realized had the members of the Congress done justice to ‘constructive work’. A satyagrahi could not wait or delay action till perfect conditions were forthcoming, and had to ‘act with whatever material is at hand, purge it of dross and convert it into pure gold.’ Gandhi recommended participation in the affairs of the Assembly to those who were sufficiently qualified ‘by virtue of their legal training or special talent’, and willing to approach the task as ‘a duty to be faced even like mounting the gallows or sacrifice of one’s all at the altar of service.’¹⁸¹ Keeping these criteria in mind, he anointed the modernist Nehru as his political successor instead of the more conservative Patel, and according to some stories also insisted on the induction of Ambedkar into the Assembly on a Congress ticket in spite of their formidable intellectual rivalry over the years.

3 Ambedkar and relational constituent power

I shall now focus on Ambedkar’s constitutional thought in this section, and seek to show that although having to grapple with very different concerns, he provides us an equally appealing picture of relational constituent power as Gandhi did. In order to establish that he was not

¹⁷⁹ Gandhi (1920, Vol. 22: 63).

¹⁸⁰ Gandhi (1931, Vol. 54: 175-187, at 178).

¹⁸¹ Gandhi (1946, Vol. 91: 249-254).

merely a thinker of freedom and law but also of their complicated entanglement with liberation and subjectivity, I discuss his engagement with constitutional morality and insurrectionary constitutionalism, and the hegemony of caste and collective liberation as non-oppression in the following subsections.

3.1 Constitutional morality and insurrectionary constitutionalism

The normative political theorist Pratap Bhanu Mehta has insightfully situated Ambedkar's advocacy of constitutional morality in the Constituent Assembly decisively within the liberal constitutionalist tradition of procedural democracy.¹⁸² Borrowing from the classicist George Grote, Ambedkar understood constitutional morality as 'a paramount reverence for the forms of the constitution', and invoked it while justifying the decision to include the details of administration in the constitutional text itself. He feared that the constitution could be perverted or opposed in spirit simply by changing the form of administration, and hence believed that this could not be left for the legislature to prescribe in a political society where the people were not saturated with constitutional morality. Constitutional morality was for Ambedkar, just as it was for Grote, not a 'natural sentiment', but one which had to be carefully 'cultivated' in a people who were 'yet to learn it'. This was especially true for India, where democracy was only a 'top-dressing on an Indian soil' which was 'essentially undemocratic'.¹⁸³ Mehta interprets Ambedkar's constitutional thought entirely in light of Grote's definition as having emphasized upon all the commonplace features of a nonideological liberal constitutionalism such as 'self-restraint, respect for plurality, deference to processes, scepticism about authoritative claims to popular sovereignty, and the concern for an open culture of criticism'.

This strong commitment to constitutional form further leads Mehta to read Ambedkar in some sense as being a greater proponent of nonviolence than even Gandhi was. While famously exhorting everyone to 'hold fast to constitutional methods' for achieving social and economic objectives, Ambedkar had denounced not just 'the bloody methods of revolution', but also 'the method of civil disobedience, non-cooperation and *satyagraha*' as a 'grammar of anarchy' which were to be abandoned as soon as possible, if India was to maintain its democracy both in form as well as in fact.¹⁸⁴ Mehta argues that by thus equating Gandhian *satyagraha* which

¹⁸² Mehta, PB (2010).

¹⁸³ Ambedkar (CADs, Vol. XI: 25 November 1949).

¹⁸⁴ Id.

he had experienced as coercion during the Poona Pact controversy, with the violence of armed revolution, Ambedkar sought to show that for political action to be genuinely nonviolent, it had to respect the formal and procedural propriety entailed in the idea of constitutional morality.

There is little to disagree with in Mehta's formulation to the extent that faith in the rule of law did certainly underpin Ambedkar's conception of democratic politics at a broad level of generality. However, since Ambedkar was more a theorist of constituent power and less a votary of liberal legalism, he did not hesitate in prioritizing democracy over law whenever the two appeared to him to be incompatible with one another.¹⁸⁵ He valued constitutional morality and the institutional apparatus within which it was enshrined for the protection they accorded to the form of constitution from the form of administration, but rejected their extant articulations as utterly inadequate when measured against the touchstone of democracy. 'Habits of constitutional morality may be essential for the maintenance of a constitutional form of government' he clarified, but 'the maintenance of a constitutional form of government is not the same thing as a self-government by the people.' Similarly, although the institutional mechanism of adult suffrage could produce a 'government of the people' in contrast with the 'government of a king', he averred that it could not by itself bring about a 'democratic government', that is one set up 'by the people and for the people'.¹⁸⁶

Democracy was for Ambedkar much more than an antimonarchical principle, and required for its accomplishment the dissolution of the power of the governing classes which had happened to grow up in every country by the force of historical circumstances. Writing about interwar Europe, he noted that Parliamentary democracy had turned out to be a tragic failure not only in dictatorial regimes owing to its slowness and delay in taking swift action, but also in countries pledged to democracy for various ideological and organizational reasons. There was widespread discontentment among the masses with its ideology of 'freedom of contract', which in turn evinced a clear preference for liberty over social and economic equality, and its organizational entrenchment of the vicious division of political life between a 'hereditary subject class' and a 'hereditary ruling class'. In Ambedkar's opinion, the 'very formal' and 'superficial' view of democracy propounded by 'Western writers on Politics' did not do enough

¹⁸⁵ For another argument against Mehta's formulation from a radical democracy perspective, see Kumar (2015: 262-263).

¹⁸⁶ Ambedkar (1990/1946, Vol. 9: 202-203).

to overcome the danger posed to it by ‘permanently settled governing classes’. Far from proving to be fatal to the ‘power and position’ of governing classes, constitutional morality and institutional mechanisms of adult suffrage and frequent elections had in fact ‘helped to give to their power and prestige the virtue of legality and made themselves less vulnerable to attack by the servile classes.’ For all of these reasons, he took the courage to tell the people of India thus: ‘Beware of parliamentary democracy, it is not the best product as it appears to be.’¹⁸⁷

I do not mean to suggest that Ambedkar was sceptical of modern constitutionalism in the same way as Gandhi was, but only that he was aware of the severe shortcomings at least in its liberal version which had resulted in dire consequences for Europe. In the same very speeches before the Constituent Assembly wherein he drew upon constitutional morality, Ambedkar had also warned that if such a model were to materialize in India, those who suffered at its receiving end ‘could blow up the fabric of the state’ and the ‘structure of political democracy’ which the Assembly had so laboriously built up.¹⁸⁸ In its place therefore, as Shruti Kapila has shown, he espoused a counter liberal and agonistic constitutionalism that was geared towards visibilizing the continuous subterranean struggles between the rulers and the ruled, by according them an appropriate constitutional outlet. Conflicts were for him ineliminable from political society, and so the task before a constitution was not to resolve them pacifically, but to provide imaginatively fashioned institutional arenas where relations of antagonism and hostility could be converted into and articulated as adversarial relations of confrontation and competition.¹⁸⁹ It is certainly possible to discern in this a marked resonance with contemporary theorists of agonistic democracy, but as Kapila has argued, the recent revival of the *agon* in Europe is a post-consensus phenomenon, whereas Ambedkar operated under conditions of radical dissensus characterizing late colonial and early postcolonial India.¹⁹⁰

Ambedkar’s agonistic constitutionalism was centred around the category of the governed, and had space in it both for insurrectionary as well as disruptive activities. This category of the governed was either composed of different major and minor communities sharing a common ultimate destiny within a nation, or of different nations divided on the question of ultimate destiny itself.¹⁹¹ Drawing upon the utilitarian philosopher Henry Sidgwick, he distinguished

¹⁸⁷ Id., at 445-449.

¹⁸⁸ Ambedkar (CADs, Vol. XI: 25 November 1949).

¹⁸⁹ Kapila (2014: 253-271 at 267-271).

¹⁹⁰ Kapila (2019: forthcoming).

¹⁹¹ As elaborated in ‘Partition, or the Creation of Pakistan’. Ambedkar (1990/1941, Vol. 8).

between a community's 'right of insurrection' as being 'restricted only to insisting on a change in the mode and manner of government', and a nation's greater 'right of disruption' as also extending 'to the secession of a group of the members of a State with a secession of the portion of the State's territory in its occupation.' Thus in summary, while a community had a 'right to safeguards', a nation had a 'right to demand separation'.¹⁹² Employing this distinction, Ambedkar dispassionately made a philosophical case for India's partition and the creation of Pakistan in 1941, as he believed that Muslims in India had transformed themselves from a community demanding constitutional recognition, into a nation attracted by the magnetism of a 'new destiny' to live together in a 'separate national state'.¹⁹³

Such a disruption of India would not only diffuse the fraternal enmity between Hindus and Muslims, but it was also at the same time a necessary precondition for the constitutionalization of an insurrectionary politics around the caste question, which was in many ways the chief motivation for Ambedkar joining the Constituent Assembly. With a view to translate this aspiration in concrete form, Ambedkar had for much of his life argued in favour of supplementing adult suffrage with innovative constitutional mechanisms more relevant for India's divided society such as separate electorates, and reserved seats in legislatures and government employment for the Dalit community at par with other minorities and neglected groups. His idea behind setting up of representative and participatory institutions was to confer upon deprived sections their fair share in democratic state sovereignty, and not merely to placate or mollify them so that the constitution could be secured from illegal and extralegal insurgencies. Thus in 1953, when Ambedkar realized that the constitutional text which he had helped author did not live up to these expectations, he denounced it from the floor of Parliament: 'Sir, my friends tell me that I made the Constitution. But I am quite prepared to say that I shall be the first person to burn it out. I do not want it. It does not suit anybody.'¹⁹⁴ This vehement attack, reminiscent of Ambedkar's public burning of the *Manusmriti*—Hinduism's ancient code of casteist jurisprudence—in a symbolic funeral pyre in 1927, was perhaps unprecedented in the history of modern constitutionalism, wherein the framer of a constitution had effectively disowned his own creation.¹⁹⁵ He followed it up two years later with another lament couched in theologico political language: 'We built a temple for a god to

¹⁹² Id., at 325-328.

¹⁹³ Id., at 331.

¹⁹⁴ Quoted from Keer (1962/1954: 446).

¹⁹⁵ Kumar (2015: 264).

come in and reside, but before the god could be installed, if the devil had taken possession of it, what else could we do except destroy the temple ?'¹⁹⁶ Disillusioned with what formal politics had to offer, he converted to Buddhism just two months before his death in a mass ceremony along with five hundred thousand followers, a gesture which has become the most well known act of public defiance faced by postcolonial India's Brahminical establishment thus far.

3.2 The hegemony of caste and collective liberation as non-oppression

While grappling with the question of caste, Ambedkar's agonism could not afford to merely stick to either of the two conceptions of liberal freedom as noncoercion or republic freedom as nondomination associated with modern constitutionalism. This was because contrary to Upendra Baxi, he did not see the caste system as a 'dominance without hegemony' sanctioned by the 'lawless laws' of the Hindus, that is simply as a state of affairs where coercion outweighed persuasion.¹⁹⁷ It was rather a hegemony supported by the consent of the 'dvijas', that is the twice born or the first three castes who were situated at different rungs in a hierarchical regime of 'graded inequality'. This meant that the tremendous violence heaped upon the *panchamas*, or the fifth caste of untouchables who were not included within the fold of the caste system, was not merely physical but also structural, as it was numerically backed by a general acquiescence even if not an outright endorsement from the rest of society. Unlike the case with slavery, the untouchables did not have to deal with a single identifiable master exercising coercion or domination over them; they were rather up against the entire society of caste Hindus which subordinated them systematically, without even allowing them their consciousness of unfreedom.

Untouchability was for Ambedkar not a category of positive law, and so could not be reduced to a clear and precise definition in the same way as coercion and domination could. In his understanding, it was a 'social concept' which had come to be embodied in a 'custom', and just as custom varied from place to place, so did untouchability. The untouchables were in fact legally free and only socially unfree, but 'custom is no small a thing as compared to law'. Even though law was enforced by the state through its police power and custom was not unless legally valid, this distinction between the two was practically of no consequence, for '[c]ustom

¹⁹⁶ Ambedkar (1997/1955, Vol. 15: 949).

¹⁹⁷ Baxi (1995). Also see Baxi (2013).

is enforced by people far more effectively than law is by the state. . . the compelling force of an organized people is far greater than the compelling force of the state.’ As a pervasive social practice, untouchability was ineliminable from the ‘nomos’ of caste order, and could therefore depend upon the ‘amplitude of plenary powers’ generated by ‘mass action’ for its defence.¹⁹⁸

In order to annihilate this hegemony of caste, Ambedkar’s agonistic constitutionalism had to resort to a counter hegemonic constituent power as collective liberation. There is much in Ambedkar’s thinking on state socialism and nationalism grounded in social homogeneity which seems to share affinities with the tradition of positive liberty as self mastery and self determination, but he was neither a conventional Marxist nor a communitarian nationalist. This was because the oppression entailed in caste and untouchability could not be analogized with the exploitation of capitalism and colonialism. His project of collective liberation as non-oppression instead drew upon an alternative Indic source in the religion of Buddhism, which he in turn imaginatively contemporanized for the mid twentieth century. Ambedkar embraced Buddhism for its rational, godless, soulless and casteless theology, and went to the extent of identifying the Buddha and not the French Revolution as the source of his social philosophy of liberty, equality and fraternity. He specifically reworked its liberatory concept of *nibbana*, the dominant monastic interpretations of which had thus far emphasized exclusively upon individual self renunciation. Somewhat akin to Hindu social reformers and anticolonial activists including Gandhi, Ambedkar brought out *nibbana* into the world as a socially engaged Buddhist, but unlike them, he did not believe in the metaphysical idea of a soul needing salvation from the transmigratory cycle of birth and rebirth. His religion was utterly this-worldly, wherein *nibbana* meant nothing more than ‘enough control over passion so as to enable one to walk on the path of righteousness.’¹⁹⁹ Furthermore, he did not feel particularly drawn to the exemplary figure of the detached individual renouncer acting for the sake of social welfare, and sought to fashion in its stead an exemplary community of Dalits acting collectively for their own liberation from the oppressive structure of caste. It is hardly surprising then that he remained such a fierce opponent of Gandhi’s all through his life.²⁰⁰

¹⁹⁸ Ambedkar (1989, Vol. 5: 229, 283-284).

¹⁹⁹ Ambedkar (1992/1957, Vol. 15: 237).

²⁰⁰ For a more elaborate version of this argument about Ambedkar as a theorist of liberty as non-oppression, see Tundawala and Choudhuri (2016).

4 The social and the political

In the previous two sections, I have dealt with the constitutional thought of Gandhi and Ambedkar separately, and tried to show that their antagonism is not reducible to tensions between subjectivity and law, liberation and freedom, as is usually the case with rival protagonists of revolutionary and constitutionalist constituent power. Although working on constitutional projects which were undoubtedly very different from one another, they both were united in their common appreciation of the relational nature of these concepts under conditions of India's distinct pathway to modernity. By bringing them closer together in this manner, I believe that we may now be able to unsettle the widely accepted disjunctive bifurcation of Indian constitutional imagination into categories of political independence and social justice discussed in section one, which have also gone on to inform much of the public intellectual discourse on the Gandhi Ambedkar debate thus far.

This distinction is by no means an Indian peculiarity, and is in fact roughly analogous with the separation of the political from the social in the Euro American constitutional context, which has been best articulated in Hannah Arendt's philosophical writings. To put it succinctly, Arendt theorized the domain of the political as an aesthetic arena of public life dedicated to the performative enactment of speech and action in concert, and differentiated it from the domain of the social construed as a private realm of necessities which had little to do with politics as an art of collective associational living. She went on to caution that every attempt at providing a political solution to the social question of necessity in the name of a sovereign dispossessed people had led to terror, as was the case with the French Revolution. In sharp contrast was her unreserved admiration for the American Revolution, which she believed was guided by a genuine political impulse to found a republic unhindered by the material problem of human misery. Arendt's formulations have remained a mainstay in discussions of relational constituent power, even though she has been heavily criticized for her elitist conceptualization of the political, which completely excludes the creative and emancipatory potential of the social from its purview.

However relevant such a sharp binary may be for European and American constitutional cultures, it yields a strange conclusion at least when applied to India, suggesting that only the anticolonial struggle for national liberation was a political movement, and therefore had to be prioritized over the comparatively less significant social question of institutionalizing freedom

under a postcolonial constitution. It is possible to infer that this is precisely what may have happened over here, with Gandhi's initial victory over Ambedkar signifying the primacy of the political over the social during their lifetime when independence was yet to be achieved, and Ambedkar's symbolic sidelining of Gandhi in more recent times being indicative of the triumph of the social over the political, with a greater attention being given to issues of corrective and distributive justice, now that the question of independence had been fully resolved and was no longer salient in public life. But we must not rest satisfied with this pithy formulation, as my debunking of the disjunctive bifurcation between subjectivity and law, and liberation and freedom in the constitutional thought of Gandhi and Ambedkar raises serious doubts about the way in which categories of political independence and social justice have come to distinguish them from one another in particular and divide the Indian constitutional field in general.

4.1 Gandhi on caste and Ambedkar on nationalism

It is true that Gandhi was not as trenchant a critic of the caste system as Ambedkar was, but the removal of untouchability had always remained an integral part of his constructive programme. He attacked untouchability in most emphatic terms as a 'blot on India's forehead', and a 'sin of Hinduism', and went on to suggest just like Ambedkar that 'even the slavery of the Negroes is better than this'.²⁰¹ Gandhi believed that colonialism was a just retribution for the 'crime of untouchability', and made it very clear in 1920 that '[w]e shall be unfit to gain Swaraj so long as we keep in bondage a fifth of the population'.²⁰² What is difficult to defend in Gandhi today, is that even while going on to practically call for the abolition of caste as an institution, he continued to value it for much of his life in an idealized fourfold *varnasrama* form as a horizontal, non-hierarchical and functional division of society. However as Skaria points out, this conservative faith in its enduring efficacy was gradually shaken up, especially after encountering the likes of Ambedkar, as he began to normatively prioritize the figure of the Atisudra over that of the Brahmin, and reluctantly brought himself to take seriously the argument that untouchability could not be destroyed without destroying the caste system itself.²⁰³ Thus when it was suggested to him in a 1927 interview that destruction of *varna* was

²⁰¹ Gandhi (1917, Vol. 16: 137).

²⁰² Gandhi (1920, Vol. 22: 6).

²⁰³ Skaria (2015: 168-169).

necessary for the destruction of untouchability, he had this to say: 'I do not think so. But if *varnashrama* goes to the dogs in the removal of untouchability, I shall not shed a tear.'²⁰⁴

Similarly, it cannot be denied that Ambedkar had largely refrained from taking an active part in the national movement at least on terms defined by the Congress and Gandhi. But he was no native collaborator or stooge of the colonial government either. In his opinion, while the untouchables had welcomed the British as their deliverers from age long tyranny and oppression by helping them in militarily conquering and retaining India, they did not get anything substantial in return, apart from the principle of 'equality before the law' thus far unknown to Hindu jurisprudence. In other respects, there was no fundamental change in the position of untouchables under colonial rule, as the British had literally done nothing for their emancipation and elevation in areas of public service, education and social reform. Therefore, speaking on behalf of the Depressed Classes at the First Round Table Conference in 1930, he had this to say in support of a *swaraj* constitution:

'We feel that nobody can remove our grievances as well as we can, and we cannot remove them unless we get political power in our own hands. No share of this political power can evidently come to us so long as the British government remains as it is. It is only in a *Swaraj* constitution that we stand any chance of getting the political power in our own hands, without which we cannot bring salvation to our people . . . though the idea of *Swaraj* recalls to the mind of many the tyrannies, oppressions and injustices practiced upon us in the past.'²⁰⁵

My intention here is neither to force a reconciliation between Gandhi and Ambedkar, nor to create an opening for a fresh reinterpretation of the Indian political as a unified homogenous field of mutual consensus and reciprocity. Gandhi and Ambedkar certainly adopted divergent intellectual positions on caste, nationalism and other related issues, but there have been various scholarly and activist attempts to bring these views together in a productive dialogue if not in complete harmony with one another. However, I believe that even if it becomes hypothetically possible to envisage Gandhi as a radical anticaste activist and Ambedkar as an ardent anticolonial nationalist, there still remains a more fundamental incompatibility between the two as theorists of constitutional self rule, which a constitutionally less significant distinction between political independence and social justice ends up occluding from our view. This fundamental incompatibility to which I now turn in the remainder of the chapter, is between

²⁰⁴ Gandhi (1927, Vol. 40: 486).

²⁰⁵ Ambedkar (1982/1932, Vol. 2: 503-506).

Gandhi as a thinker of social law and subjectivity, and Ambedkar as a thinker of political law and subjectivity, or in other words as between their irreconcilable conceptualizations of *swaraj* through the rival languages of *dharma* and *dhamma* respectively.

4.2 *Dharma, niti, dhamma*

In my understanding, Gandhi and Ambedkar will remain separated from one another for their entirely different responses to questions of law and subjectivity, regardless of whether these were freely chosen or compelled by circumstances. To put it schematically, Gandhi's constitutional project was determined by his experience of the law of colonial civil society as the negative other and source of self alienation. His response was therefore articulated from the position of an indigenous social subjectivity, the law appropriate to which was *dharma*. On the contrary, Ambedkar's constitutional project was determined by his experience of the law of Hindu caste order as the negative other and source of self alienation. As an outcaste, he in fact did not perceive himself to belong to Gandhi's social subjectivity, and hence his response was articulated from the position of an indigenous political subjectivity, the law appropriate to which was *dhamma*. Thus in effect, it can be said that Gandhi and Ambedkar respectively occupied what I have described in the previous chapter as the inner and outer domains of anticolonial society, and their engagement with law and subjectivity was influenced significantly by this spatial ordering of the Indian political. I do not wish to deny Gandhi and Ambedkar their creative agency, especially in an interpenetrating context marked by the simultaneous socialization of the political and politicization of the social, but am only interested here in explaining what this mutual incompatibility means in theoretical terms.

Gandhi recognized that under conditions of colonial modernity, the social and the political could no longer be thought of as two unrelated spheres of activity entirely autonomous from one another. But rather than uncritically endorsing this intrusion of a corrupt statist politics in society, what he aspired to do was to purify and spiritualize India's emergent anticolonial political subjectivity through social law. There was no one better than the figure of the *sanyasi* or renunciant to partake in this enterprise. When Gandhi was once asked about his idealization of *sanyasa* with his struggle for *swaraj*, he replied thus:

'If the *sanyasins* of the old did not seem to bother heads about the political life of society, it was because society was differently constructed. But politics properly so-

called rule every detail of our lives today. We come in touch, that is to say, with the State on hundreds of occasions whether we will or not. The State affects our moral being. A *sanyasin*. . . being well-wisher and servant par excellence of society, must concern himself with the relations of the people with the State, that is to say, he must show the way to the people to attain *swaraj*.’²⁰⁶

Gandhi variously translated *dharma* as duty, obligation, religion and law, and interpreted its different forms such as *varnashram dharma* (*dharma* of castes and stages of life), *swadharma* (*dharma* of the individual), *rajadharma* (*dharma* of the ruler) and so on, as distinguishing particular subjects from one another in terms of their distinct normatively prescribed roles in society. He conceived *swaraj* as a *dharmarajya*, that is as a polity oriented towards *dharma*, and provided for its emulation an ideal model of *Ramarajya*, an expression which usually refers to the reign of the popular mythical divine ruler Rama.

Since Gandhi did not endorse the idea of a people as an abstract unity, and instead preferred to grapple with social relations in their ineradicable differences, commentators are divided on whether he could be regarded as an innovative thinker of sovereignty, or as someone who disavowed it altogether.²⁰⁷ I do not wish to elaborate on this debate, because neither sovereignty nor abstract unity are necessary prerequisites for a theory of constituent power, even though they appear to be so under global conditions of nation state supremacy today. It suffices for my purposes that Gandhi envisaged for concrete everyday interactions between the governors and the governed an integrating symbolic order of *Ramarajya*, where the ruler was to be regarded not as a sovereign master but instead as a ‘servant of his servants’: ‘*Ramarajya* means rule of the people. A person like Rama would never wish to rule. God calls Himself a servant of his servants.’²⁰⁸

This notion of *Ramarajya* was in turn modelled on affective bonds of family and kinship where relations of strife and conflict were most likely to be reconfigured non-violently by adhering to *dayadharma* or the *dharma* of love and compassion, and *padoshi dharma* or the broad ranging practices of neighbourliness, including *satyagraha* or civil resistance with antagonists, *mitrata* or friendship with equals, and *seva* or service with subordinates.²⁰⁹

²⁰⁶ Gandhi (1925, Vol. 31: 375).

²⁰⁷ Devji versus Skaria.

²⁰⁸ Gandhi (1932, Vol. 55: 13).

²⁰⁹ I borrow this categorization from Skaria (2002).

What was true of families and communities was for Gandhi true of nations as well, since there was no reason to believe that there was one law for families and another for nations. At another place, he described *satyagraha* itself as ‘an extension of the domestic law on the political field’. In the same way as a son was dutybound to resist his father’s injustice, *satyagraha* was to be offered to the British if they did not see themselves as servants of the people:

‘although you are the rulers, you will have to remain as servants of the people. It is not we who have to do as you wish, but it is you who have to do as we wish. . . . if the above submissions be not acceptable to you, we cease to play the part of the ruled. . . . If you act contrary to our will, we shall not help you; and without our help, we know that you cannot move one step forward.’²¹⁰

If we briefly turn to Gandhi’s other two practices of neighbourliness, it would become very clear why Ambedkar would wish to have nothing to do with them. As a Hindu, Gandhi was able to move beyond the strategic alliance of interests to seek with Muslims an unconditional friendship on terms of equality. But as far as Dalit subalterns were concerned, he could only offer them *seva* or service in a spirit of atonement for the sin of untouchability, whilst at the same time refusing to countenance the possibility of their performing *satyagraha* against caste Hindus. From Ambedkar’s point of view, this sacred ritual of self-purification could have space only for one hero, that being the guilt ridden caste Hindu reformer, and not the untouchables themselves, who were waging a completely different battle against Hindu society for their own self-respect and dignity. Hence he had no option but to reject the Gandhian model in its entirety.²¹¹

As D.R. Nagaraj has emphasized, Ambedkar was invested in posing a constitutive rather than merely a regulative challenge to Gandhi’s language of *dharma*.²¹² Like Gandhi, he too recognized that the social and the political had come to be closely related with one another in colonial India. But rather than worrying about protecting an indigenous social subjectivity from the corruption of colonial civil society, he called for its fresh reconstitution in consonance with the political law of *dhamma*.

Ambedkar warned the nationalists against pursuing political power without first addressing the issue of ‘social reform’:

²¹⁰ Gandhi (1909, Vol. 10: 306-307).

²¹¹ Nagaraj (2010: 21-60 at 45-46).

²¹² Id., 38-39.

‘Are you fit for political power even though you do not allow a large class of your own countrymen like the untouchables to use public school ? Are you fit for political power even though you do not allow them the use of public wells ? Are you fit for political power even though you do not allow them the use of public streets ? Are you fit for political power even though you do not allow them to wear what apparel or ornaments they like ? Are you fit for political power even though you do not allow them to eat any food they like ?’²¹³

This social reform, by which he meant nothing less than the ‘annihilation of caste’, could only be accomplished by destroying the extant Hindu *dharma* upon which it was founded:

‘if you wish to bring about a breach in the system, then you have got to apply the dynamite to the Vedas and the Shastras, which deny any part to reason, to Vedas and Shastras, which deny any part to morality. You must destroy the Religion of the Shrutis and the Smritis. Nothing else will avail.’²¹⁴

In order to politicize the social question of caste oppression, Ambedkar drew upon a counter constituent language from the *niti* tradition, which he regretted had for a long time become dormant in India.²¹⁵ In a lecture to law students in 1948, he disagreed with orientalist and orthodox pundits who believed in the idea of a timeless India with a static ancient constitution, and instead alluded to a more eventful history wherein there was no other country in the world which had undergone so many revolutions as this country had. For Ambedkar, India had witnessed a conflict between ‘ecclesiastical law’ or ‘communal law’ made by God or divine lawgivers like Manu and Yajnavalkya, and a people made ‘secular law’ whose foundations were laid out in Kautilya’s *Arthashastra*, long before the Pope’s authority was sought to be challenged in Europe. But unlike Europe where the law had become purely secular today, with the jurisdiction of the church being confined to the priest alone, ecclesiastical law had unfortunately triumphed over secular law in India, which in his opinion was ‘one of the greatest disasters in this country’. As a result of this defeat, the decadent Hindu society could not reform its defects through law, and ‘our nation which was once at the pinnacle of progress started declining’ at first, and got completely devastated and destroyed eventually.

I wish to clarify however, that Ambedkar’s roughly drawn categorial distinction between ecclesiastical law and secular law is not exactly mappable onto the familiar tension between

²¹³ Ambedkar (1979/1936, Vol. 1: 41).

²¹⁴ Id., at 75.

²¹⁵ I am relying here on the account of Rao and Subrahmanyam (2008: 396-423).

religion and secularism in modern Euro American constitutional debates. That Ambedkar did not regard the religious and the secular as binary opposites can be discerned from his final speech before the Constituent Assembly, in which he sited the Buddhist Sangha as an exemplary institution for the enactment of people made law:

‘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.’

Ambedkar proceeded to conjecture that although the Buddha applied these rules of Parliamentary procedure to the meetings of *Sanghas*, ‘he must have borrowed them from the rules of political assemblies functioning in the country in his time’.²¹⁶ In other words, what was important about these rules was not necessarily their antireligious secularity, but rather their political orientation which had to be extended to other spheres of society as well.

On a similar note, it must also be said over here that Gandhi’s politics of religion was not necessarily hostile or antithetical to secularism. Gandhi is widely known to have been guided by the maxim that ‘those who think that religion has nothing to do with politics understand neither religion nor politics’. However at the same time, he strongly insisted on a secular vision of the state when independence drew closer:

‘If I were a dictator, religion and State would be separate. I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State would look after your secular welfare, health, communications, foreign relations, currency and so on, but not your or my religion. That is everybody’s personal concern.’²¹⁷

What is more, although Gandhi was a Hindu, his religion was not denominational in nature. The *Ramarajya* of his imagination was not necessarily a Hindu institution, and could as well be helmed by the first Islamic Caliphs: ‘The race of Rama is not extinct. In modern times the first Caliphs may be said to have established Ramarajya.’²¹⁸

²¹⁶ Ambedkar (CADs, Vol. 11: 25 November 1949).

²¹⁷ Gandhi (1946, Vol. 92: 190).

²¹⁸ Gandhi (1925, Vol. 27: 62).

I need not engage with the various illuminating scholarly attempts at making sense of the secularism that was internal to Gandhi's religious politics, and the religion that was internal to Ambedkar's secular politics. The only point being made here is that the two concepts were not in tension with one another in their work in the same way as social law and political law were.

This leads me to consider the usefulness of another related categorial distinction between moralism and realism for explaining the irreconcilability between Gandhi and Ambedkar. While it is easy to read Gandhi as an ethical antipolitical thinker, the newer scholarship being produced on him seems to be rightly pointing out that he did not see politics and ethics in oppositional terms. Although Gandhi did not make any distinction between norm and exception, he intriguingly conceptualized his ethical politics around the site of the battlefield, where the question of violence was inescapable. His object was not to sanitize politics, but to convert its ineliminable violence into nonviolence through the exemplary performance of personal self sacrificial action. As Karuna Mantena has gone on to show, he may in fact be said to have practiced a form of political realism, for treating nonviolence not purely as morally right action, but also as a plausible practical orientation in a political world marked by recurring violence and conflict.²¹⁹

On the contrary, as far as Ambedkar is concerned, it is true that his agonistic constitutionalism was sceptical of constitutional morality, but he did not give up on the concept of morality as a whole. Ambedkar's problem with Hindu *dharma* was precisely its morally bankrupt code of 'legalized class ethics', against which he counterposed the universal morality of Buddha's *dhamma* defined in terms of *prajna* or 'understanding', *karuna* or 'love for human beings', and *maitri* or 'extending fellow feeling to all beings, not only to one who is a friend but also to one who is a foe: not only to man but to all living beings'.²²⁰ In order to further understand what Ambedkar meant by morality, we may turn to the distinction he made in *Annihilation of Caste* between rules and principles: while rules prescribed an imperative course of action for the agent to pursue unreflexively, principles were more intellectual in nature in that they laid down broad guidelines to enable the agent to think and judge reflexively. The Hindu caste order was a degenerated form of religion, since it was based purely on rules of commands and prohibitions, which even if right could only produce mechanical action. On the other hand, a

²¹⁹ Mantena (2012: 455-470).

²²⁰ See generally, 'Buddha and his Dhamma', published in Ambedkar (1992, Vol. 11).

truly religious act was for Ambedkar grounded in principles, and so even if the principle was wrong, the act was at least conscious and responsible. With its law of *kamma* or responsible action, only Buddhism qualified as a moral religion of principles in this sense, and thus became worthy of veneration both for him and his followers.²²¹

One may argue over here on behalf of proponents of constitutional morality that it may today be able to accommodate what Ambedkar had in mind while talking about reflexive action. This is especially so after the antipositivist turn in normative legal theory, following which a roughly analogous distinction is commonly made between law as a structure of primary and secondary rules, and law as a structure of higher principles with an intrinsic morality of its own. All that can be said in response is that Ambedkar was not satisfied with morality alone, and also insisted upon its sacralization: ‘in *Dhamma*, Morality takes the place of God, although there is no God in *Dhamma*.’²²² This sacralization of morality had got very little to do with fostering a culture of what has come to be known today as constitutional patriotism. It was instead geared towards the universalization of fraternity understood as a sovereignty concept, which could not be strictly encased within established forms of constituted authority—reflexive or otherwise.

Conclusion

If there is anything that brings Gandhi and Ambedkar closer together as constitutional thinkers, it has to be their keen appreciation of the distinction between the formal and material dimensions of India’s constitution. This enabled them both to effectively engage with institutional as well as extra-institutional politics at different points of time in their respective careers. But as has been discussed herein above, these engagements were mediated by two diverging worldviews encapsulated in rival symbolic languages of *dharma* and *dhamma*, of social law and subjectivity and political law and subjectivity, meaning thereby that a Gandhi Ambedkar reconciliation is impossible to envisage.

This tension was not peculiar to Gandhi and Ambedkar alone, but has in fact been at the heart of the constitution of the modern Indian political as a whole. It is hardly surprising then that even though neither of the two partook in the mainstream of nationalist thought, the

²²¹ Id., at 243-245.

²²² Id., at 323. For the trajectory of antipositivist turn in normative legal theory, see: Hart (2012); Fuller (1969); Dworkin (1986).

postcolonial state has sought to appropriate Gandhi as the father of the nation and Ambedkar as the chief architect of the Constitution in many ways over the years to legitimize its authority. While Gandhi stands in for the hegemony of *dharma* which was initially secularized under Nehruvian civic nationalism and communalized later on under ethnic Hindu nationalism, Ambedkar has in more recent times become the most potent signifier of the recessive *dhamma* tradition which has been contained but refuses to be fully tamed owing to the emergence of the Dalit community as a powerful votebank on the landscape of India's democracy. In the next three chapters, I turn to postcolonial debates on the making of the constitutional subject, transformative constitutionalism and the judicialization of politics, and map the traces therein of this irresolvable dyadic relationship between social law and subjectivity on the one hand, and political law and subjectivity on the other.

CHAPTER III

UNITY IN DIVERSITY AND THE MAKING OF INDIA'S CONSTITUTIONAL SUBJECT

Introduction

In the previous chapter, I made a case for moving beyond an over emphasized dissonance between relational categories of subjectivity and law, liberation and freedom in Indian constitutional studies, and through an extensive engagement with the constitutional thought of M.K. Gandhi and B.R. Ambedkar, alluded to a more fundamental and irreconcilable antagonism between social and political conceptions of *swaraj* as the symbolic signifier of constituent power in India's constitutional imagination. But since the domain of constitutional thought was over here barely sequestered from the domain of constitutional action in which Gandhi, Ambedkar and other protagonists of the national movement conducted themselves as effective leaders, reformers, jurists and ideologues, this antagonism cannot be regarded merely as an abstract formulation of high constitutional theory alone. It has in fact also been an active force in various foundational debates associated with concrete constitutional practice in colonial and postcolonial India.

The most germinal among these debates has been the one pertaining to the very constitution of the people as a collective subject in the name of whom the new postcolonial constitutional text came to be enacted in 1950.²²³ This issue of the constitutional subject assumed centre stage because India's so called founding constituent moment did not witness a preformed revolutionary subjectivity giving to itself an altogether fresh constitution of government which could be seen as having marked a clean break from the colonial past. However at the same time, continuities with the colonial form of government did not imply that it produced a constitutionalist constitution of state which could in turn be taken as having fashioned an antipolitical subjectivity wholly oriented to the rule of law. I shall rather argue in this chapter that the making of the constitutional subject in India has been shaped by the social law of *dharma*, the political law of *dhamma* and the unresolved conflict between the two. In order to

²²³ For an insightful account of the constitutional subject and its relationship with the concept of constituent power, see Rosenfeld (2009).

establish my point, I would need to turn to the contentious debates on affirmative action which have most starkly brought out the fault lines underlying the modern Indian political at the level of the constitution of its collective subject.

India's Constitution has put in place one of the most robust affirmative action programmes anywhere in the world, which today provides for the reservation of a sizeable quota of seats for a large range of beneficiaries in central and provincial legislatures, government employment, and public and private education. There has naturally developed an extensive body of scholarship critically appraising this policy in the light of various legal, moral and philosophical principles salient in normative constitutional theory. Perhaps the most commonly discussed question in respect of affirmative action in India has been whether the special provisions enabling or prescribing reservations were to be considered as temporary exceptions to the norm of formal equality for all citizens, or whether they could themselves be normatively defended by resorting to another related notion of substantive equality.²²⁴ In more recent times however, some commentators have begun to trace justifications for the programme in a revised theory of constitutional liberalism, where group differentiated rights were seen as supplementing individual rights in an anticipation of the Euro American turn to multicultural accommodation by several decades, and where the duty of asymmetric discrimination was grounded not so much in the equality ideal as it was in considerations of reducing group vulnerability and enhancing personal autonomy.²²⁵ Others prefer to look past antidiscrimination and instead draw support from ideas of corrective justice and distributive justice whilst conceiving the reservations policy either as a compensatory mechanism for the redressal of historical wrongs, or as an egalitarian device geared towards securing adequate representation for the disadvantaged in different sectors of society.²²⁶ Finally, it has also been explained as an instantiation of a procedural conception of aggregative democracy characterized simply by majority rule, covering nearly eighty percent of the population in one way or another.²²⁷

²²⁴ See for example the debate between Mahendra P. Singh (1994) and Parmanand Singh (1995).

²²⁵ On affirmative action and a liberalism accommodative of difference, see Bajpai (2011); on affirmative action as a vulnerability reducing and autonomy enhancing measure in anti-discrimination law, see Khaitan (2008) and (2015: 215-240).

²²⁶ On affirmative action and compensatory discrimination, see Galanter (1984).

²²⁷ Sitapati (2010).

These concepts of formal and substantive equality, individual and group rights, antidiscrimination, personal autonomy, corrective and distributive justice, and procedural democracy have no doubt served a useful purpose in helping make sense of affirmative action as a constitutional policy in post-independence India. Their general influence has however meant that the system of reservations is essentially viewed as a successful or flawed actualization of particular normative values by existing judicial, executive and legislative institutions, and concomitantly as supplying a modular blueprint for institutional designers to consider emulating in deeply divided societies elsewhere in the world. In other words, it is understood primarily from the point of constituted power connected at best with the constitution of government as an institutional apparatus of rule, which has in effect resulted in a comparative neglect of the more fundamental idea of constituent power alluding to the constitution of state as a whole into a political unity. I therefore wish to address this lacuna in the literature by tracing the antecedents of affirmative action on grounds of backwardness in postcolonial India to the colonial history of minority entitlements and the constitutional imagination of anticolonial nationalism.

The chapter is divided into five parts. In part one, I begin with the tension between homogenous universality and heterogeneous particularity which generally informs much of the intellectual discussion on the making of India's collective constitutional subject. My argument will be that this antinomy cannot be regarded as having lent India's constitutional experience a distinct postcolonial specificity, as it has in fact been a central feature in the intellectual history of the sovereignty concept across the globe. In order to explain what sets apart the Indian political from the global, part two makes a case for dissociating the homogeneity-heterogeneity dyad from the civil society-community framework of postcolonial theory, and recontextualizing it within the prism of the two primordial categories of collective intentionality, that is of the own and the strange, which are essentially at the root of structuring any multitude into a political unity. Connecting homogeneity and heterogeneity with ideas of the self, the other and the stranger, the third and fourth parts will seek to establish that the constitutional subject in India was in fact shaped by two fundamentally incompatible articulations of unity in diversity, anchored either in the social domain of familiarity or in the political domain of contract, and governed by the competing logics of *dharma* and *dhamma* respectively. Finally, in part five, I show how these contrasting images of collective selfhood confronted each other at the moment of transition from the colonial to the postcolonial, and displaced minority with backwardness as the new fault line for a counter hegemonic politics of a-legality.

1 Debating homogenous universality and heterogenous particularity in Indian constitution making

Since India's collective constitutional subject has explicitly been founded on the political principle of unity in diversity, no investigation into the intellectual history of its making is possible without focusing on the mediating ideas of homogenous universality and heterogeneous particularity which are increasingly being recognized as the basic building blocks of the modern state form everywhere across the globe. This is more so the case in India, where a deeply entangled relationship between these categories is in fact understood as having lent the republican constitutional state its distinct postcolonial specificity. In order to elucidate how their harmonic and disharmonic interaction is generally perceived in legal and political scholarship on the constitution, let me commence with two major constituent moments witnessed during the final phase of colonial rule, which continue to remain germinally significant in the postcolonial period even today.

The first such episode pertains to the assertion of constituent power by MK Gandhi at the Second Round Table Conference in 1932, where he was famously confronted by BR Ambedkar on the issue of separate electorates for the then untouchable community of Depressed Classes, more popularly known today as the Dalits. Separate electorates had been controversially introduced by the colonial government in the context of an otherwise limited franchise as a special form of legislative representation for different communal minorities, who voted alongside a general electorate mostly composed of Hindu upper caste urban professionals to elect their own representatives in provincial and imperial legislative councils. They were initially granted to the Muslims in 1909, later extended to smaller groups such as the Sikhs, the Europeans and the Indian Christians in 1919 and 1935, and on Ambedkar's passionate insistence almost to the Depressed Classes as well, but Gandhi's forceful intervention came in the way.

Gandhi held that unlike the question of religious minorities which did certainly concern a wider cross-section of people, the problem of untouchability was internal to Hinduism and had to find a solution within it alone. While repudiating Ambedkar's demand, Gandhi not only relied upon the claim of the Congress to represent the whole of India, but further went on to declare emphatically that more than anyone else, it is he who represented the vast mass of untouchables in his own individual capacity:

‘I claim myself in my own person to represent the vast mass of the Untouchables. Here I speak not merely on behalf of the Congress, but I speak on my own behalf, and I claim that I would get, if there was a referendum of the Untouchables, their vote, and that I would top the poll.’²²⁸

It goes without saying of course that implicit herein was a claim to represent the caste Hindus also, which prompted him in fact to talk about saving Hinduism from being compartmentalized into two divisions, if need arose even with his own life. So when British Prime Minister Ramsay MacDonald announced the so called Communal Award recommending the extension of separate electorates to the Depressed Classes for the next twenty years in areas where they were most populous, and at the same time allowing them to vote in general constituencies alongside caste Hindus, Gandhi decided to commence a fast unto death in Yerawada Jail, a fast which was to end only when the government agreed to withdraw this scheme and all representatives of the Depressed Classes were required to be elected by the general electorate under a common franchise.

Ambedkar on his part sought to follow the example of the powerful Muslim model, and argued that the untouchables were an altogether separate community outside the fold of caste Hindu society, who were entitled to special legislative representation in the same way as was the case with other communal minorities under colonial constitutionalism. As a virtual outcaste in the country of his birth, he could not get himself to look past India’s hierarchical social divisions and uncritically endorse the Congress imagination of an extant culture of composite nationalism. So when praised by Gandhi as a ‘patriot of sterling worth’ for his espousal of swaraj at the First Roundtable Conference, Ambedkar insisted that he had no homeland of his own to speak about:

‘How can I call this land my own homeland and this religion my own wherein we are treated worse than cats and dogs, wherein we cannot get water to drink ? No self-respecting Untouchable worth the name will be proud of this land. . . . If at all I have rendered any national service as you say, helpful or beneficial, to the patriotic cause of this country, it is due to my unsullied conscience and not due to any patriotic feelings in me.’²²⁹

²²⁸ Gandhi (1931, Vol. 54: 158).

²²⁹ As cited in Keer (1962/1954: 166-167).

Ambedkar had in fact indicated from the very beginning of his career that he prioritized the cause of the untouchables more than everything else, even though the precise contents of their constitutional entitlements were definitively sketched out by him only later on. There was an initial preference in his scheme for universal suffrage for the Depressed Classes, but since this was unlikely to be materialized anytime soon, he unequivocally asked for separate electorates at the Second Roundtable Conference and therefore ended up clashing with Gandhi as a consequence.

In order to save Gandhi's life however, Ambedkar was eventually left with no option but to compromise with his demand and sign upon the Poona Pact, which abandoned the idea of separate electorates and put the touchables and untouchables together in a joint electorate, albeit by also going on to provide a much larger number of reserved seats to the Depressed Classes in comparison with what they were supposed to receive under MacDonald's Communal Award. Furthermore, there was an additional facility of a primary election in every reserved constituency, wherein voters belonging to the Depressed Classes were to first elect a panel of four candidates, who were to then contest a second election involving all voters making up the general electorate. This seemed to be only a provisional resolution of the conflict at the time, but was later carried forward even into the postcolonial constitution of 1950, and came to be regarded as a chief inspiration behind its scheme on reservations.²³⁰

The second constituent episode took place just before independence, when the Cabinet Mission was sent to India in 1946 by the post War British Labour government to negotiate the terms of decolonization and set in motion a machinery for the framing of a new homegrown constitution. Tasked with an onerous responsibility of mediating between the Congress's idea of India as one integrated nation with a diverse population and the Muslim League's idea of India as two separate nations of Hindustan and Pakistan belonging to the Hindus and Muslims respectively, the Mission settled upon a proposal for a three tiered federation in a single sovereign state with a semblance of communal parity. Although the plan was initially accepted by both parties, neither of the two was fully satisfied with all of the proposals contained therein. While for the League, the basic problem was that this constitutional arrangement diverged sharply from its demand for a separate Pakistan that was equal in status to its Hindu counterpart, what Congress found most contentious was the requirement of a compulsory grouping of Hindu

²³⁰ On the Poona Pact, see generally Kumar (1985: 87-110).

majority provinces and Muslim majority provinces which could in effect impinge upon the sovereign character of the newly created Constituent Assembly.

So even as elections were held for the constitution making body and an interim government was established later on in accordance with the plan, the brief moment of detente between the two rival parties came to an end when Congress President Jawaharlal Nehru controversially remarked in a press conference that his party had made no other commitment to anybody apart from agreeing to participate in the Constituent Assembly. Nehru categorically stated that the Congress was 'entirely and absolutely free' to determine what it would do in the Constituent Assembly, and thus opened up the possibility also of changing or modifying the terms of the Cabinet Mission Plan as it thought best.²³¹ Mohammed Ali Jinnah, the President of the Muslim League, found in this an excellent pretext to withdraw his party's acceptance of the plan, and instruct its representatives to boycott the Assembly and prepare for 'Direct Action' for the creation of an independent Pakistan. What followed next was a period of intense communal violence, which culminated eventually in the partition of undivided India into two sovereign states of India and Pakistan, with separate constituent assemblies of their own as laid down under the Indian Independence Act of 1947.

As a consequence, the Congress now came to enjoy a much stronger majority in India's Constituent Assembly, and was therefore in a position to actualize its constitutional vision of a centralized federal state with little difficulty. But although managing to displace Jinnah and the question of religion from the centre of the Indian political, it had to come to terms at least with Ambedkar and the question of caste in order to claim legitimacy to speak in the name of the people as a whole. The colonial government had by that time ceased to recognize Ambedkar as an important player on the negotiating table, especially after his Scheduled Castes Federation suffered heavy defeats in the elections of 1945, albeit hampered no doubt by the denial of a separate electorate to the untouchables. Ambedkar never the less received a respectable position in the new postcolonial dispensation, which was necessary from the Congress's point of view to break his developing political alliance with Jinnah. He was reelected to the Constituent Assembly on a Congress ticket in 1947 after losing his earlier seat as a result of partition, made the Chairman of its Drafting Committee and even offered a berth in the union cabinet as independent India's first law minister. These favours were welcomed by Ambedkar

²³¹ As cited in Wolpert (1996: 370).

in spite of his well known antagonism with the Congress, because he understood that participating in the constitution making exercise was going to be crucial for the future prospects of the Dalit community in the country.²³² After joining hands with the Congress however, Ambedkar could no longer persist with his demand for a separate electorate. But nor could the Congress reject his alternative proposal for affirmative action in its entirety. So both sides had to make concessions and compromises while coming together to frame a new constitution for postcolonial India in a spirit of mutual accommodation, since this was meant to be nothing short of an unequivocal expression of people's constituent power that had purportedly been suppressed under two centuries of colonial rule.²³³

These two episodes discussed herein above invariably invite attention to a confrontation between the homogenous universalism of nationalist thought on one hand and the heterogenous particularism of community allegiances on the other.²³⁴ Although such a tension has come to be reduced to a legally manageable rivalry between individuated citizenship and group entitlements under India's formal constitution, it remains more intractable at the level of the material constitution, which is interpreted especially in postcolonial scholarship as alluding to an irresolvable contradiction between the universal history of bourgeois rights and abstract labour 'posited by capital', and particular histories of community that do not belong to capital's own 'life process'.²³⁵ Implicit here is an argument most thoughtfully developed by Sudipta Kaviraj about India's alternative trajectory of modernity, which did not entail a transition from ascriptive *gemeinschaftlich* to contractual *gesellschaftlich* associations as had been stipulated in contemporary European social theory expounded by the likes of Henry Maine and Ferdinand Tönnies, but instead involved a move away from a fuzzy unenumerated sense of community to a fixed enumerated one.²³⁶ It can further be inferred from Dipesh Chakrabarty's insightful theorization that even though this fixed and enumerated sense of community identity was sought to be sublated here within the institutional form of the nation state operating in the empty homogenous time of abstract capital, such a totalizing project was interrupted and resisted by heterotemporalities of collective subaltern subjectivities and their different counter hegemonic practices.²³⁷

²³² Austin (1966: 19-20).

²³³ On the role of consensus and accommodation in the Constituent Assembly, see Austin (1966: 311-321); for a more recent account of India's constitution making process as a revolutionary reform, see Arato (2017).

²³⁴ Jayal (2013: 199-228).

²³⁵ On the 'two histories of capital', see Chakrabarty (2000: 47-71).

²³⁶ Kaviraj (1992: 1-39).

²³⁷ Chakrabarty (2000).

In other words, critical postcolonial theorists of the material constitution regard the tension between homogeneity and heterogeneity as an irreconcilable one, and present it as a distinctive feature of the Indian experience which is in effect incommensurable with the working of the archetypal modern European state. Their starting premise is that in European constitutional imagination, political unity is largely understood as dependent upon the creation of a social homogeneity within the constitutional order. Although a similar connection between unity and homogeneity is acknowledged even in respect of India's nationalist thought, they never the less harp upon the ineliminability of a resilient social heterogeneity from its body politic. In Partha Chatterjee's estimation in fact, no available historical narrative of the nation can help resolve the resulting contradictions between the utopian homogeneity of undivided popular sovereignty and the real heterogeneity of a congeries of populations.²³⁸

But if we look beyond the civil society-community problematic of the material constitution and focus instead on the symbolic constitution of political unity, it would be clear that far from being unique to the formation of the constitutional subject in postcolonial India alone, this antinomy has in one way or another come to be recognized today as a central feature in the intellectual history of the sovereignty concept across the globe. As historian David Gilmartin has shown by drawing upon a wide cross-section of scholarship ranging from the work of J.R. Heesterman on the 'conundrum of the king's authority' in ancient India, and Azfar Moin on the 'millennial sovereign' in the Muslim Safavid and Mughal empires, to Ernst Kantorowicz on the 'king's two bodies' in medieval Europe, the multiple articulations of sovereignty in different jurisdictional contexts have commonly been attributed to an insoluble paradox of state power, grounding legitimate rule in a space simultaneously and contradictorily imagined as both outside and within worldly society. What this basically means is that sovereign rulers everywhere across the globe have generally projected themselves as embodying their whole community as a political unity by transcending everyday immediate politics, while at the same time being also required to manage the divisions and conflicts immanent to the mundane political world as effective agents of order and governance.²³⁹ Thus the paradox of India's postcolonial constitution allowing full play to the ordinary politics of caste and religion in spite of its political unity being premised upon an individuated conception of citizenship comes

²³⁸ Chatterjee (2004: 3-26).

²³⁹ Gilmartin (2010: 406-427), (2012: 407-423), and (2015: 371-386). See also Heesterman (1985); Moin (2012); Kantorowicz (2016/1957).

across in a reading like that of Gilmartin as nothing but a specific manifestation of a wider global problematic of sovereignty under twentieth century conditions of popular democracy.

I would however take such a formulation as my point of departure in the remainder of this chapter, as contrary to a commonly shared presupposition of both postcolonial theory as well as global history paradigms, the conflict between homogenous universalism and heterogeneous particularism is not all that there was to the working of the Indian political and the shaping of its constitutional subject. While sticking to the postcolonial emphasis on India's alternative trajectory of political modernity, I shall seek to establish that the constitutional debates on separate electorates and affirmative action were in fact anchored in two competing articulations of this tension, which can in turn be traced to a more fundamental incompatibility between the social and political conceptions of law and subjectivity, or that between *dharma* and *dhamma* respectively. It is here that the Indian political comes across as most distinctive and diverges categorically from the global model of sovereignty at the level of the symbolic constitution.

2 The own and the strange in colonial and anticolonial constitutional imagination

In order to establish the distinctiveness of India's constitutional engagement with the question of homogeneity and heterogeneity, I must first dissociate this dyad from the framework of civil society and community enunciated in postcolonial theory, by attempting to connect it instead with readily available juridical discourses of the common law and the civil law. A complete convergence would of course be impossible to discern, for even if the two major legal languages of the world may have been in wide circulation over here, their deployment was dependent on reasons that were entirely internal to the different projects of subverting or upholding the Indian political. But what this would at least enable me to do is to prepare the ground for recontextualizing the dyad within the two more primordial categories of collective intentionality, that is of the own and the strange, which are at the root of structuring any multitude into a political unity.

We saw in the previous section how postcolonial theory sought to challenge the hegemony of a capitalist civil society by counterposing it with a resistive narrative of community which capital could never overcome, especially in a non-European setting like that of colonial India. What it also emphasized was that far from acting as a neutral third party in respect of this conflictual relationship, the state was rather inextricably intertwined with interests of colonial

civil society, which were invariably prioritized over those of indigenous communities. There is little to disagree with in such a reading, but instead of connecting it to neo-Marxian and Foucauldian perspectives on the perils and possibilities of liberal governmentality as has usually been the case in the critical scholarship produced thus far, I would prefer to adopt a more nominal approach and attribute this mutual entanglement to the legal culture of common law that was transferred to India during colonial rule. It must be pointed out that institutions of civil society including economic production and markets, police and corporations, and private law and administration of justice have been understood as separate from and outside the public oriented governing institutions of the state only in the legal imagination of continental Europe. In contrast, British common law generally regarded the political authority of the state as a fundamental institution of civil society, and thus as much more embedded in the structures of everyday life than its abstract theorization in the civil law tradition.²⁴⁰ This symbiosis of state and civil society received further impetus with the suppression of the seventeenth century Leveller discourse on people's constituent power premised upon conditions of public and private autonomy, and its subsequent absorption into the doctrine of the absolute authority of the Crown-in-Council-in-Parliament to speak for the nation as a whole.²⁴¹ Such a common law driven constitutional state bolstered by a Hobbesian conception of sovereignty is what prevailed in colonial India as well, and hence the absence over here of a state-civil society distinction should not surprise, at least when examined strictly from a juridical point of view.

There was however one major difference which separated the metropolitan state from its colonial counterpart in India. While sovereignty was instituted in the former context through a heuristic social contract, which constituted a multitude afraid of each other in the state of nature into a commonwealth that was exclusively represented in a sovereign leviathan, in the latter context, it was acquired by force, and depended upon an act of submission on the part of the conquered out of fear not of themselves but of the conqueror.²⁴² Even though Hobbes suggested that the same rights and consequences followed in the two cases, since instituted and acquired forms of sovereignty were both ultimately founded upon a preference for life over death, we have seen in chapter one how the operationalization of constitutionalism in India's colonial setting ended up diverging so fundamentally from its career in the contemporary metropole.

²⁴⁰ Harris (2003: 5, 24-25).

²⁴¹ For a historical account of how constituent power came to be subverted in the British public law tradition, see Loughlin (2007: 27-48); on the constitutional thought of the Levellers, see Loughlin (2007: 1-39).

²⁴² Hobbes (1976/1651: 255-256).

While the exercise of ordinary and extraordinary governmental authority at home was interpreted as a reiteration of the national people's sovereign selfhood, the resort to coercion and domination, or even simply adhering to constitutional restraints in the colonial field could not be justified amidst an alien population except by drawing upon the two antipolitical ideologies of improvement and protection specifically developed in the nineteenth and twentieth centuries. There was thus a clear bifurcation in British constitutional imagination between a space designated as its own, comprising the colonial state and civil society nexus, and a strange space inhabited by the diverse population of India's indigenous society. As it was constitutively influenced by the onset of an abstract modernity, this distinction became more pronounced with time and in turn created conditions for the emergence of an anticolonial discourse on constituent power, which superficially bore greater resonance with the juridical experience of the continental world.

When common law presuppositions were grafted onto the categories of the own and the strange in colonial India, the resulting outcome brought it peculiarly close to the continental constitutional tradition, and the distinction made therein between the public and the private respectively. In order to explain how this convergence came about, I borrow from Hannah Arendt who observed in her work on the modern age of expansionist imperialism that the British proved adept not at pursuing the 'Roman art of empire building' but instead at following the 'Greek model of colonization' while competing with other major European powers for economic and political supremacy across the world. Rather than attempting to assimilate or integrate all dependencies under a single *jus* and *imperium* as the French had sought to do in Roman style, English colonists settled down in their newly acquired territories as members of the same British nation with a common law and a common past, which they refrained from imposing upon the conquered peoples. These subjects were in fact left to their own devices in respect of law, religion and culture, under the management of a supposedly humane and culturally sensitive mechanism of indirect rule.²⁴³ In India more specifically, the British strove to create a colonial public by codifying various aspects of procedural and substantive civil and criminal law, ranging from crime and evidence to contract, transfer of property, trusts, easements and so on, while at the same time permitting the multitude of local natives occupying the private domain of culture some degree of liberty in matters of religion, caste and family, where they were purportedly governed in accordance with their respective personal laws.

²⁴³ Arendt (1958/1951: 127-130).

Postcolonial scholars have of course emphasized that this state policy of non-interference was hardly a benign enterprise, for even if direct intervention in its affairs may have been mostly avoided, a distinct cultural domain was first sought to be produced afresh through different forms of colonial knowledge, and then regulated all the same without compromising upon the priorities of the ruling regime. According to them, what happened as a result was that a complex social terrain comprising a radically diverse multitude came to be reduced to a more simplified population legible enough for governmental purposes, while its concrete customary norms of behaviour were converted into increasingly abstract formulations of a rationalizing modernizing common law legality.

I would like to suggest however that the colonial situation was not particularly unique at least in this respect, as it merely replicated a general feature of European legal theory in which the distinction between public law and private law was envisaged as a public one.²⁴⁴ But unlike in Europe where the public and the private came together in a unified political whole, the own and the strange in colonial India remained incommensurably severed from one another, and could never be brought together as a constitutional unity by an antipolitical public sphere.

It is this colonial imagination of a bifurcated space of the own and the strange which was carried forward into debates on the issue of representative government during the first decades of the twentieth century, albeit under conditions of a limited franchise. The idea of territorial constituencies for the general population familiar from the working of the first-past-the-post system of elections in the metropole had to be supplemented in India by a scheme of special representation for minority communities identified on the basis of religion and caste, a constitutional policy somewhat akin to how different intermediary corporate interests lying between civil society and state were sought to be accommodated politically through the system of proportional representation in continental Europe. Yet neither could ascriptive identities and choice based interests be thought of as equivalent categories, nor were contemporary European nation states particularly successful in according constitutional protection to their respective minority populations, a failure in fact which eventually culminated in the barbarity of the Jewish holocaust. The British policy of special legislative representation in India was therefore incomparable with European examples, at least in so far as it was premised upon the

²⁴⁴ Kelsen (1992: 95-96).

constitutive necessity of maintaining a virtual distance between the state and civil society nexus as the sphere of the own on the one hand, and an abstract construction of indigenous society as a society of strangers unbridgeably divided into different communities on the other. It is on the basis of this hierarchical distinction that self government for the native population was indefinitely deferred to an unspecified future, that is until they underwent a sufficiently long period of colonial tutelage in liberal civilizational values.

By way of a response, nationalist thought rejected such a characterization of India as an agglomeration of communities, and harped upon an already existing culture of civilizational unity in the name of which political sovereignty was eventually acquired in 1947, and sought to be institutionalized under the republican constitution of 1950. It thus inverted the prevailing legal imagination of the own and the strange, by striving to disrupt the ‘what are Indians’ question of sameness and difference asked by the colonial regime in the process of governing a diverse population, with the ‘who are we’ question of selfhood and alterity asked by the people themselves in their united capacity.²⁴⁵ While such interruptions of extant forms of constituted power by novel articulations of constituent power have been common to other modern revolutions and constitution making enterprises as well including those in the wider postcolonial world, what set late colonial India apart was that even though the Congress did try to dominate the national movement over here by claiming to be the only authentic representative of the entire people, it could not prevent the formation of multiple parties with rival constituent possibilities struggling for supremacy in the constitutional field at the time of decolonization and beyond.²⁴⁶ As must be clear from the previous section, Jinnah’s Muslim League and Ambedkar’s Dalit politics emerged as its most formidable opponents in the project of reconstructing India’s constitutional identity. But rather than conveniently reducing these conflicting positions to a simple binary tension between homogeneity and heterogeneity or universalism and particularism for the constitution to negotiate provisionally, I shall now proceed to argue in parts three and four that they produced two contrasting imaginations of unity in diversity, which sought to fashion the constitutional subject either in the social domain

²⁴⁵ For highly generative extensions of the Ricœurian distinction between identity as sameness and identity as selfhood to constitutional theory, see Lindahl (2008: 14-17) and Rosenfeld (2009: 27-36).

²⁴⁶ In late twentieth century Central Europe and South Africa, the absence of a single agent which could exclusively embody the sovereign power of a constituent people resulted in the emergence of what Arato (2016) has theorized as the post sovereign paradigm of constitution making. But to the extent that sovereignty and constituent power continue to remain the foremost concepts of constitutional imagination over here even today, India cannot be said to have anticipated this new turn.

of familiarity or in the political domain of contract governed by the competing logics of *dharma* and *dhamma* respectively.

3 The social familiarity of self and other in nationalist thought

Although India's anticolonial movement had largely remained a nonviolent struggle for emancipation from colonial rule, its independence and partition was tragically accompanied by an immense violence, with different factions of a supposedly united people killing each other in an unprecedented fashion. This was possible because, as Shruti Kapila has explained, unlike the centrality of the distinction between the friend and the foe in the Schmittian understanding of the political that so influentially circulated across the globe in the twentieth century, it was the issue of fraternal enmity which equipped the political in modern India.²⁴⁷ However empty of meaning his two categories may otherwise have been, the foe was for Carl Schmitt at least a solely public enemy which existed whenever a fighting collectivity of people potentially confronted another similar collectivity in a relationship of public hostility, and not a private adversary towards whom one was inimically or hatefully predisposed.²⁴⁸ In India however, a more primary distinction between the own and the strange informed the working of its legal order much more than what was at best a secondary division between public and private, enforced and administered here ultimately with a view to advance the good of the colonial regime. As a result, anticolonial thinkers did not rest content merely with the transformation of their indigenous society hitherto defined in private terms into a rival conception of public alone, but instead sought to invert the colonial construction of the own and the strange altogether, by counterposing an inner domain of collective selfhood against an alien liberal constitutionalism operational in the outer domain of state and civil society. But contrary to Schmitt who used the stranger as a synonym for the other and reduced it to an enemy,²⁴⁹ the phenomenon of enmity in late colonial India was, to borrow from Ashis Nandy's psychoanalytically inflected language, rather 'intimate' in nature, where far from being equatable to the stranger, the other was present both as a temptation and a possibility for the own self.²⁵⁰ In such a context therefore, the fratricidal violence of partition became a ruptural event for the self to try and cleanse itself of the other with which it was ordinarily so closely intertwined, whilst at the same time also being able to bid a gracious farewell to the departing colonial stranger.

²⁴⁷ Kapila (2010: 437-457).

²⁴⁸ Schmitt (1996/1932: 28).

²⁴⁹ Id at 27.

²⁵⁰ See Nandy (1983) and (2015).

So in contradistinction to the Schmittian categories of public friendship and public enmity, familiar relations of fraternal intimacy prevailing in the indigenous anticolonial society provided the starting point for discussions of the Indian political, or at least of what I have been referring to as its *dharma* based social model. The connection between *dharma* and intimacy in intellectual imaginations of the political can most revealingly be traced in modern commentaries on the *Bhagavad Gita* and the central dilemma posed therein by the warrior Arjuna to his divine charioteer Lord Krishna, that being whether to kill or not to kill his kinsmen on the battlefield.²⁵¹ There emerged various contemporary interpretations of Krishna's advice persuading Arjuna to fight in the civil war, chief among which was Bal Gangadhar Tilak's take on the ethicality of desireless action (*nishkam karma*) as the core of the Gita, and its absolute prioritization therein over the pursuit of knowledge and devotion harped upon in other such commentaries.²⁵² In thus predicating the political upon the possibility of brothers within a house converting into enemies on the eve of war, Tilak was able to anticipate how violence would not only be foundational to India's constitution of state, but also remain a persisting internal feature of its body politic, which could neither be crushed by declaring an emergency nor be tamed within formal legal instruments of legitimized coercion and domination, as has arguably been the case in the archetypal modern European state.²⁵³

Unlike Tilak, Gandhi read the *Gita* as allegorically eluding to the eternal struggle of *dharma* with *adharma*, and drew from it the central message of performing ethically right action under all circumstances, which in turn provided the basis for his generative politics of *satya* and *ahimsa*, or truth and nonviolence.²⁵⁴ But rather than sublating the aforementioned intimate enmity into the abstract mediation of modern constitutionalism, the syncretic communal harmony of premodernity, or the invisibilizing assimilation of the other into the self as under ethnic nationalism, he sought to recast it as a relationship of everyday neighbourliness by encouraging the self to preserve the otherness of others and lovingly offer unconditional

²⁵¹ For a set of insightful interpretive essays on modern Gita commentaries, see Kapila and Devji (eds.) (2013); see also Bandyopadhyay's (2016: 3-191) brilliant long essay on the premodern and modern receptions of the Gita's famous verse 2.47.

²⁵² Tilak (1915).

²⁵³ I follow Kapila's (2010) reading of Tilak as a theorist of intimate violence on the battlefield, but disagree with her conceptualization of the political as an exception to the ethical. Rather than seeing the two as oppositional categories, Tilak thought about *dharma* as a set of conflicting principles, and urged the steady of mind (*stithipragya*) subject to decide upon them situationally in a spirit of desireless action.

²⁵⁴ See the section on Gandhi in Bandyopadhyay's (2016: 123-146) long essay on the Gita.

sacrifices for their sake as a matter of ethical duty.²⁵⁵ Objecting to interdining and intermarriage as models of miscibility appropriate for national unification, he suggested that ‘the true beauty of Hindu-Mahomedan Unity lies in each remaining true to his own religion and yet being true to each other.’ Hindu Muslim unity was for him instead dependent on the two communities ‘having a common purpose, a common goal and common sorrows’, without necessarily approving everything that they were required to tolerate in each other’s manners and customs.²⁵⁶ Distinguishing himself from social reformers of the past such as Kabir and Guru Nanak who attempted to fuse the Hindus and the Muslims by showing the basic unity of all religions, Gandhi observed that

‘the effort today is not for uniting the religions, but for uniting hearts while maintaining the separateness of religions. The effort is to see how the orthodox Hindu, while remaining staunchly Hindu, can respect and sincerely wish prosperity to an orthodox Muslim. True, this attempt is altogether new, but its spirit is there at the roots of Hindu dharma.’²⁵⁷

Gandhi’s uncompromising commitment to a politics of asymmetrical recognition of the other was best demonstrated in his refusal to make Hindu participation in the Khilafat movement contingent upon Muslim reciprocation on the issue of cow slaughter.²⁵⁸ He urged Hindus to dutifully co-operate with their Muslim neighbours in what was a ‘morally just’ campaign launched in the immediate aftermath of the First World War to have the British government honour its ‘broken pledge’ and retain the titular authority of the defeated Ottoman Sultan as Caliph of the Islamic world, without in any way obliging them to return the gesture by abstaining from killing the cow considered holy in dominant strands of Hindu imagination. Declining any bargain on the Khilafat question, he stated thus:

‘I consider myself to be among the staunchest of Hindus. I am as eager to save the cow from the Mussulman's knife as any Hindu. But on that very account I refuse to make my support of the Mussulman claim on the khilafat conditional upon his saving the cow. The Mussulman is my neighbour. He is in distress. His grievance is legitimate and it is my bounden duty to help him to secure redress by every legitimate means in my power even to the extent of losing my life and property. The nobility of the help will be rendered nugatory if it was rendered conditionally. That the result will be the saving of the cow is a certainty. But should it turn out to be otherwise, my view will

²⁵⁵ On Gandhi’s politics of neighbourliness, see Skaria (2002: 955-986). The most influential intellectual use of Gandhian neighbourliness albeit in a more syncretistic register remains Ashis Nandy’s work on nonmodern modes of tolerance, hospitality and conviviality. See for example Nandy (2004) and (2012).

²⁵⁶ Gandhi (1920, Vol. 19: 417-419).

²⁵⁷ Gandhi (1921, Vol. 22: 289).

²⁵⁸ On Gandhi and the politics of friendship, see Devji (2003: 78-98).

not be affected in any manner whatsoever. The test of friendship is a spirit of love and sacrifice independent of expectation of any return.’²⁵⁹

This Gandhian idea of converting intimate enmity into neighbourly friendship by respecting the absolute difference between the self and the other not only extended to the cultural domain of religious freedom alone, but also informed his lifelong espousal of ‘indivisible India’ as an ‘article of faith’ and eventual coming to terms with its partition into two sovereign nation states at the moment of decolonization. It is true that in insisting upon the prior achievement of independence for India as a whole before getting down to settle the Pakistan question, Gandhi only appeared to be endorsing the official Congress position giving precedence to the acquisition of political power by a national unity over issues relating to its division and distribution which were to be resolved later on under a formal constitution enacted by the Constituent Assembly. Unlike the Congress however, he did not seek to tame the Hindu-Muslim antagonism through the mediation of an abstract civic nationalism, and merely envisioned the coming together of the self and the other in a common struggle for the ouster of the colonizing stranger without in any way giving up on their distinct collective identities.

Rather than positing the Congress as a natural successor to the colonial regime, Gandhi was astonishingly open about the possibilities for the future of free India without the British:

‘Thus assuming that the British leave, there is no government and no constitution, British or other. Therefore there is no Central Government. Militarily the most powerful party may set up its rule and impose it on India if the people submit. Muslims may declare Pakistan and nobody may resist them. Hindus may do likewise, Sikhs may set up their rule in territories inhabited by them. There is no end to the possibilities. And to all this idle speculation let me suggest one more addition. The Congress and the League being the best organized parties in the country may come to terms and set up a provisional government acceptable to all.’²⁶⁰

But such a popular government based on mutual cooperation was never to be established, especially in the presence of the British as the third party outsider to whom rival indigenous parties looked for support and sustenance, rather than having to rely upon each other for retaining their power. So Gandhi finally wrote to the Viceroy Lord Mountbatten in May 1947 suggesting that the colonial government should transfer its power to an interim government constituted entirely by a single party:

²⁵⁹ Gandhi (1920, Vol. 21: 118-119).

²⁶⁰ Gandhi (1942, Vol. 83: 80-81).

‘Meantime the Interim Government should be composed either of Congressmen or those whose names the Congress chooses or of Muslim League men or those whom the League chooses. The dual control of today, lacking team work and team spirit, is harmful for the country. The parties exhaust themselves in the effort to retain their seat and to placate you.’²⁶¹

Even if partition had become inevitable, he stated that the British should not preside over it and instead leave this for the Indians to decide upon themselves through nonviolent or violent methods:

‘Whatever may be said to the contrary, it would be a blunder of the first magnitude for the British to be party in any way whatsoever to the division of India. If it has to come, let it come after the British withdrawal, as a result of understanding between the parties or of an armed conflict’.²⁶²

All this while, Gandhi was well aware that the immediate departure of the British would likely plunge India into ‘anarchy or chaos’ marked by ‘no rule in the initial stage’, since victory was gained by ‘moral force’ and not the ‘force of arms’. Yet risking such an eventuality was necessary, for ‘we would still go through the fire no doubt, but that fire would purify us.’²⁶³

As Faisal Devji has shown, while the Congress, the League and the British were driven by the threat and fear of violence when they came to agree upon the partition of India, Gandhi was even ready to risk a civil war that could have brought Hindus and Muslims into a direct and unmediated conflict with one another, for the possible emergence of a genuine nonviolence if only enough people were willing to sacrifice their lives in demonstrating its reality. But with little active support for his proposal from within the Congress establishment, a thoroughly disillusioned Gandhi gave into the inevitability of partition, and dedicated himself to working for ‘heart unity’ between Hindus and Muslims in India, and between the neighbouring people of India and Pakistan, notwithstanding the newly drawn territorial borders separating them. This was until his assassination on 30th January 1948, by an ethnic Hindu nationalist deeply anxious about exorcising the other from the self through its forcible assimilation within a nation defined purely in terms of blood and soil.²⁶⁴

²⁶¹ Gandhi (1947, Vol. 95: 45).

²⁶² Id.

²⁶³ Gandhi (1947, Vol. 95: 27).

²⁶⁴ Devji (2012: 151-184).

4 A political contract between non-national strangers

I have focused thus far on the inextricably intertwined Hindu-Muslim relationship with reference to a categorial distinction between the self and the other. But this distinction does not suffice to capture the whole picture about India's collective constitutional subject in all its complexities, especially after we introduce into the mix the figure of the untouchable Dalit, which destabilized a dualistic politics of religion with a crosscutting politics of caste in the colonial period, and went on to supplant it as the basic template of counter hegemony in the postcolonial period. What made the Dalits so generative for constitutional politics was the invitation they offered to move beyond the tension between self and other in the inner domain of social familiarity, and fashion a new political law and subjectivity in the outer domain of anticolonial society occupied not by brothers, kinsmen or neighbours, but by a more distant figure of the stranger. Although a possible yet tragic and only partially accomplished solution to the problematic of intimate enmity between self and other was the extrication of the Muslim from the Hindu by being converted into a foreigner, such an option was not available to the Dalit as stranger, who was not reducible to a foreigner and was in fact sought to be integrated into India's own national selfhood. Let me now turn to the contested contours of such integration by focusing for one final time on the Gandhi Ambedkar debate.

The estrangement of Dalits from the Hindu social order was implicitly recognized even by Gandhi, in a curious analogy that he would often make between what colonial rule had done to the people of India and what Hindus had wrought upon the untouchables. Quoting from the moderate nationalist Gopal Krishna Gokhale, he suggested that in suppressing the untouchables, the Hindus had themselves become depressed, and that their status as 'pariahs of the empire' was the 'retributive justice meted out to us by a just God.'²⁶⁵ Furthermore, writing in 1921 about his abandonment of the belief that he was a citizen of the empire, Gandhi stated thus:

'I can take no pride in calling the empire mine or describing myself as a citizen. On the contrary, I fully realize that I am a pariah untouchable of the empire. I must therefore constantly pray for its radical reconstruction or total destruction, even as a Hindu pariah would be fully justified in so praying about Hinduism or Hindu society.'²⁶⁶

²⁶⁵ Gandhi (1920, Vol. 21: 387).

²⁶⁶ Gandhi (1921, Vol. 25: 102).

While we can say that Gandhi had transitioned from arguing for the ‘radical reconstruction’ of empire to wishing for its ‘total destruction’ by the Quit India Movement of 1942, never in life did he cease to have faith in the spiritually generous Hinduism of his imagination to be entertaining any thought of calling for its complete overhaul. Unlike the colonizing stranger who had to be removed from India, the alienation of estranged Dalits was to be overcome by including them within the own sphere of Hindu society and not just that of the nation alone. Gandhi’s unyielding conviction in the possibility of such an inclusion was at the crux of his vehement opposition to Ambedkar’s advocacy of separate electorates, which he challenged precisely in such terms at the Second Round Table conference:

‘Let this Committee and let the whole world know that today there is a body of Hindu reformers who are pledged to remove this blot of untouchability. We do not want on our register and on our census untouchables classified as a separate class. Sikhs may remain as such in perpetuity, so may Mohamedans, so may Europeans. Will untouchables remain untouchables in perpetuity?’²⁶⁷

So the untouchable was not the intimate other who had to be accorded asymmetrical recognition by the self, but remained an integral part of the Hindu family notwithstanding their legitimate resentment against the abominable practice of untouchability. In Gandhi’s words,

‘my intimate acquaintance with every shade of untouchability convinces me that their lives, such as they are, are so intimately mixed with those of the caste Hindus in whose midst and for whom they live, that it is impossible to separate them. They are part of an indivisible family. Their revolt against the Hindus with whom they live and their apostasy from Hinduism I should understand. But this so far as I can see they will not do. There is a subtle something—quite indefinable—in Hinduism which keeps them in it even in spite of themselves.’²⁶⁸

It is this attempted enfolding of the estranged Dalit within the sphere of the intimate own which Ambedkar was most indignant about. But rather than merely refusing integration within a preestablished culture of nationalism, he more fundamentally challenged the very nationalist credentials of what according to him was an exclusively caste Hindu conception of collective selfhood.

²⁶⁷ Gandhi (1931, Vol. 54: 159).

²⁶⁸ Gandhi (1932, Vol. 57: 40).

We must remember here that most mainstream protagonists of the anticolonial movement had a strong tendency to presuppose India as an already existing national unity, notwithstanding whatever obligations the self may have owed to the other therein. As Gandhi himself observed in *Hind Swaraj*,

‘India cannot cease to be one nation because people belonging to different religions live in it. The introduction of foreigners does not necessarily destroy the nation; they merge in it. A country is one nation only when such a condition obtains in it. That country must have a faculty for assimilation. India has ever been such a country. . . . The Hindus, the Mahomedans, the Parsis and the Christians who have made India their country are fellow countrymen, and they will have to live in unity, if only for their own interest. In no part of the world are one nationality and one religion synonymous terms; nor has it ever been so in India.’²⁶⁹

Ambedkar’s constitutional politics was premised upon a persistent questioning of this very presupposition by raising the issue of caste, which in his understanding had prevented India’s transformation into a national unity for much of its recorded history.

Responding to those patriots who claimed that India was a nation because underlying its apparent diversity there was a fundamental unity that marked the life of Hindus across the country having similar habits and customs, thoughts and beliefs, Ambedkar argued that all of these features did not suffice to constitute a multitude into a society of commons. More than the parallel performance of similar activities, what bound men into a society was their sharing and participation in common activities so that the same emotions of success and failure could be aroused in them that were animating the others. This transformation of joint action from the aggregative ‘we each’ into the integrative ‘we together’ was inconceivable in India with its ancient order of caste: ‘The caste system prevents common activity; and by preventing common activity, it has prevented the Hindus from becoming a society with a unified life and a consciousness of its own being.’²⁷⁰

When Ambedkar stated that India was not yet a nation, what he meant was that it was actually a society of strangers, not in a geographical sense as alluding to a distinction between the domestic and the foreigner, for the Hindus occupied the same physical territory and possessed similar cultural practices, but in a more primordial sense as alluding to a conceptual and

²⁶⁹ Gandhi (1909, Vol. 10: 270).

²⁷⁰ Ambedkar (1936, Vol. 1: 51).

psychological distinction between the inside and the outside, the own and the alien, since they did not share a fraternal ‘feeling of fellowship’ with one another which could bind them together into a common political unity in spite of their myriad economic and social differences. This order of estrangement was juridically enforced through the hierarchical, inegalitarian and non-fraternal social law of Hindu *dharmā*, which according to his historical mythography had displaced the then reigning political law of Buddhist *dhamma* broadly contained in the principles of *nibbana* (liberty), *samata* (equality) and *maitri* (fraternity), and remained hegemonic in India ever since the triumph of Brahminism over Buddhism around the second century BC. Therefore, in order to make sense of the nature of estrangement underpinning India’s disunited society, it is necessary to briefly turn to his narrative about the decline of Buddhism and the subsequent ascendancy and eventual entrenchment of Brahminism on the seat of political power.

Ambedkar noted that ancient Indian history was marked by several generations of virulent fratricidal wars of extermination fought between Aryans and non-Aryans, Brahmins and Kshatriyas, and especially after Buddha’s radical denunciation of the fourfold Hindu *chaturvarna* system, there also arose a mortal conflict between Hinduism and Buddhism. Buddhism defeated Hinduism and became the state religion during the rule of the Mauryan Empire (322 BC to 185 BC), with the Emperor Asoka going on to prohibit animal sacrifice and thereby depriving the officiating Brahmins of their chief source of livelihood. Pushyamitra, the Brahmin commander in chief of the Mauryan army, revolted against this suppression by assassinating the ruling monarch Brihadratha and in turn founding the Sunga dynasty, with a view to destroy Buddhism and make Brahmins the sovereign rulers of India.

So contrary to the French Revolution wherein the decapitation of Louis XVI inaugurated political modernity, and in the formulation of Claude Lefort opened up the empty space of symbolic power previously occupied by the *corpus mysticum* of the monarch, in Ambedkar’s understanding, the Mauryan regicide in ancient India stood for the victory of social law over political law and foreclosed any possibility of symbolic unity, with a narrow sectional Brahminism incapable of looking at society as a whole except through the prism of its own caste interests coming to be firmly entrenched on the seat of sovereignty.²⁷¹ This sovereignty

²⁷¹ Lefort (1988: 213-255); for a recent account of Lefort on the symbolic, see Moyn (2012: 37-50); for the intellectual career of the idea of the symbolic, see more generally Breckman (2013).

was expressed in a virulent and violent persecution of Buddhism verging on its complete annihilation, and in the promulgation of the post-facto justificatory legal code of Manusmriti which validated the Brahminical transgression of Aryan law by recognizing their right to become kings, their right to take up arms and their right to commit rebellion and massacre if necessary for the preservation of *dharma*, and conferred upon them various other privileges and immunities in respect of teaching the Vedas, performing sacrifices, receiving gifts, freedom from taxation and exemption from certain forms of punishment for criminal offences. It further went on to transform the flexible pre-Buddhist *chaturvarna* system of social intercourse into a more rigid caste system by making status and occupation hereditary and prohibiting interdining and intermarriage among individuals belonging to different caste groups. Although the sole intention of these restrictive provisions was to prevent non-Brahmins from undertaking united action for the purpose of overthrowing Brahminism, they ended up effecting a complete dismemberment of society which could no longer come together as a national unity even when faced by external aggression from a foreign nation.²⁷²

The Gita which was received as the ur-text in nationalist thought for enabling clear thinking on the question of intimate enmity in ethico-political terms, came to be interpreted in Ambedkar's corpus as nothing other than a puerile philosophical defence for the counter revolution of Hinduism against Buddhism. Rather than enjoining desireless action or ethically right action in a generalized form, he read Krishna exhorting Arjuna to fight on the battlefield as an insistence on the detached performance of one's particularistic caste duties, and thus as merely attempting to uphold the doctrinal sanctity of *chaturvarna* increasingly under threat from Buddha's message of nonviolence and social equality.²⁷³ More than the problematic of intimate enmity, what the caste system and its graded inequality represented for Ambedkar was the exclusion of Shudras and Atishudras from the sphere of sovereignty, and their conversion from erstwhile enemies into estranged objects condemned to varying degrees of juridical violence. He speculated that this was brought about in the case of Shudras by denying them the sacred thread (*upanayana*), and most perniciously in the case of Atishudras by transforming them from 'broken men' into 'untouchables' after their turn to Buddhism and subsequent refusal to give up on beef eating even when the cow had become a totemic figure for Brahminical

²⁷² See the essay titled 'The Triumph of Brahminism' published in Ambedkar (1987, Vol. 3: 266-331). This engagement with the social law of *dharma* shows that there was more to Ambedkar's theorization of Brahminical sovereignty than what Shruti Kapila has referred to as a 'dispersed monarchy'. See Kapila (2018).

²⁷³ 'The Krishna and his Gita' in Ambedkar (1987, Vol. 3: 357-380). See Bandopadhyay (2016); Kumar (2010: 391-415).

Hinduism in the fifth century AD.²⁷⁴ Therefore the perpetration of lawlessness against the untouchables by the touchables was paradoxically deemed lawful in Hindu society because neither of them could meet each other as individuals alone, but only as 'strangers' belonging to two altogether different groups whose relations were governed by war or negotiation and not by law:

‘The relationship resembles the relationship between different clans in primitive society. In primitive society the member of the clan has a claim, but the stranger has no standing. He may be treated kindly, as a guest, but he cannot demand "justice" at the hands of any clan but his own. The dealing of clan with clan is a matter of war or negotiation, not of law; and the clanless man is an 'outlaw', in fact as well as in name and lawlessness against the strangers is therefore lawful. The untouchable not being a member of the group of touchables is a stranger. He is not a kindred. He is an outlaw. He cannot claim justice. He cannot claim rights which the touchable is bound to respect.’²⁷⁵

I would argue that Ambedkar's constitutional project was at its most ambitious an attempt to convert the aforementioned estranged intercommunal relationship grounded in 'status' into a collective selfhood based on 'contract'. Although comparisons can be made here with the social contract tradition, it must be emphasized that this estrangement was constituted through the symbolic order of Hindu *dharma*, which could therefore be confronted only by resorting to an equally powerful counter symbolic order of Buddhist *dhamma*. In other words, instead of containing social divisions within a contractual language of distributive justice, he was more interested in anchoring them afresh in a distinctly political language of shared sovereignty.²⁷⁶ This possibly entailed at least until India's independence, different minorities defined in terms of caste and even religion coming together against a dominant Hindu majority under the banner of a non-sectional political unity.

There was a strong resonance here with the contemporary politics of the Muslim League, at least in so far as it sought to convert the intimate enmity between Hindus and Muslims into a more formal constitutional relationship grounded in a political contract. The League was in fact powerful enough to provide leadership to this emerging minoritarian alliance, but it increasingly began to insist upon the recognition of Muslims as a separate nation and not as a

²⁷⁴ This story was elaborated in two works on the Sudras and the untouchables published in 1946 and 1948 respectively. Republished in Ambedkar (1987, Vol. 7).

²⁷⁵ Ambedkar (1989, Vol 5: 63).

²⁷⁶ For the distinction between justice and sovereignty, see Kahn (2011B).

mere minority, especially after the perceived betrayal of the Congress in the provincial elections of 1937. The two nations theory eventually culminated in the partition of India, in the aftermath of which Ambedkar provisionally joined hands with the Congress for the purpose of framing a new republican constitution with backwardness as its chief political concept. In the final section, I provide a brief historical sketch of this momentous yet non-revolutionary non-constitutional transformation of the constitutional field.

5 From minority to backwardness

When Jinnah was joined by groups as diverse as the Dalits, the non-Brahmin Justice Party and the Hindu Mahasabha in organizing a ‘deliverance day’ to celebrate the Congress resignation from provincial governments in 1939 and calling for an enquiry into its alleged atrocities, Gandhi wrote him a congratulatory message for bringing all minorities together in a pact, even if this involved an opposition towards the policies and politics of the Congress. For Gandhi, the Congress majority was ‘made up of a combination of caste Hindus, Muslims, Christians, Parsis and Jews’, and could thus be legitimately opposed only by a political formation like the minorities pact, which purported to be equally representative of all classes, and could ‘one day convert itself into a majority by commending itself to the electorate.’²⁷⁷ In other words, what he seemed to be envisaging for India was a Westminster style Parliamentary democracy where ‘mainly two parties’—that is ‘the Congress’ and ‘non-Congress’ or ‘anti-Congress’—competed with one another’s ‘body of opinion’ to occupy the seat of governmental authority by nevertheless claiming to speak on behalf of a jointly shared national unity.

Although the liberal constitutionalist in Jinnah had indeed been invested in converting India’s permanent communal majorities and minorities into changeable political ones in the earlier part of his career, a growing disgruntlement with Congress’s ‘Hindu Raj’ and a suspicion towards other minorities eventually compelled him to abandon the thought of actualizing this possibility, and espouse the two nation theory instead. Thus contrary to Gandhi, he interpreted the alignment of different minorities on deliverance day not as an alternative expression of national unity, but as a ‘case of adversity’ bringing ‘strange bedfellows’ with ‘common interests’ together in justice. There were otherwise no longer any illusions on his part about India’s national character: ‘I have no illusions in the matter, and let me say again that India is not a nation, nor a country. It is a subcontinent composed of nationalities, Hindus and Muslims

²⁷⁷ Gandhi (1939, Vol. 77: 222-223).

being the two major nations.’²⁷⁸ However, this was not accompanied by an unequivocal and unambiguous demand for the creation of a separate sovereign state altogether, for even after the famous Pakistan Resolution of 1940, the League did reluctantly come to accept the Cabinet Mission Plan in 1946, provided it could be interpreted as a scheme for a loose bi-national federation constituted through a political contract between two different people-subjects of constituent power belonging to the Hindu and Muslim provinces respectively.²⁷⁹ It was only after Nehru hinted that the intention of Congress was to enter the Constituent Assembly and frame a new constitution by drawing constituent power from a single people-subject, and thus dissolve the proposed federation into a federal state with central and provincial governments and no intermediary structure of authority, that the League withdrew its support to the plan and agitated for India’s division into Hindustan and Pakistan. Yet even as an independent Pakistan came into existence, Jinnah continued to deploy the idea of contract while going on to hail the occasion as an ‘unprecedented cyclonic revolution’, for having brought a ‘mighty sub-continent with all kinds of inhabitants’ to agree upon a ‘titanic, unknown, unparalleled’ plan for the partition of India and subsequent establishment of two independent sovereign dominions in its place, and achieving this ‘peacefully and by means of an evolution of the greatest possible character.’²⁸⁰

After such a resolution of the Pakistan question, it was possible to infer that India imagined as a pre-existing nation of social familiars could now proceed to give to her territorially curtailed selfhood a new constitutional document without having to face any further encumbrances of a constitutive nature. At least this is what Nehru had hoped for in his famous ‘tryst with destiny’ speech announcing formal independence on the midnight of 15th August 1947. The speech in fact turned out to be an archetypal iteration of modern constituent power, in which the past of India’s ‘unending quest’ since the ‘dawn of history’ and the future inauguration of a new history of ‘greater triumphs and achievements’ were brought together in the present moment of waking up to ‘life and freedom’ after enduring a long, painful and sorrowful period of ‘ill fortune’. In this inaugural constituent moment, he urged the members of the Constituent Assembly to ‘take a pledge of dedication to the service of India and her people and to the still larger cause of humanity’, and made an appeal to the people to join them ‘with faith and

²⁷⁸ As cited in Prasad (1941: 86). For the Gandhi Ambedkar exchange on the minority question, see Devji, 2013: 178-182).

²⁷⁹ I am drawing here on Schmitt’s understanding of the federation as the only genuine form of contractual constitutionalism. See Schmitt (2008/1928: 371-408).

²⁸⁰ Jinnah (CADs Pakistan: 11th August 1947), sourced from Allana, G. (1969: 407-411).

confidence in [the] great adventure' of 'build[ing] the noble mansion of free India where all her children may dwell.' As if to distinguish his position from the politics of Muslim separatism and Hindu majoritarianism, Nehru went on to caution that communalism and narrow-mindedness could not be encouraged in any nation aspiring to be great, and made it clear that all the people of India were equally her children, with equal rights, privileges and obligations, regardless of whichever religion they may belong.²⁸¹

Nehru was however silent on the question of caste and the constitutive challenge it could pose for his presumed national unity. As discussed in the previous section, this issue was rather Ambedkar's lifelong intellectual preoccupation and in fact at the core of his engagement with the political. Even while entering the Constituent Assembly with support from the Muslim League, he had maintained that the caste question could be addressed only by supplementing parliamentary democracy with the institutionalization of additional safeguards to prevent the communal majority of caste Hindus from converting itself into a permanent political majority and depriving the Dalits of their legitimate share in state sovereignty. He thus made a proposal to abolish the system of elections introduced by the Poona Pact, as reserved seats invariably returned candidates most favoured by the caste Hindus rather than reflecting the electoral choices of the Dalits themselves, and called for its substitution by a system of separate electorates for minority communities on grounds of the prevailing social discrimination faced by them.²⁸² Although partition left him with no option but to give up on the demand for separate electorates and align with the Congress instead, Ambedkar remained antagonistic to the major premises of nationalist thought even in this brief moment of rapprochement with its chief protagonists, as can be gaged from his very final speech on the floor of the Assembly after successfully accomplishing the task of drafting a new constitution for postcolonial India. As has usually been the case with any theorist of modern constituent power, the principle of fraternity was in Ambedkar's scheme an essential precondition for a political regime of equal liberty for all, since without fraternity, liberty and equality 'will be no deeper than coats of paint', and by failing to 'become a natural course of things', they 'would require a constable to enforce them'. Fraternity could be a fact only when there was a nation, and India could not be thought of as one so long as the difficulties arising out of the anti-national institution of caste were not overcome. He was of the opinion that 'we are cherishing a great delusion' in believing

²⁸¹ Nehru (CADs, Vol. V: 14 August 1947).

²⁸² Ambedkar articulated this demand in his pamphlet 'States and Minorities' submitted to India's Constituent Assembly in 1946. Republished in Ambedkar (1946, Vol. 1: 401-402, 419-424).

that ‘a people divided into several thousands of castes’ could be called a nation, and that the sooner it was understood that ‘we are not as yet a nation in the social and psychological sense of the word, the better for us’, for only then shall we ‘realize the necessity of becoming a nation and seriously think of ways and means of realizing the goal.’²⁸³

In order to explain how precisely this Ambedkarite formulation of constituent power envisaging India as a nation in the making differed from its Nehruvian explication based on India’s recognition as a pre-existing nation, I must first point out the commonalities which brought them together in the Constituent Assembly for the purpose of framing a new postcolonial constitution. The two worldviews collaborated with one another to abolish untouchability in all its forms, set aside income and educational qualifications that had regulated the limited franchise granted by the colonial constitution of government, and put in place a regime of universal adult suffrage or mass democracy under conditions of large scale poverty and illiteracy in the country. The postcolonial constitution of state unprecedentedly managed to convert peasants into citizens overnight so to speak, without requiring them to undergo any formal or informal pedagogic training at least in this regard.²⁸⁴ This was accompanied by the continuation and expansion of the affirmative action programme initiated during the colonial period, but which had to be rooted now in normative justifications appropriate for the changed context of political sovereignty, wherein an older language of state and civil society came to be challenged increasingly by a newer legitimizing vocabulary of nation and community.

In a momentous break from colonial constitutional practice, the Constituent Assembly abolished separate electorates and replaced them with a joint electorate for elections to central and provincial legislatures, but social differences were sought to be accommodated temporarily through the reservation of seats for a period of ten years. During the first phase of deliberations which ended in August 1947, legislative quotas either by way of election or Presidential nomination were provided for minority communities, that is, Anglo Indians, Indian Christians, Sikhs, Muslims, Scheduled Caste Dalits and Scheduled Tribe Adivasis. At the drafting stage however, reservations on the basis of religion were abandoned, leaving only Scheduled Castes and Scheduled Tribes to benefit from the policy. Framing of provisions dealing with

²⁸³ Ambedkar (CADs, Vol. XI: 25 November 1949).

²⁸⁴ Chakrabarty (2000); For the French contrast, see Weber (1976).

reservations in public employment followed a similar trajectory, except that no time limit was stipulated in this case. Initially, they were permitted for all classes, which in the opinion of government were not adequately represented in its services. This included religious minorities as well, whose claims were to be taken into consideration while making appointments, consistently with the maintenance of administrative efficiency. Subsequently however, reference to them was omitted from these provisions, and substituted by Scheduled Castes and Scheduled Tribes, as reservations came to be restricted to backward classes only. Thus in other words, India's constitutional regime of affirmative action was eventually formulated on the basis of backwardness, rather than the original scheme favouring minority status.²⁸⁵

Although there was a nominal convergence between Nehru and Ambedkar on the issue of changing the basis of affirmative action from minority status to backwardness, they came to this policy outcome separately for political reasons which were in a deeper sense mutually incompatible with one another. As has been indicated herein above, Nehru's constitutional project was situated in a nationalist problematic where any kind of political mobilization around communal majorities and minorities alike was perceived as detrimental to the idea of a composite India imagined as an already existing nation of social familiarity. Partition did not result in the transformation of this national selfhood into a denominational Hindu state, but whatever trace there remained of a violent or nonviolent encounter with the intimate other, came to be sublated within the constitutional language of religious group rights in the domain of culture, and that of formal equality and non-discrimination in the domain of politics. There was no space for religion based affirmative action under such a conception of national unity, and so when the proposal regarding reserved seats in legislatures for religious minorities was withdrawn in 1949, Nehru welcomed the move as a 'historic turn in our destiny', confessing that he had never been convinced about retaining any measure in the constitution which was likely to promote separatism in the body politic:

'Reluctantly we agreed to carry on with some measure of reservation ... but always there was this doubt in our minds, namely, whether we had not shown weakness in dealing with a thing that was wrong. ... doing away with this reservation business is not only a good thing in itself—good for all concerned, and more especially for the minorities—but psychologically too it is a very good move for the nation and for the world. It shows that we are really sincere about this business of having a secular democracy.'²⁸⁶

²⁸⁵ Bajpai (2011: 116-170).

²⁸⁶ Nehru (CADs, Vol. VIII: 26 May 1949).

Nehru was uncomfortable with reservations even for the Scheduled Castes, but brought himself to come to terms with them for a limited period of ten years. To borrow his own words once again,

‘Frankly I would like this proposal to go further and put an end to such reservations that still remain. But ... I realise that in the present state of affairs in India that would not be a desirable thing to do ... in regard to the Scheduled Castes. ... I do not look at it from the religious point of view or the caste point of view, but from the point of view that a backward group ought to be helped and I am glad that this reservation will also be limited to ten years.’²⁸⁷

Put differently, he conceded Scheduled Caste reservations only because these were justifiable on grounds of backwardness of the beneficiary communities. Unlike group identities which were deemed to be fixed and immutable, backwardness was in his understanding a purely empirical condition describable in social scientific terms, which could be overcome with time through ameliorative governmental intervention. The reservations scheme was viewed as one among various other developmental programmes specifically designed to cater to this objective, and could be terminated once the problem of socio economic backwardness was rectified and the former untouchables were sufficiently integrated into the mainstream national fold.

In contrast, Ambedkar could find in backwardness a more appropriate anchor for his constitutional project of forging India into a nation through a political contract between non-national strangers who were hitherto bound together only by way of their legal subjection to a hierarchical and inequalitarian caste order. He was neither fully satisfied with the minoritarian politics of late colonial India, nor with the counter nationalism of the Muslim League, as both of these responses to the perceived danger of Hindu Raj under a *de facto* Hindu majority remained closely aligned to the self-other problematic within which Indian nationalism continued to be imagined by its chief protagonists. Without jettisoning this problematic altogether, it was not possible to move beyond commonly shared material interests on the one hand and religious difference on the other, and institute a radically new politics around material

²⁸⁷ Id.

deprivation, physical vulnerability and social stigma associated with caste oppression in general and the phenomenology of untouchability in particular.²⁸⁸

Ambedkar had remained sceptical of exclusive constitutional safeguards for the Muslims in colonial India, as they were in all respects a much stronger political community when compared with the Dalits. Yet he also supported the League in recognizing the Muslims as a separate nation, and was in fact among the first to make a philosophical argument in favour of creating Pakistan if they truly and deeply so desired.²⁸⁹ This espousal of the two nation theory was however not motivated by some heartfelt need for a real external enemy against which the contrastive self identity of a truncated India could be fashioned, as was arguably the case with proponents of an ethnic Hindu nationalism. He was rather more anxious about the immanent possibility of Muslim elites converting their intimate enmity with caste Hindus into a fraternal contractual relationship under a single constitutional order, which would in effect have eliminated the Dalit question altogether from the purview of the Indian political.²⁹⁰

Even while endorsing the Pakistan idea, Ambedkar also made it clear that partition was in his opinion a 'worse than useless' remedy for the problem of Hindu hegemony.²⁹¹ He strongly believed that Hindu Raj had to be prevented at any cost, for it was a menace to liberty, equality and fraternity, and thus incompatible with democracy. But the only effective way of burying its ghost was the abolition of a communal party like the Muslim League, and the formation of mixed parties of Hindus and Muslims based on agreed programmes of social and economic regeneration. The issue of backwardness came in here as a possible ground on which the lower castes in Hindu society could be aligned with the majority of the Muslim population, as had arguably been demonstrated from 1920 to 1937:

‘There are many lower orders in the Hindu society whose economic, political and social needs are the same as those of the majority of the Muslims, and they would be far more ready to make a common cause with the Muslims for achieving common ends than they would with the high caste of Hindus who have denied and deprived them of ordinary

²⁸⁸ This point is also made by Anupama Rao, but grounded in an alternative interpretation of the minority principle itself. See Rao (2009: 118-162 at 133-136).

²⁸⁹ Ambedkar's provocative thesis on partition was laid out in 'Pakistan, or the Partition of India', first published in 1944 and revised in 1946. Republished in Ambedkar (1990/1946, Vol. 8).

²⁹⁰ This anxiety could for instance be gaged from Ambedkar protesting the 'secret negotiations' between Gandhi and Jinnah 'for a settlement between the Hindus and the Muslims'. See the 1944 resolution on the 'Political Demands of the Scheduled Castes', republished as an appendix to 'What Congress and Gandhi Have Done to the Untouchables'. Ambedkar (1990/1946, Vol. 9).

²⁹¹ Ambedkar (1990/1946, Vol. 8: 361-362).

human rights for centuries. To pursue such a course cannot be called an adventure. The path along that line is a well trodden path. Is it not a fact that under the Montagu-Chelmsford Reforms in most Provinces, if not in all, the Muslims, the Non-Brahmins, and the Depressed Classes united together and worked the reforms as members of one team from 1920 to 1937? Herein lay the most fruitful method of achieving communal harmony among Hindus and Muslims, and of destroying the danger of a Hindu Raj.²⁹²

This insistence on mixed parties of Hindus and Muslims may paradoxically appear to have brought Ambedkar's position in close alignment with the broad church of Congress nationalism. It is true that unlike the League which stood for two different people-subjects of constituent power sharing a common federation or divided into separate nation states, both him and Congress imagined India as 'one integral whole, its people a single people living under a single imperium derived from a single source.'²⁹³ But contrary to Gandhi and to a lesser extent even Nehru, who were at the most willing to accommodate rival interpretations of the single subject of people's constituent power, what interested Ambedkar more was to pose a fundamental challenge to the very hegemony of nationalist thought that these interpretations would nevertheless claim to represent. He therefore gave impetus to a radically new counter hegemonic politics around the category of backwardness, which was understood here not merely as a developmental hindrance on the path to an inclusive constitutional society, but instead as supplying to different kinds of strangers oppressed under the caste system an alternative basis for constituting themselves into a lasting political unity.²⁹⁴

Conclusion

In this chapter, I have attempted to move beyond the antinomies of homogenous universality and heterogenous particularity influential in global discussions of the sovereignty concept, and instead situated the intellectual history of the making of the collective constitutional subject in late colonial and early postcolonial India within a distinctive narrative of the Indian political. By focusing on the intellectual imagination of different proponents of social law and political law in terms of their competing approaches towards the self, the other and the stranger, the chapter has indicated why these thinkers could not arrive at any substantial consensus on how

²⁹² Id., at 359.

²⁹³ Ambedkar made this remark while defending the draft constitution in the Constituent Assembly. Ambedkar (CADs, Vol. VII: 4 November 1948).

²⁹⁴ For a different view, see Bajpai (2011: 116-170). I disagree with Bajpai in so far as she situates this transition from minority to backwardness within a singular framework of a hegemonic nationalist ideology. In my understanding, the Ambedkarite politics of backwardness did not merely attempt to remould nationalist hegemony, but provide a more radical ideational challenge through a counter hegemonic narrative of its own.

India's constitutional subject was to be fashioned at its so called founding moment. What did bring them together, was their mutual appreciation for the principle of unity in diversity as the basis of the Indian political at the broadest level of generality. But such a nominal convergence could not overcome a more fundamental incompatibility between two antagonistic articulations of this constitutional principle anchored in social familiarity and political contract respectively. In the aftermath of India's partition, the concept of minority was displaced by backwardness as the new antagonistic fault line around which a non-national politics of a-legality could come to be freshly organized. While minoritarian politics in colonial India was associated with the legislative system of separate electorates and weighted representation, the federation of Hindu and Muslim majority provinces, and the two nation theory, the politics of backwardness in postcolonial India has resulted in the continual expansion in the scope and beneficiaries of affirmative action policies initiated both by central and provincial governments. As if to normalize what was regarded in nationalist thought at best as an exceptional provision, the Constitution is amended every ten years to extend the temporal limit of legislative reservations for the Scheduled Castes and the Scheduled Tribes. Furthermore, reservations are now provided in public employment and education not merely to Scheduled Castes and Scheduled Tribes, but also to a much larger section of the lower caste population officially designated as the Other Backward Classes, including even some Muslim communities identified as socially and educationally backward. All of this was in a way a response to an enormous democratic upsurge that the postcolonial constitution had itself triggered in the country, the normative and institutional implications of which I shall go on to discuss in the next two chapters.

CHAPTER IV

THE CONSTITUTIONAL PROJECT OF INDIA'S COLLECTIVE SELF TRANSFORMATION

Introduction

In the previous chapter, I showed how the contentious intellectual debates pertaining to the making of the constitutional subject in India witnessed two antagonistic articulations of unity in diversity, grounded either in *dharma* or *dhamma* oriented logics of social familiarity and political contract respectively. But howsoever irreconcilable these starting premises may have turned out to be, most political actors at least converged with one another in insisting that the normative point of their joint action in setting up a constitutional society was the collective self transformation of the Indian people. This emphasis on transforming the social distinguished India's constitutional experiment from the negative model of constitutionalism associated with the guarantee of bourgeois liberal entitlements under a limited government, and instead connected it with the positive model of constitutionalism envisaging a more interventionist governmental apparatus of rule geared towards the refashioning of society as a whole.²⁹⁵ Even though the new constitution could not be interpreted as a successful institutionalization of a thoroughly revolutionary enterprise, it did bear a marked resonance with the French Jacobin rather than the American constitutional project for attempting to find a political solution to the problem of material insufficiency and inequality arising out of two centuries of colonial exploitation. In addition, the constitution makers also confronted and sought to respond to a radically diverse living tradition stretching back into precolonial nonmodernity with its resilient lifeforms and millennial histories of injustice. Their confident constitutionalization of the social question in India was meant to be accomplished by putting in place what has come to be termed in postcolonial scholarship as a regime of transformative constitutionalism.²⁹⁶

When translated into the text of the new republican constitution, this institution of transformative constitutionalism took the form of a preambular commitment to 'justice, social,

²⁹⁵ For the distinction between negative and positive forms of constitutionalism in European constitutional imagination, see Loughlin (2015: 1-25).

²⁹⁶ For an insightful theoretical account situating India in the French rather than the American constitutional tradition, see Mehta (2010: 15-27); on transformative constitutionalism, see generally Klare (1998: 146-188), Langa (2006: 351-363), Viljoen, Vilhena and Baxi eds. (2013), Dasgupta (2014), and Bogdandy (2017).

economic and political', whose contours were principally elaborated in Parts III and IV, dealing successively with 'Fundamental Rights' and 'Directive Principles of State Policy'. But the two parts were separated from one another through the incorporation of a crucial distinction in the constitutional document: while fundamental rights were declared justiciable in courts of law, directive principles were held judicially unenforceable.²⁹⁷ As a result, only the former came to be perceived as facets of constitutional law properly so called, enacted for the purpose of limiting the government and in some instances even non-governmental entities. It was true that the latter were acknowledged as fundamental in the governance of the country, so much so that the government was duty bound to apply them in the making of laws, but they did not seem to be commanding any legal significance in the ordinary course of the constitution.²⁹⁸ Due to this partial suspension of justiciability therefore, the idea of juridifying the national programme of social transformation which undoubtedly marked a critical departure from the colonial past, appeared to have been unexpectedly interrupted at the founding moment itself by a novel scheme of bifurcation not anticipated in anticolonial constitutional imagination until very recently.²⁹⁹

The constitutionally enshrined division between Parts III and IV was initially construed in light of the famous distinction between negative and positive liberties, with fundamental rights regarded mainly as a set of civil and political entitlements imposing upon others a negative obligation of non-interference, and directive principles construed predominantly as a list of social and economic rights necessarily requiring positive action for their full realization. But rather than hinting at the inferiority or superiority of one over the other as has usually been thought to be the case, such a perspective merely indicated that directive principles had to depend more on legislative and executive branches of government for their actualization, and not the judiciary which was instead vested with the primary responsibility of giving effect to

²⁹⁷ Contrast Art. 13 with Art. 37, Constitution of India, 1950.

²⁹⁸ For a critique of such a legalistic approach towards the Directive Principles in the early years, see Tripathi (1954: 7).

²⁹⁹ As is well known, the Constitutional Advisor Sir B.N. Rau recommended the separation of Fundamental Rights and Directive Principles by drawing upon a somewhat similar distinction between Fundamental Rights and Directive Principles of Social Policy in the 1937 Irish Constitution, as well as that between rights meant to be enforced by ordinary courts and rights incapable of or unsuitable for such enforcement drafted in Hirsh Lauterpacht's International Bill of Rights of Man, 1945. Rao (1967, 2:33-36). It was in the Sapru Committee Report of 1945 that a distinction between justiciable and non-justiciable rights came to be mooted in India for the first time specifically with reference to the question of minority entitlements. Sapru Committee Report (1945: 256-257).

fundamental rights.³⁰⁰ Nevertheless, it did presume an untenable disjuncture between the legal and political dimensions of the constitution, one that was however set aside subsequently both in theory as well as in practice. What made this possible was a growing international appreciation of the point that there was no categorical difference between negative and positive entitlements, and that all rights in fact entailed a complex set of corresponding or correlative duties to see to it that they were respected, protected and fulfilled.³⁰¹ To add to their undeniable conceptual entanglement, many provisions in Part III also extended to the social sphere and authorized an interventionist government in the same way as Part IV did, meaning thereby that fundamental rights could not be easily dissociated from directive principles in the constitutional text either.³⁰² Finally, the judiciary started reading many directive principles into the fundamental right to life and personal liberty, and went to the extent of recognizing the harmonious interpretation of both parts taken together as an essential feature of the constitutional basic structure.

It is clearly evident then that fundamental rights and directive principles have been equally central to the shaping of India's postcolonial constitutional society. But their precise relationship is still construed either in terms of the functionalist or the normativist styles of public law thought circulating across the globe in the twentieth century. For decisionist scholars on the one hand, fundamental rights are subservient to the constitutional welfare state, and can thus be infringed if necessary in pursuit of the larger goals enshrined in the directive principles.³⁰³ On the other hand, normativist scholars view directive principles as providing the underlying framework of values that are to guide rather than be superimposed upon what is in substance regarded as a moral activity of rights based constitutional interpretation.³⁰⁴ Although these positions may differ with one another in their attitude towards the instrumental use of constitutional law, they share a mutual disinterest in an intellectual engagement with the concept of constituent power, which makes the tension between them politically meaningful in the first place. In this chapter therefore, I will approach the Indian career of transformative

³⁰⁰ A view most famously articulated by Granville Austin, who distinguished between fundamental rights and directive principles on the lines of the Berlinian distinction between negative and positive liberties, and yet called them both the 'Conscience of the Constitution'. Austin (1966: 50-51).

³⁰¹ This widely used formulation can be traced to Henry Shue's trifurcation of the kinds of duties that every right involves—the duty not to violate it, the duty to prevent third parties from violating it, and the duty to ensure its enjoyment. Shue (1980).

³⁰² For example see Arts. 15(2), 17, 23 and 24, Constitution of India, 1950.

³⁰³ For the functionalist linking of directive principles with justice as equity, see Mukherjee (2010: 181-218).

³⁰⁴ Bhatia (2016); see also Khaitan (2018: 389-420), who argues that directive principles were incorporated into India's liberal democratic constitution for the instrumental reason of securing the consent of ideological dissenters.

constitutionalism from the prism of constituent power, and endeavour to establish that the conflict between functionalism and normativism at the level of its formal and material constitution can more appropriately be attributed to two fundamentally irreconcilable imaginaries of sovereignty anchored in the symbolic lifeworlds of *dharma* and *dhamma*, and in turn finding expression in the juridical languages of social duties and political rights respectively.

The chapter is divided into four sections. In section one, I begin with the Gandhian discourse of social duties anchored in the self abnegating *satyagrahi*, and show how it came to be modified substantially in the Nehruvian imagination of India as a welfare state with a relatively open democracy. Section two argues that the early postcolonial politics of constitutional exceptionalism was nothing but an extension of Nehru's vision of national sovereignty, represented exclusively by the institutional supremacy of Government in Parliament in the project of transformative constitutionalism. I next move to Ambedkar's critique of social duties for their presupposition of an immutable subject how so ever defined, and his rival formulation of the discourse of political rights based on the notion of an impermanent subject. This enabled him to speak of state socialism under Parliamentary democracy guaranteeing effective representation to the most marginalized, and rethink the idea of sovereignty itself from the position of those who were a part that ordinarily had no part in the political community. The final section moves from the founding moment of postcolonial sovereignty to trace the continuation of this irreconcilable conflict between social duties and political rights even in the contemporary age of constitutional populism, in which the real and the imaginary threaten to overwhelm the symbolic dimensions of the Indian political.

1 Social duties

When Mohandas Gandhi was asked to contribute a philosophical essay on the idea of human rights in 1947, he declined the invitation and instead wrote a brief response emphasizing upon the primacy of human duties. 'I learnt from my illiterate but wise mother', Gandhi replied, 'that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world.'³⁰⁵ This prioritization of duties over rights was by no means a late formulation and in fact went as back as *Hind Swaraj*

³⁰⁵ Gandhi (1947, Vol. 95: 96).

published in 1909, wherein he lamented the ‘farce of everybody wanting and insisting on his rights, nobody thinking of his duty.’³⁰⁶ Similarly in 1940, he rejected a proposal for the framing of an international bill of rights, and rather made a suggestion to begin with a ‘charter of duties of man’, from which rights would follow as inevitably as spring followed winter. Drawing from his own experience, Gandhi observed that he started life as a young man by seeking to assert his rights, but soon discovered that he had none, as the enjoyment of rights was necessarily dependent upon one’s assumption of duties first. So he dedicated himself entirely to the performance of duties towards his wife, children, friends, companions and society, and found out as a result that ‘I have greater rights, perhaps, than any living man I know. If this is too tall a claim, then I say I do not know anyone who possesses greater rights than I.’³⁰⁷

Gandhi was not the only constitutional thinker in the world to have harped upon the idea of duties from around the early twentieth century.³⁰⁸ Contemporaneously with his arrival on India’s political landscape, there emerged a discernable shift in European constitutional imagination from an unequivocal espousal of the metaphysical principles of subjective right both at the individual as well as the collective level, to a growing acceptance of a sociological understanding of social interdependence, suggesting the need for a more functional system of objective duties oriented to the promotion of social solidarity. This resulted in the replacement of public authority by public service as the ultimate basis of a socializing regime of modern public law. Grounded in general interest rather than general will, the newly emergent social law was also accompanied by an increasing scepticism towards the notion of sovereignty and a concomitant rise of governmentality in various jurisdictions across Europe.³⁰⁹ In India however, the discourse of social duties was especially distinctive given its contextualization within a radically contentious anticolonial movement, whose different ideational strands were on the whole striving in pursuit of nothing other than divergent conceptions of self-determination. What brought them together on the same stage was their common articulation of a will to sovereignty as the germinal source of constitutional imagination, even as the legal order continued to deploy a modified version of the pre-existing mechanism of colonial governmentality for the realization of the national good.

³⁰⁶ Gandhi (1909, Vol. 10: 287).

³⁰⁷ Gandhi (1940, Vol. 79: 293).

³⁰⁸ For a short sketch on the global intellectual history of duties, see Moyn (2016B).

³⁰⁹ The most influential representative of the ‘social law school’ was the French thinker Leon Duguit, whose ideas came to India via the English political theorist Herold Laski. Duguit can be said to have anticipated Michel Foucault’s thesis about the displacement of sovereignty by the logic of governmentality in early modern Europe. See Duguit/Laski (1921); Sinha (1934: 402-406); Foucault (2007).

That concerns of governmentality could not trump the pre-eminence of sovereignty was most certainly the case for the mainstream of nationalist thought, at least in so far as it was invested in dislodging the British and reoccupying the space of political power vacated by them. There is however a strong tendency to exceptionalize Gandhi in this regard, by portraying him as a theorist of non-sovereignty who resisted a colonial governmentality of population management by practicing a counter governmentality of his own, through a disciplined engagement with different technologies of the self such as spinning *khadi*, fasting, celibacy and reducing consumption to the barest minimum.³¹⁰ By controlling bodily desires and appetites in such a manner, he no doubt believed that it was possible for the self to be reduced to ‘zero’ and become a ‘cipher’, and thereby create conditions for relinquishing the politics of domination and subordination of others to one’s own will. But Gandhi’s politics of self abnegation, indissociably connected with the precept of ‘*neti neti*’ or ‘not this, not this’ drawn from the non-dualist negative theology of Advaita Vedanta, was only alluding to the emptiness or void at the heart of the sovereignty concept, and not to its complete disavowal altogether.³¹¹ He sought to navigate an otherwise unbridgeable gap between sovereignty and governmentality, being and action, *satya* and *karma*, by submitting himself to the social law of *dharma* as translated into the symbolic apparatus of duties rather than rights. For a subject or soul aspiring union with god’s being also understood as the truth, Gandhi commended the performance of ethically right action without having any attachment to its fruit, and in this way accorded primacy to duties as action over rights as the fruit of action:

‘The true source of rights is duty. If we all discharge our duties, right will not be far to seek. if leaving duties unperformed we run after rights, they escape us like a will-o’-the-wisp. The more we pursue them, the farther they fly. The same teaching has been embodied by Krishna in the immortal words: “Action alone is thine. Leave thou the fruit severely alone.” Action is duty: fruit is the right.’³¹²

What made duties so central to Gandhi’s constitutional imagination was that unlike rights, they did not require any formal institution as their guardian, and could thus open up the space for the socially embedded individual to transform into an agent of sovereignty by rigorously

³¹⁰ On Gandhi as a theorist of nonsovereignty, see Skaria (2016); on Gandhi and governmentality, see Godrej (2017: 894-922).

³¹¹ For three different entry points into the relationship between sovereignty and emptiness, see Lefort (1988: 213-255); Agamben (2011); Laclau (2006: 137-147).

³¹² Gandhi (1925, Vol. 30: 68).

observing the discipline of *satyagraha*. Although *satyagraha* travelled across the world as a non-violent modality of civil resistance, in India it also involved an elaborate ‘constructive programme’ for the regeneration of the indigenous political centred around the village as the exemplary site of experimentation for the nation building enterprise. The programme included an expanding set of social reforms, ranging from the promotion of *khadi*, cottage industries, communal unity and removal of untouchability, to items like sanitation and hygiene, status of women, farmers, labourers and other marginalized groups, basic and adult education, and the prohibition of alcohol.³¹³ For its actualization in every locality, Gandhi envisaged a non-violent army of workers pursuing the ‘real politics’ of rendering service to the three hundred million people of India, while maintaining a principled distance from the ‘politics of power’ associated with the Congress and the participation in elections and municipal bodies.³¹⁴ During his final days in fact, he called for the Congress to be disbanded ‘in its present shape and form .. as a propaganda vehicle and a parliamentary machine’, and to be reconstituted as a ‘Lok Sevak Sangh’ or an organization in service of the people, striving for the ‘social, moral and economic independence’ of the seven hundred thousand villages in the country. This proposal did not mean to reject the constituted power of governmental authority as is implicitly presupposed in antistatist accounts of Gandhi’s constitutional thought, but to interruptively supplement it with the constituent power of self-sacrificing *satyagrahis* standing inside and outside the legal order at the same time, and ungrudgingly and wisely serving the ‘whole of India’ as their ‘master’.³¹⁵

Like Gandhi, India’s Constituent Assembly also found itself drawn to the discourse of social duties, as can perhaps be best glimpsed from Prime Minister Jawaharlal Nehru’s famous ‘tryst with destiny’ speech delivered at the moment of independence on the midnight of 15th August, 1947. Inviting attention to the challenge of a new future of immense possibilities that beckoned the nation at the end of a long period of ill fortune, Nehru urged his compatriots to take the pledge of rendering ‘service to India’, which meant ‘the service of the millions who suffer’, and ‘the ending of poverty and ignorance and disease and inequality of opportunity.’ He invoked Gandhi and iterated that the ambition of ‘the greatest man of our generation’ was to ‘wipe every tear from every eye’. Even though this may have been beyond them at present,

³¹³ Gandhi (1941, Vol. 81: 354-374).

³¹⁴ For the distinction between ‘real politics’ and the ‘politics of power’, see Gandhi (1940, Vol. 77: 370-375).

³¹⁵ Gandhi (1948, Vol. 98: 333-335).

Nehru made it clear that ‘so long as there are tears and suffering, so long our work will not be over.’³¹⁶

While going on to institutionalize an elaborate constitutional framework for social transformation, the Assembly however made one critical departure from Gandhi’s constitutional thought by setting aside the figure of the *satyagrahi* from the space of sovereignty created in the anticolonial movement. *Satyagraha* was in fact equated with other violent methods of insurrection and revolution, and treated essentially as an instrumental means for the acquisition of political sovereignty from a foreign colonizer, which could have little or no place in the government of a centralized nation state. Instead it came to be displaced by the Parliament, or rather the Government in Parliament, as the new agent of people’s constituent power. The Government in Parliament was specifically tasked with the responsibility of giving effect to the social provisions in the constitutional text, and especially those enshrined in the Directive Principles of State Policy envisaged as the laws of lawmaking appropriate for India as a postcolonial democracy.³¹⁷

Defending their inclusion in the Constitution, B.R. Ambedkar analogized these judicially unenforceable directive principles to the ‘Instruments of Instructions’ that were previously issued to colonial governors by the British Crown under the Government of India Act, 1935. He went on to construe them in the changed postcolonial context as instructions sourced now from the Indian people, and delivered through the Assembly to legislatures and executives of the day for implementing action. Although the government ‘may not have to answer for their breach in a court of law’, Ambedkar expected that ‘[it] will certainly have to answer for them before the electorate at election times.’³¹⁸

This scheme of transformative constitutionalism administered by a responsible government was sought to be legitimized by India’s constitution makers through their confident and unprecedented institutionalization of universal adult suffrage under conditions of mass poverty and illiteracy. It was in the open competition for power enabled by the procedure of electoral democracy that they located the emptiness of the principle of popular sovereignty. Since sovereignty resided in the nation as a whole, no individual or group could singularly come to

³¹⁶ Nehru (CADs, Vol. V: 14 August 1947).

³¹⁷ Mukherjee (2010: 189).

³¹⁸ Ambedkar (CADs, Vol VII: 4 November 1948).

occupy the space of power, by appropriating power for their own ends or incorporating it into themselves.³¹⁹

That the chief protagonists of the national movement appreciated the enormous threat posed by ideologies of fascism and totalitarianism to the idea of the political by fully occupying its space of power, is clear from an essay titled ‘Rashtrapati’ or President, penned by Nehru himself under the pseudonym of Chanakya in 1937. Worried by his growing populist image among the people, ‘Chanakya’ wrote about ‘the most extraordinary of popular welcomes’ which Nehru received while travelling across the vast land of India, as though he were ‘some triumphant Caesar passing by, leaving a trail of glory and a legend behind him.’ ‘Men like Jawaharlal’, the author warned, ‘are unsafe in democracy. He calls himself a democrat and a socialist, and no doubt he does so in all earnestness, ... [but] A little twist and Jawaharlal might turn a dictator sweeping aside the paraphernalia of a slow-moving democracy.’ So even though the people had a right to expect good work from Nehru, they ought not ‘spoil him by too much adulation and praise. His conceit is already formidable. It must be checked. We want no Caesars.’³²⁰

Several years later, it was this commitment to an open democracy which prevented the Constituent Assembly from declaring socialism to be an official ideology of the new constitutional state. While Nehru hoped that ‘India will stand for socialism’, this aspiration could not be referred to in the text of the objectives resolution because otherwise, ‘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.’³²¹ Similarly, Ambedkar justified the Assembly’s decision to enact a broadly worded chapter on directive principles by arguing that there were several ways in which the constitutional ideal of ‘economic democracy’ could be brought about—individualism, socialism or communism—and that it was not proper to specially single out either of them in a ‘political democracy’ antithetical to the ‘perpetual dictatorship of any particular body of people’. Thus rather than being fashioned as fixed and rigid precepts, enough room was deliberately left in the language of these directives, so as to enable people with different ways of thinking to strive and persuade

³¹⁹ I am drawing a parallel here with Claude Lefort’s account of modern democracy in Lefort (1988: 9-20).

³²⁰ ‘Chanakya’ (1937).

³²¹ Nehru (CADs, Vol. I: 9 December 1946).

the electorate that theirs was indeed the best means for the realization of economic democracy in the country.³²²

But paradoxically enough, India's Parliamentary democracy, bolstered by Nehruvian economic developmentalism in the early postcolonial period, is precisely what created the conditions for a politics of constitutional exceptionalism, whose trajectory I shall now go on to trace in the next section of this chapter.

2 Constitutional exceptionalism

In an important essay, the political theorist Uday Singh Mehta has argued that it is not Gandhi but Thomas Hobbes who must be recognized as the 'largely unacknowledged mentor of Indian constitutionalism'. Being conservatively and pragmatically oriented to ethical forms of everyday life as it already existed, Gandhi was in Mehta's reading one of the foremost thinkers of the autonomy of the social, which did not require to be supplemented or supplanted by the political in any way. On the contrary, India's founding framers were according to him much like Hobbes, in their deep commitment to the establishment of an autonomous political domain in the country through the setting up of a new constitutional state, where all social questions of necessity and diversity could eventually come to be subsumed under the 'absolutism of politics'.³²³

However, as I showed in the previous section, the mainstream of nationalist thought had a close affinity with Gandhi at least in so far as both connected sovereignty and governmentality by invoking a commonly shared discourse of social duties. What distinguished them more clearly was the centrality of *satyagraha* or constructive work for Gandhi's constitutional thought on the one hand, and the pre-eminence of parliamentary democracy for India's constitution makers on the other. Even then, Nehruvian economic developmentalism was not averse to collaborating with the Gandhian movement for *sarvodaya* (universal uplift) in the early postcolonial period, provided that the government continued to be recognized as the ultimate bearer of responsibility for social reconstruction, with other entities cast only in the supporting role of complementing its various efforts and activities.³²⁴ But by thus absorbing and co-opting

³²² Ambedkar (CADs, Vol VII: 4 November 1948).

³²³ Mehta, US (2010B: 15-27).

³²⁴ Sherman (2016: 249-270).

Gandhi, the new nation building exercise paved the way for his subsequent neutralization and depoliticization. What came about instead, was a politics of constitutional exceptionalism in pursuit of the nonviolent social revolution which it purported to have initiated in the country. In order to make sense of postcolonial India's politics of constitutional exceptionalism, we must look past Hobbes, who was no doubt among the most insightful modern theorists of state and sovereignty, but not necessarily so of the postrevolutionary phenomenon of democratic constituent power. Hobbes had basically envisaged the modern state as a *persona ficta*, which constituted the multitude in the state of nature into a people through a heuristic social contract, and came to be represented exclusively in the figure of the sovereign leviathan. Consequently therefore, it is the leviathan who got to determine the terms of state sovereignty, with a relatively passive people left to bear the burden of a potentially authoritarian culture of constitutional legality.³²⁵ These Hobbesian premises have taken scholars in India only as far as treating the idea of a people authored constitution as a legal fiction incontestable in a court of law.³²⁶ While formal constitutionalists appreciate such an unfalsifiable presupposition for providing necessary stability to the entire juridical system, materialist sceptics of the formal constitution perceive it as nothing other than a chimera deployed for the purpose of facilitating a smooth transfer of authority from colonial elites to their nationalist counterparts. Both of these intellectual positions offer us an incomplete picture: whereas the former fails to take into account the active agential role assumed by the people in managing the constitutional law and politics of postcolonial India, the latter cannot look past the vast swathes of coercion and domination underpinning the legal landscape, and engage more seriously with the notion of people's constituent power at the symbolic centre of the Indian political.

More pertinent for the Indian context is the constitutional theory of the German jurist Carl Schmitt, who in spite of being profoundly influenced by Hobbes, viewed him as an antipolitical thinker.³²⁷ In contrast with Hobbes's purely juristic conception of the state based on the bourgeois ideology of the rule of law, Schmitt focused on the existential idea of a dynamically emerging political unity grounded in the friend-enemy distinction, and maintained if necessary by the sovereign resorting to exceptional decisions departing from the precepts of liberal legalism.³²⁸ Unlike Schmitt, Nehru's understanding of the political was neither dependant upon

³²⁵ On Hobbes and constituent power, see Forsyth (1981: 191-203); on Hobbes and representation, see Loughlin (2004: 53-71).

³²⁶ Tripathi (1972/1968: 323-340 at 323-328).

³²⁷ Strauss in Schmitt (2007/1932: 97-122 at 108).

³²⁸ Schmitt (2007/1932).

the friend-enemy distinction, nor did it require a *führer*-like dictator to be at the helm of India's constitution of state. It was rather anchored in the symbolic externality of social law, which conferred upon Parliamentary democracy the paramount duty to provide for the welfare of the people. While undertaking this responsibility however, Nehru did not mind carving out a zone of constitutional exceptionality which empowered the legislative and executive establishment against the judiciary on one hand and extralegal revolutionaries on the other as its chief antipolitical opponents.

The most contentious issue for constitutional politics in the early postcolonial period was centred around the question of compensation for land acquisition, involving a clash between the right to property and the goal of egalitarian redistribution contained in Parts III and IV of the Constitution respectively.³²⁹ Even though the right to property was incorporated in the fundamental rights chapter without much controversy, it had to be circumscribed considerably in order to enable the enactment of land reform legislations at the provincial level, especially those purporting to overhaul a colonially sanctioned semi-feudal regime of agricultural production governing property relations in rural India. A majority of the founding framers were mindful of the pro-property leanings of the contemporary culture of legal formalism, and therefore in particular concerned about saving these laws from judicial scrutiny at least on grounds that the compensation being provided herein was not just, fair, or equitable. So after several rounds of debates and discussions in the Constituent Assembly, it was the legislature which came to be put in charge of specifying either the amount or the principles of compensation while framing the law authorizing the expropriation of property for any public purpose. Furthermore, a *carte blanche* protection from judicial review was extended to land acquisition laws already introduced or passed in different provincial legislatures before the commencement of the Constitution and assented to by the President.³³⁰

Nevertheless, the courts did intervene in the land question by invalidating a few of such laws as unconstitutional, for failing to offer an equivalent or adequate compensation to those who had been deprived of their proprietorial entitlements.³³¹ Nehru reacted strongly to the judicial

³²⁹ Contrast Arts. 19(1)(f) and 31 with Arts. 38 and 39, Constitution of India, 1950.

³³⁰ For a detailed account of the developments leading to the enactment of Art. 31, see Austin (1966: 87-99).

³³¹ In particular, see *Kameshwar Singh v. Province of Bihar*, AIR 1950 Pat 392; *Dwarkadas Srinivas v. The Sholapur Spinning and Weaving Company*, AIR 1951 Bom 86; *Kameshwar Singh v. State of Bihar*, AIR 1951 Pat 91; *West Bengal Settlement Kanungo v. Bela Banerjee and Others*, AIR 1952 Cal 554; *State of Bihar v. Kameshwar Singh and Others*, 1952 (3) SCR 889; *State of West Bengal v. Bela Banerjee and Others*, AIR 1954 SC 170; *Dwarkadas Srinivas v. Sholapur Spinning and Weaving Company*, AIR 1954 SC 199.

vetoing of socially beneficent legislation, and observed that it was as though ‘this magnificent Constitution’ had been ‘kidnapped and purloined by lawyers’.³³² While judicial interpretations of the constitutional text were to be ordinarily accepted, he asserted that if courts only saw an inherent contradiction between Parts III and IV, ‘it [was] up to the Parliament to remove the contradiction and make the Fundamental Rights subserve the Directive Principles of State Policy.’ He argued that full compensation may have to be paid in ordinary land acquisition cases, but not necessarily so in exceptional schemes of social engineering, for if this were to be done, the ‘haves’ would remain ‘haves’, and ‘have-nots’ as ‘have-nots’.³³³ So all judicial decisions appearing to negate the social revolution were in course of time nullified by Parliament through extraordinary constitutional amendments enacted in the exercise of its constituent power, with a view to clarify the lexical priority of directive principles over fundamental rights, and restore the institutional supremacy of the legislative organ in the democratic enterprise of transformative constitutionalism.³³⁴

Notwithstanding its revolutionary rhetoric however, the land reform programme merely sought to curtail the scope of the right to property, without effecting any structural changes for a more thorough emancipation from the institution of private property altogether. The various legislative schemes implementing this programme were no doubt meant to eliminate the worst forms of exploitation in the agricultural sector by abolishing the zamindari system of rent-seeking absentee landlordism and regularizing tenancy entitlements, but they did not proceed further to bring about a large scale socialization of land ownership in the countryside by supporting the practice of cooperative farming or the transfer of land to the tiller. Rather on the contrary, extra-parliamentary social movements making such radical demands and even rebelling against the establishment were forcibly controlled by infringing civil liberties and deploying the same preventive detention measures invoked until very recently for suppressing the anticolonial national movement.³³⁵

³³² Nehru (1951, Parliamentary Debates: Vol. 2 Part 2, Column 8832).

³³³ Nehru (1955, Parliamentary Debates: Vol. 3, No. 16, cols, 1948, 1953, 1956).

³³⁴ In particular, see the Constitution (First Amendment) Act, 1951 and Constitution (Fourth Amendment) Act, 1955, amending Art. 31 and inserting Arts. 31-A and 31-B to the Constitution of India, 1950.

³³⁵ See the list of restrictions on the right to freedom under Art. 19, the omission of a due process clause from Art. 21 containing the right to life and personal liberty, and the authorization of preventive detention in Art. 22, Constitution of India, 1950. For a detailed account of how these provisions came to be incorporated, see Austin (1966: 101-113).

These executive actions were no doubt facilitated by an extensive list of constitutionally permissible restrictions in the fundamental rights chapter, which according to the communist Somnath Lahiri seemed as though it had been drafted from the perspective of a police constable:

‘I am constrained to say that these are fundamental rights from a police constable’s point of view and not from the point of view of a free and fighting nation. Here whatever right is given is taken away by a proviso. Does Sardar Patel want even more powers than the British Government, an alien Government, an autocratic Government—which is against the people—needs to protect itself?’³³⁶

However, there was nothing to be suspicious about the emergent culture of constitutional exceptionalism, or so argued the Congressman Brajeshwar Prasad and many others like him, since independence had resulted in the replacement of a colonial regime with a popularly elected national government:

‘It is wrong to regard the State with suspicion. Today it is in the hands of those who are utterly incapable of doing any wrong to the people. It is not likely to pass into the hands of the enemies of the masses. . . . If you want to prevent the political reactionaries from gaining political power and ascendancy, the rulers of the land must be vested with large discretionary powers.’³³⁷

In other words, the implication here was that the project of social transformation could only be pursued through the governmental apparatus of the formal constitution, albeit one that came to be legitimized now in the name of a democratic constituent power.

While in the nationalist rendering, India’s postcolonial constitutional moment is hailed for opening up the possibility of actualizing a long cherished collective aspiration for liberation and freedom, other more critical voices have justifiably remained largely sceptical of this celebratory assessment. For Marxian and neo-Marxian thinkers in particular, the claim of the constitutional text to be representative of the whole of the people essentially gestured to a spurious hegemony, one which was premised upon the preservation of property based class interests of a dominant coalition made up of big land owning farmers, industrialists, and managerial elites, and the concomitant subordination of peasants, workers, and other subaltern communities.³³⁸ But even if the dynamism of the anticolonial movement came to be sublated

³³⁶ Lahiri (CADs, Vol. IV: 29 April 1947).

³³⁷ Prasad (CADs, Vol IX: 10 September 1949).

³³⁸ Guha (1997: 97); Kaviraj (1988: 2429-2443).

within an institutional form appropriate for what was at best a passive revolution, the discourse of sovereignty that it inaugurated cannot be reduced entirely to the class prerogatives of those who held positions of governmental authority under the new nation state. The problem over here stems from sovereignty itself being generally regarded as a property belonging to the highest bearers of juridical authority or political capacity. It was instead conceived by the founding framers as a more relational category bringing the two competing dimensions of legality and popularity together in a provisional settlement, and doing just enough to inscribe the constitutional engagement with the property concept in the symbolic language of social duties. As the jurist Alladi Krishnaswami Aiyar observed while siding with Nehru in the debate on the property clause:

‘Our ancients never regarded the institution of property as an end in itself. Property exists for *dharma*. *Dharma* and the duty which the individual owes to the society form the whole basis of our social framework. *Dharma* is the law of social well being and varies from *yuga* to *yuga* [age to age]. . . . The sole end of property is *yajna* [sacrifice] and to serve a social purpose, an idea which forms the essential note of Mahatma Gandhi's life and teachings. In the fervent hope that the amendment will further social progress of the teeming millions of the agricultural population of this country, I accord my wholehearted support to the proposition as put forward by the Honourable the Prime Minister.’³³⁹

The hegemony of social duties may have appeared to be a spurious one especially when approached from the prism of a radical emancipatory politics, but what made the crucial difference was the transition from a colonial to a postcolonial context, and the accompanying change in reference to a democratic constituent power as the ultimate source of legitimacy. This in effect meant that it could not be resisted merely by galvanizing plebeian subjectivities against elite domination, unless their sociological mobilization was also intellectually backed up by another counter-hegemonic discourse staking a claim to constituent power. Precisely such a challenge was posed by Ambedkar in the symbolic language of political rights, which I will now endeavour to investigate in the next section.

3 Political rights

One may find a convenient explanation for Ambedkar's discomfiture with the symbolic language of social duties in his fierce opposition towards the Hindu *dharmik* order, wherein

³³⁹ Iyer (CADs, Vol. IX: 12 September 1949).

each particular community was customarily assigned a different function to perform, depending upon its specific position inside or outside the caste hierarchy. But I would argue that his opposition ran much deeper, extending also to the contemporary culture of spiritual nationalism which entailed an entirely modernist reworking of the concept of duties in the register of ethics and morality. As a result of this primacy of duties in fact, he apprehended that the idea of sovereignty could no longer remain as an empty enough a place of power, with the responsibility for action being always imputed to an immutable subject, irrespective of whether it was otherwise defined in terms of caste or nation or even as a *satyagrahi* for that matter.³⁴⁰

Although Ambedkar converged with his nationalist counterparts in drawing upon the law of *karma* to suggest a cause-effect relationship between acts and their consequences, he broke away from the mainstream by adopting its theorization in the Buddhist tradition of *dhamma* which rejected the distinctly Hindu notions of *Atman* (soul) and *Brahman* (divine reality), and also harped upon the inexistence of a permanent subject more generally. Influenced by the negative theology of *Sunnyata* (emptiness), he interpreted the Buddha as having moved beyond the perennial tension between eternalism and nihilism to fashion an impermanent subject that was neither immortal nor altogether non-existent. The Buddha was for Ambedkar an annihilationist only as far as the soul was concerned, since he did not believe in its rebirth or transmigration, but not so in respect of material energy, which according to him continued to regenerate after the death of the physical body by joining the general mass of energy playing about in the universe.³⁴¹ In articulating the impermanence of the subject through the formula ‘being is becoming’, Ambedkar sought to break the connection linking the responsibility for action in the past and future to the living individual at present, a doctrinal understanding of *karma* which incidentally supplied the theological basis for the perpetuation of caste oppression in Brahminical Hinduism. His constitutional project was rather aimed at preventing the collective subjectivity of state and society from escaping responsibility for the condition of the poor and lowly, who in fact were to be made equal partners in India’s newly acquired national sovereignty through the invocation of a rival symbolic language of political rights.³⁴²

³⁴⁰ For a critique of the connection between action and the immutable subject in the Indo European intellectual tradition, see Agamben (2018).

³⁴¹ See Ambedkar (1957, Vol. 11: 240-241, 329-336).

³⁴² On Ambedkar’s formulation of *kamma*, see Id., at 242-245, 337-345. Agamben’s recent work on *karman* strongly resonates with Ambedkar’s project, but with two crucial exceptions: first, unlike Ambedkar, Agamben is not uncomfortable with notions of rebirth and transmigration; second, unlike Agamben, Ambedkar’s critique of the nexus between action and the permanent subject did not lead him to abandon the concept of sovereignty altogether. Agamben (2018).

Before proceeding any further, it is pertinent to ask how Ambedkar's constitutional imagination could come to be centred so much around political rights, in spite of him having started with the core objective of destabilizing the notion of the immutable subject. The discourse of rights after all generally presupposes an already existing subject, be it the man endowed with reason under the prepolitical natural law, or the citizen receiving political recognition under the positive law of the nation state. Let me respond to the question by showing how his work moved beyond these competing presuppositions of natural law and positive law, and yet ended up developing a rights based model of sovereignty anchored in an impermanent subject.

Ambedkar did not present political rights as a mere concretization into the constitutional order of the more abstract prepolitical human rights drawn from the natural law tradition. Although he was averse to dictatorship of any kind for the threat it posed to the development of a nonviolent culture of civil liberties, his objections were couched in theologico-political terms and evinced a deeper concern for the dangerous implications such a regime might come to have on the egalitarian and fraternal arrangement of sovereignty in the country. Even while being an integral part of the constitution making oligarchy as the Chairman of the Constituent Assembly's Drafting Committee, he had thus warned on the floor of the house:

‘In India, *bhakti*, or what may be called the path of devotion or hero-worship, plays a part in its politics unequaled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be the road to the salvation of a soul. But in politics, *bhakti* or hero-worship is a sure road to degradation and to eventual dictatorship.’³⁴³

This critique acquired a much sharper overtone after Ambedkar resigned from the cabinet and dissociated himself from the Congress government in 1951. It was now specifically directed at Prime Minister Nehru and his practice of amending the constitutional text from time to time to deal with unfavourable judicial decisions on the property question:

‘... there is a dogma in the working of the British Constitution ... that the King can do no wrong. If any wrong is done in the working of the Constitution, the person responsible for the wrong is the Prime Minister and his colleagues. But the King can never be wrong and can never do wrong. We too in this country have adopted practically, with slight modifications, the British Constitution. But unfortunately the

³⁴³ Ambedkar (CADs, Vol. XI: 25 November 1949).

working of our Constitution is governed by a dogma, which is just the opposite of the dogma adopted by the British people. In our country the dogma on which we proceed is that the Prime Minister can do no wrong and that he will do no wrong. Therefore, anything that the Prime Minister proposes to do must be accepted as correct and without question. This devotion in politics to a personality may be excusable in cases, but it does not seem to me excusable where the fundamental rights are being invaded.’³⁴⁴

Ambedkar was aware that contrary to his understanding of fundamental rights as carrying out the very objectives of the Constitution as laid down in its Preamble, the Congress regarded them merely as ‘a kind of ornament which the Indian people should have’. Yet even this attitude had undergone a significant change, with fundamental rights now being looked upon ‘as an iron chain which ought to be broken, whenever occasion arose for it’. Such a contemptuous treatment of fundamental rights by the party in power, as though their frequent infringement was a matter of no moment at all, could in his opinion easily lead to dangerous consequences in the future.³⁴⁵

It must be born in mind over here that Ambedkar as Law Minister had himself piloted the first constitutional amendment, which made the initial incursions on the scope of the right to property in the name of a legislatively authorized social revolution. He no doubt appreciated that providing full compensation in lieu of property acquisitions was neither possible nor desirable, but also believed that persons deprived of their instruments of earning a living must at least be compensated in accordance with a law enacted by Parliament. What therefore compelled him to oppose the fourth amendment in particular was its positing of the executive organ of government as the sole determinant of the quantum of compensation if any, without being bound by even the most minimal precepts of constitutional legality.³⁴⁶

I am not suggesting that Ambedkar uncritically espoused a bourgeois regime of private property for independent India, although he did certainly embrace the possibility it had opened up for the stigmatized community of untouchable Dalits to claim their space on the grid of capitalist modernity. In a pamphlet entitled ‘States and Minorities’ submitted to the Constituent Assembly, he had in fact proposed a most audacious plan for the constitutionalization of the social question, which specifically entailed the nationalization of key and basic industries including agriculture. It was clear to him that the consolidation of holdings and the enactment

³⁴⁴ Ambedkar (1955, Vol. 15: 944).

³⁴⁵ Id., at 947.

³⁴⁶ For Ambedkar's entire speech on the Fourth Amendment, see Id., at 944-962.

of tenancy legislations could not solve the problem of the sixty million untouchables, most of whom merely toiled away as landless labourers. He therefore insisted that the state must acquire agricultural lands from private individuals in return for an appropriate compensation, and put in place a collectivized method of intensive farm cultivation financed by its own resources within ten years of the coming into force of the Constitution.³⁴⁷

Apart from enshrining the standard set of fundamental rights which were to be found in other contemporary democratic constitutions, Ambedkar also wanted India's constitutional text to lay down the shape and form of the economic structure of society as a whole. He observed that the dominant tendency in existing constitutions was to prescribe the form of the political structure of society, whilst leaving its economic structure entirely untouched. This arrangement eventually resulted in the setting at naught of what remained a political democracy merely in a formal sense, by the material domain of social economy where private interests continued to reign supreme. So it was necessary that late comers to constitution making like India did not copy the faults of other countries, and rejected the antiquated notions of old time constitutional lawyers who focused exclusively on institutionalizing politics at the cost of ignoring the economy altogether. Only by extending the democratic principle of 'one man, one value' to the economic sphere through 'the law of the Constitution' could individual liberties be actually safeguarded from other individuals, and a permanent state socialism be established under a nondictatorial Parliamentary democracy.³⁴⁸

There is a deep connection between Ambedkar's work as a transformative constitutionalist and his more theologically inflected writings on Buddhism as a political religion. He in fact went on to combine Marx with Buddha to hold that private property brought power to one class and sorrow to another, but insisted on its abolition without resorting to violence and dictatorship.³⁴⁹ While Marxism and Buddhism both shared a common end which was the removal of misery and exploitation from society, they adopted radically divergent means for the purpose of its realization. According to the Marxian creed on the one hand, communism could be established only by breaking up the existing system through the force of violence, and continuing with the new system through the dictatorship of the proletariat. The Buddha's gospel of *dhamma* on the other hand, sought to 'convert a man by changing his moral disposition to follow the path

³⁴⁷ Ambedkar (1946, Vol. 1: 381-452, at 396-397).

³⁴⁸ Id., at 408-412.

³⁴⁹ Ambedkar (1987, Vol. 1: 441-465).

voluntarily'.³⁵⁰ Far from rejecting violence in an absolute sense, the Buddha simply insisted upon the regulated use of 'force as energy', such that other valuable ends were not destroyed in achieving the abolition of private property.³⁵¹ Furthermore, although Ambedkar understood that a temporary dictatorship may be good and a welcome thing even for making democracy safe, he nevertheless proceeded to ask thus: 'Why should not Dictatorship liquidate itself after it has done its work, after it has removed all the obstacles and boulders in the way of democracy and has made the path of Democracy safe.' Finding an appropriate exemplar in the Buddhist Emperor Asoka who had famously renounced violence after battling the Kalingas, he remarked that 'If our victors today not only disarm their victims but also disarm themselves there would be peace all over the world'.³⁵² The Buddha himself came across in Ambedkar's reading as a thorough democrat who had nothing to do with dictatorship, an ordinary *bhikku* who seemed at the most like a Prime Minister among members of a Cabinet, and a follower of *dhamma* which was taken to be the supreme commander of the Sangh.³⁵³ Implicit in this denunciation of dictatorship was a clear preference for the Parliamentary form of government based on 'the duty to obey the law and the right to criticize it', a regime where each man was morally trained in such a way that 'he may himself become a sentinel for the kingdom of righteousness'.³⁵⁴ He admired the French Revolution for aspiring to found human society in accordance with the postulates of liberty, equality and fraternity, but criticized its bourgeois order of liberty for failing to produce equality. This equality was no doubt produced by the wonderful achievements of the Russian Revolution, but at the heavy cost of sacrificing liberty and fraternity. It seemed to him that the three could coexist only if one followed the way of the Buddha.³⁵⁵

We may be tempted to infer from all this that Ambedkar the theorist of collective political sovereignty supplanted or superseded Ambedkar the theorist of constitutional fundamental rights. In his understanding after all, rights did not simply inhere in human nature, and were in fact conceived as 'gifts of the law' which the state granted and could even qualify in the interest of national sovereignty.³⁵⁶ What concerned him more was not the lack of rights as such, but rather the possibility of their non-actualization in society in spite of being recognized by the

³⁵⁰ Id., at 450.

³⁵¹ Id., at 451.

³⁵² Id., at 459.

³⁵³ Id., at 451-452.

³⁵⁴ Id., at 459.

³⁵⁵ Id., at 461-462.

³⁵⁶ Ambedkar (CADs, Vol. VII: 4 November 1948).

positive constitutional law of the state. Positive law by itself was no substitute for the social and moral conscience of society when it came to securing and safeguarding rights effectively. To put this in his own words,

‘If social conscience is such that it is prepared to recognise the rights which law proposes to enact, rights will be safe and secure. But if the fundamental rights are opposed by the community, no Law, no Parliament, no Judiciary can guarantee them in the real sense of the world. What is the use of Fundamental rights to the Untouchables in India? As Burke said, there is no method found for punishing the multitude. Law can punish a single solitary recalcitrant criminal. It can never operate against the whole body of people who choose to defy it. Social conscience ... is the only safeguard of all rights, fundamental or non-fundamental.’³⁵⁷

It was precisely this perceived absence of a social conscience in India which made Ambedkar speak about the challenges of working the constitution:

‘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.’³⁵⁸

The solution he found both for himself as well as the Dalit community was their conversion to and owning up of Mahayana Buddhism, which at least had the potential of instituting the good society that was needed for the purpose of giving force to India’s republican constitution.

Ambedkar’s conversion to Buddhism was in fact a continuation of his larger constitutional project aimed at the annihilation of subalternity at least, if not at the annihilation of caste itself. What created the conditions of possibility for annihilating subalternity was no doubt his claim to a share in nation state sovereignty, but one which was in turn articulated in the language of political rights, alluding more germinally to the right to have rights or the right to politics. The right to politics did not have any fixed or determinate subject, as it was performatively enacted by those who were a part that ordinarily had no part in the political community. Rather, its process of subjectivization produced an impermanent subject who came to be defined by the interval between the social identity of caste and the juridical identity of legal personhood,

³⁵⁷ Ambedkar (1943, Vol. 1: 222).

³⁵⁸ Ambedkar (CADs, Vol. XI: 25 November 1949).

whilst presuming to speak and act as though participating in an order of sovereignty from which he or she had hitherto been excluded or disqualified.³⁵⁹

To be more particular, Ambedkar initially conceived this right as the ‘right to effective representation’, and expressed it in terms of his various demands for political safeguards on behalf of the governmental category of Depressed Classes or Scheduled Castes, so that the institutional apparatus of the formal constitution could be made to cohere with the social reality of the material constitution.³⁶⁰ Such a view was supplemented later on by a materialist reading of Buddhism, wherein Buddha the enlightened *parivrajaka* or wandering mendicant was presented as a *marga data* (path giver) rather than a *moksha data* (salvation giver), who not only renounced his own Sakya Republic but also refused to draw support from the kings of Kosala or Magadha, and instead established a fraternal community of monks and laity anchored in the symbolic sovereignty of the political law of *dhamma*.³⁶¹ The Dalit community of converted Buddhists was urged to emulate precisely this example, especially when exercising the right to partless participation in India’s constitutional order, given their ambivalent position inside and outside its national framework of sovereignty.³⁶²

The reason why Ambedkar’s subsequent conversion to Buddhism turned out to be so momentous was that it came in the wake of a constitutional text which had originally prioritized social duties over political rights, and thereby departed fundamentally from what he had first set out to achieve in the Constituent Assembly. While the directive principles were aimed at setting up a social order oriented to the promotion of popular welfare and especially of the most disadvantaged, they did not proceed to institutionalize a state socialism under parliamentary democracy in the way he had envisaged. Furthermore, although provisions were made for the reservation of seats in legislative bodies as well as in public employment, they either had a limited life of ten years from the inception of the constitution, or were framed as responsibilities of government rather than as rights held by marginalized communities themselves.

³⁵⁹ The right to have rights was most famously articulated by Hannah Arendt, and later reformulated as the right to partless participation in the critical response of Jacques Rancier. Implicit in Ambedkar though, is a fusing together of these two accounts, with a view to rethink the contours of nation state sovereignty from the margins of political society. Arendt (1958: 290-302); Rancier (2004: 297-310); see also Schaap (2011: 22-45).

³⁶⁰ This right was elaborated at the time of constitution making in the pamphlet ‘States and Minorities’. See Ambedkar (1946, Vol. 1: 401-402, 419-424).

³⁶¹ For Ambedkar’s radical reconstruction of Buddha’s *parivrajaka*, see Ambedkar (1957, Vol. 11: 24-29).

³⁶² For a different reading of Ambedkarite *parivrajaka* as a partless participation without sovereignty, see Skaria (2015: 450-465).

Notwithstanding these shortcomings however, Ambedkar could not give up on the constitution altogether, for the hope of an open democracy which its electoral regime of universal adult franchise represented. Yet he clung on to the view that the politicization of the social question was crucial for the prospects of democracy in India, and worried about the ‘life of contradictions’ facing the country, with political equality on the one hand and socio economic inequality on the other. He sternly warned that if social equality was denied for long, ‘those who suffer from inequality will blow up the structure of political democracy which this Assembly has two laboriously built up.’³⁶³

It may seem to us in hindsight that Ambedkar’s apprehensions were somewhat far fetched, with the constitution managing to survive well enough for nearly seventy years now. But in spite of the discourse of social duties remaining hegemonic for much of India’s postcolonial history, its legitimacy has persistently been contested by the competing discourse of political rights, especially so in the aftermath of the fresh possibilities opened up by the growing democratization of the constitutional field. In the final section, I will argue that it is this irresolvable rivalry between the two discourses traceable to the founding moment which has continued to sustain the project of transformative constitutionalism even in the contemporary age of populist reason.

4 Populist reason

The deeply intertwined relationship between India’s constitutional imagination and its newly acquired political sovereignty sketched out in the previous sections received a fresh recontextualization as the country entered the global age of populist reason in the final decades of the twentieth century. Theorizing the implications of this turn to populism, Partha Chatterjee has influentially argued that while the postcolonial constitutional order was founded as a liberal democratic republic,

‘(its) space of politics effectively became split between a narrow domain of civil society where citizens related to the state through the mutual recognition of legally enforceable rights and a wider domain of political society where governmental agencies dealt not with citizens but with populations to deliver specific benefits or services through a process of political negotiation.’³⁶⁴

³⁶³ Ambedkar (CADs, Vol. XI: 25 November 1949).

³⁶⁴ Chatterjee (2011: 13-14).

For Chatterjee, the politics of civil society more dominant in the early post-founding period was in a sense only a continuation of the anticolonial national movement, with its commitment to the normative precepts of *dharma* emphasizing upon self sacrifice, faith, and dedicated service to the nation. But in the aftermath of the national emergency (1975-1977), as the will of the subjects shifted from an engagement with sovereignty to a concern for governmentality, *dharma* began to be punctuated or supplemented by the ethical principles of *niti* covering the mundane details of administrative policy and procedures of governance.³⁶⁵ This paved the way for the politics of political society, where different moral communities of disadvantaged populations demanded the provision of welfare entitlements even if it required the carving out of illegal exceptions in the normal application of the law. It was in their negotiated settlements with governmental authorities involving the temporary suspension of the rule of law that he saw a new and potentially richer development of democracy in a postcolonial society like India.³⁶⁶

Chatterjee's narrative tracing the move away from a *dharma* oriented civil society to a *niti* oriented political society has no doubt been extremely generative, but it proceeds on the basis of a binary distinction between democracy and constitutionalism which seems rather unpersuasive for the Indian context.³⁶⁷ Although the constraining limitations of constitutionalism could not be squared easily enough with the unfettered exercise of democracy in postcolonial India, both of these features had nevertheless come together from the very inception of the new constitutional order in their simultaneous dedication to the collective self transformation of society. Since the national community over here was transtemporally unified at least in respect of this normative point of joint action, democracy and constitutionalism did not share as tenuous a relationship with each other as they arguably did in the archetypal Euro American constitutional state of the contemporary period. Thus even if the recent turn to populism in India may well be indicative of a general impatience with constitutional procedures and institutions, no governmental regime could claim legitimacy for itself without continuing to pursue the project of transformative constitutionalism inaugurated by the founding framers.

³⁶⁵ Chatterjee (2011: 64-74).

³⁶⁶ Chatterjee (2011: 14-17); Chatterjee (2004).

³⁶⁷ The argument about liberal constitutionalism sharing only a contingent rather than a necessary relationship with democracy has been well fleshed out in many of Chantal Mouffe's works, especially in Mouffe (2000).

While attempting to distinguish between constitutionalism and democracy or civil society and political society, Chatterjee though did not do much to move beyond the analytical treatment of duties and rights essentially as correlative concepts. But as we saw above, it was rather their mutual incompatibility that in a way defined the fault lines of the project of India's collective self transformation. So has been the case under constitutional populism, with the persistence of an unceasing struggle for hegemony between the rival languages of social duties on the one hand and political rights on the other. What has changed in the new context however, is that the real and imaginary now threaten to overwhelm the symbolic dimensions of the fundamentally irreconcilable conflict between these two lifeworlds at the heart of the Indian political.

India's symbolic constitution came under stress after Nehru's death in 1964, and the subsequent Prime Ministership of his daughter and powerful mass leader Indira Gandhi. Mrs. Gandhi was able to garner political power by purporting to radicalize the Nehruvian legacy of the welfare state, but ended up breaking away from him categorically in her attitude towards constitutional democracy. Apart from subordinating the Congress party and its local bosses to the central government, she sought to bypass the Supreme Court which had barred any amendment of the fundamental rights chapter, and struck down a few of her socialist initiatives including bank nationalization and withdrawal of privy purses.³⁶⁸ In order to do so, she made a direct appeal to the people with vague populist slogans like '*garibi hatao*' or 'eliminate poverty', and managed to win a landslide victory in the plebiscitary election of 1971. While the Parliament and judiciary were locked in a compelling battle to determine the nature and scope of amending power, the Allahabad High Court invalidated Mrs. Gandhi's own election to the lower house of Parliament on grounds of electoral malpractices, prompting her eventually to declare a state of national emergency in 1975. This enabled her to suspend the already diluted provisions on civil liberties contained in the constitutional text, and make full use of a repressive apparatus of rule against dissenters of all hues.³⁶⁹ She then positioned herself in the liminal zone of indistinction between a commissarial and a sovereign form of dictatorship, and enacted the most sweeping constitutional amendments in the history of independent India.³⁷⁰ The

³⁶⁸ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643; *R.C. Cooper v. Union of India*, AIR 1970 SC 564; *H.H. Maharajadhiraja Madhav Rao Jiwaji Raoscindia Bahadur v. Union of India*, AIR 1971 SC 530.

³⁶⁹ For a detailed account of the legal and political developments during the emergency, see Austin (1999: 295-313).

³⁷⁰ These changes were such that it was not possible to separate Mrs. Gandhi as defender of the already existing constitution from Mrs. Gandhi as creator of an entirely new constitutional order. For the distinction between commissarial and sovereign dictatorship, see Schmitt (1921: 112-131).

Constitution (Forty-Second Amendment) Act of 1976 attempted to fashion India as a self-professedly socialist and secular republic, and in particular accorded absolute primacy to all of the directive principles over the fundamental rights to equality, freedom and property. It complemented the responsibilities of government by incorporating an altogether new section enlisting the fundamental duties of the citizen, but one which could not match up to the political salience of the directive principles in due course of time.

This imposition of emergency rule faced strong resistance from the Jaya Prakash Narayan lead social movement calling for a ‘Total Revolution’ against the incumbent establishment, and came to an end after the Janata Party defeated the Congress in the general election of 1977. The new government enacted the Constitution (Forty-Fourth Amendment) Act in 1978, which undid much of the forty second amendment, held the right to life and personal liberty without legal authorization to be inviolable even during an emergency, and reduced the status of the right to property from a fundamental right to an ordinary constitutional right. Fundamental rights were no longer viewed by the judiciary as antithetical to directive principles, with the Supreme Court in fact going on to construe their harmonious relationship to be an essential feature of the basic structure of the constitution.³⁷¹ But far from remaining committed to the priorities of a welfare state, this harmony was, at least since the beginning of the 1990s, being increasingly aligned to the concerns of a neoliberal political economy.

Yet in the midst of all these changes, the generation of political power only became more dependent upon an appeal to constitutional populism in one form or another. The Congress though could no longer remain at the forefront of populist politics, given its declining social base and preoccupation with institutions of governmental authority. Its place was gradually taken up by the Bharatiya Janata Party (BJP), acting as the narrow political wing of a much broader social movement of Hindutva or Hindu nationalism. While its major ideologues were initially critical of the Western derivation of the Indian Constitution, the BJP has been able to win elections and form governments both at the central as well as the provincial levels from the 1990s and beyond, precisely by taking advantage of the constitutional institution of a relatively open democracy in the country. The Hindu nationalists in fact did not find the democratic element of the constitution to be as problematic as the background presupposition of India’s composite culture within which it was meant to be operationalized. So they fought

³⁷¹ *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

for the restoration of democracy during the emergency, and participated in politics with the objective of inscribing Hindu culture at the centre of the Indian political. What made the populist turn especially conducive for the BJP's ethno cultural conception of nationalism, was the gradual disentanglement of the democratic field from the symbolic externality of people as an empty signifier, and the concomitant possibility of its redefinition in contrast with the real externality of unassimilable religious minorities in general and Muslims in particular.

Coalition governments headed by the BJP never resorted to the large scale suspension of civil liberties unlike Mrs. Gandhi, but this is primarily because the state of exception has increasingly come to be absorbed into the normal constitution itself in the post-emergency period. Just like the Congress in fact, the BJP also accorded priority to duties over rights, both while espousing Gandhian socialism in its earlier phase, or the championing of neoliberal developmentalism in more recent times, particularly so after the massive electoral mandate of 2014 under the leadership of Narendra Modi and his '*vikas purush*' or 'development hero' image. So even if these duties no longer require the implementation of welfare through the crafting of egalitarian redistributive policies, they do involve the rendering of '*seva*' or 'service' to cater to the basic needs of at least the most disadvantaged in the social sphere. More specifically for the BJP of today, service essentially takes the form of the private provision of local public goods such as education and health, with support from a wider family of socio cultural organizations working in the parental care of the Rashtriya Swayamsevak Sangh (RSS). Only by unconditionally offering social services to the least well off has an otherwise elitist, upper caste, upper class party been able to win over the votes of a growing number of poor and marginalized subalterns, albeit without necessarily giving up on the conservative capitalist policy preferences of its core constituencies.³⁷²

With the augmentation of the transformative constitutional enterprise however, subaltern actors have begun to look beyond the limited role of supplying legitimacy to either of the two dominant national parties, and are instead taking the more radical step of mobilizing on the basis of caste and property to participate in politics on their own terms. Chatterjee may not be entirely off the mark in observing that these mobilizations in political society are meant to resist the juridical norms of civil society, although he does not proceed further to appreciate how they often counterpose the hegemony of the established order to the rival hegemony of another political legality. What comes in his way is a somewhat attenuated understanding of political

³⁷² Thachil (2014).

society as a domain associated exclusively with the ‘politics of the governed’, and not so much as an arena where the politics of sovereignty could also be played out.³⁷³ Such an understanding therefore does not suffice to capture the totality of India’s experience as a postcolonial democracy, where concerns of governmentality remain inextricably interlinked with concerns of sovereignty, even more so in the absence of a stable source of symbolic mediation under conditions of constitutional populism. Therefore while thinking about the participation of subaltern groups and communities in politics today, we must recognize the difficulty of disentangling their interest in negotiating with agents of governmentality from their claim to a share in political power itself, whose origins can ultimately be attributed to the founding moment of postcolonial sovereignty. Emphasizing upon the deeply imbricated relationship between governmentality and sovereignty is not to take away from the distinctiveness of political society as such, but to prepare the ground for its fresh reconceptualization in the language of political rights, which as discussed earlier has been striving to challenge the supremacy of the discourse of social duties more widely familiar to Indian constitutional practice thus far.

Such a reconceptualized political society is best exemplified in the democratic upsurge of the lower castes from the late 1980s and beyond. Although their ever increasing participation in electoral democracy was at one level enabled by the institutional mechanisms of universal adult franchise and special safeguards, it has at another level contributed to the expansion of the constitutional project by forcing the conversion of the reservations policy from a governmental responsibility into a question of political entitlements. The watershed episode here was undoubtedly the decision of Prime Minister V.P. Singh’s National Front government to implement the recommendations of the Mandal Commission, pursuant to which a certain percentage of seats came to be reserved in public employment at the centre for a deliberately broad category of ‘Other Backward Classes’. Adding to the constitutional provision of reservations for the Scheduled Castes and the Scheduled Tribes, this measure extended the benefits of the policy to those socially and educationally backward castes which did not otherwise face a history of untouchability. It in turn created conditions for the greater democratization of the constitutional order, with lower caste politicians coming to dominate State Legislatures in North India, and also acquiring political power under Lalu Prasad Yadav in Bihar, and Mulayam Singh Yadav and Mayavati in Uttar Pradesh. With the anti-Brahminical

³⁷³ Chatterjee (2004).

Dravidian movement having already succeeded in reshaping the political culture of the South, caste emerged as a truly nationwide currency of mass politics and could no longer be ignored or taken for granted by other established rivals. In a radical departure from its conventional rightwing and leftwing variations, this novel form of populism treated caste neither as a fixed ethnic identity nor as a pregiven material interest, but rather as an empty signifier provisionally unifying the disparate and often contradictory demands of the subaltern populous, and inviting India to an alternative democratic imaginary beyond the familiar trope of a secular or communal politics of development.³⁷⁴

The politics of development has surprisingly found another counter response in the politicization of the property concept, even though it is no longer recognized as a fundamental right under the Constitution. We have seen how land reforms were initially pursued in the name of popular sovereignty by restricting, suspending and eventually repealing what was predictably interpreted as a liberal, elitist and aristocratic right to property. In more recent times however, it is property which has appeared on the grid of constitutional populism, in spite of sharing a much closer affinity with political economy than with political sovereignty. This is especially after land acquisition became an instrument in service of neoliberal developmentalism, leaving no option for local, tribal and farming populations apart from resorting to the property argument to protect themselves from displacement and dispossession. They have been agitating with varying degrees of success against different aspects of the construction of the Sardar Sarovar Dam on the Narmada river, as well as in favour of the right of forest dwellers to forest land and resources, and the right to fair compensation, relief and rehabilitation under the new land acquisition law of 2013. A more striking instance of the blurring of the distinction between property and sovereignty occurred in 2007-2008, when the Left Front government of West Bengal invoked its eminent domain power to acquire farmlands for large industrial developments in the Special Economic Zones of Singur and Nandigram. This expropriation of peasant property resulted in violent clashes involving villagers, police and party cadre, culminating in the historic 2011 electoral defeat of the Left after 34 years in government, and their replacement by the subaltern populism of the Trinamul Congress leader Mamata Banerjee. The lands acquired have subsequently been returned back to their respective

³⁷⁴ For the political anthropology of democracy against development in Bihar relying upon Ernesto Laclau's theorization of populist reason, see Witsoe (2013); also see Laclau (2005).

owners, with Banerjee now busy preparing herself to take on the Hindu nationalist and developmentalist populism of the BJP, both in Bengal as also at the centre.³⁷⁵

Conclusion

In this chapter, I have attempted to complicate the story of India's experience with transformative constitutionalism by connecting it with the intellectual history of legal and political dissensus shaping the constitutional enterprise as a whole. Although most constitutional actors nominally agreed that the normative point of their joint action was the collective self transformation of society in India, they came to share a profound disagreement in respect of how such a task was to be precisely pursued. This disagreement has produced two incompatible discursive modalities of social duties and political rights, which remain as irreconcilable with one another in the contemporary age of populist reason, as had been the case around the founding moment of postcolonial sovereignty. But while their battle was previously waged in the symbolic languages of social law and political law, in more recent times it is increasingly being played out in the register of the real and the imaginary.

Moving away from a common understanding of duties and rights as correlative concepts, I have dealt with them separately as constitutive elements of two rival lifeworlds, and examined the implications of prioritizing one over the other for the Indian political. Although the discourse of social duties has acquired a near hegemony on the constitutional field, it continues to face an ever intensifying challenge from the counter hegemony of the discourse of political rights. I believe that only in the persistence of this unresolvable conflict can the autonomy of the political be preserved today, especially given the ascendancy of a threateningly all subsuming neoliberal developmental nationalism in the country. Another potential source of trouble for India's autonomous political however stems from an equally all pervasive culture of judicializing politics under its activist Supreme Court, to which I now turn in the final chapter of the thesis.

³⁷⁵ For an insightful reading of Trinamul's populism, see Samaddar (2015); for a socio intellectual history of the property concept in Bengal grounded in political economy, see Sartori (2014).

CHAPTER V

LEGAL THEOLOGY AND THE SUPREME COURT AS AN AGENT OF CONSTITUENT POWER

Introduction

In the previous chapter, I showed how different visions of collective self transformation that had been circulating around the founding moment of postcolonial India and extending up to the more contemporary period of populist reason came to be expressed in either of the two fundamentally irreconcilable discursive languages of social duties or political rights, which were in turn drawn from the rival symbolic lifeworlds of social law and political law respectively. But my investigation proceeded on the basis of an originalist expectation about the legislative and executive organs of government being at the forefront of authoritatively mediating between the various social and political movements proliferating in the country on the one hand, and the normative point of joint action of the collective constitutional subject on the other. Since the 1970s and 1980s however, even the higher judiciary has emerged as an active agent in the constitutional order, by assuming upon itself the task of articulating, enforcing and monitoring the project of transformative constitutionalism. I therefore turn to the rise of juristocracy and in particular examine its implications for the autonomy of the Indian political in this final chapter of the thesis.

The last few decades have seen a considerable expansion in the constitutional role of India's Supreme Court, with an ever increasing variety of governmental and non-governmental activities coming to be subjected to the rigours of judicial scrutiny. Apart from seeking to uphold fundamental rights and adjudicating upon issues of legislative and executive competence, the Court directly intervenes in matters as broad ranging as the provision of welfare, good governance, environment protection, transparency and accountability of public institutions, and the appointment of judges and their transfers. Its jurisdiction is no longer limited to the striking down of illegal and unconstitutional actions, and participation in conventional and creative interpretive exercises alone, but also extends to the formulation of administrative policies, enactment of ordinary legislations, and most remarkably even to the determination of validity of constitutional amendments. No wonder then that it is widely recognized as one of the most powerful constitutional courts in the world today.

Notwithstanding a general acknowledgment of the Supreme Court's growing prominence however, there is little scholarly consensus on how precisely to make sense of the concomitant judicialization of different aspects of social and political life in the country. Constitutional lawyers usually emphasize upon the Court having shifted from a formalist reading of the Constitution in the early years of independence, to a more structuralist style of interpretation after the late 1960s.³⁷⁶ While individual constitutional provisions were initially construed as mutually exclusive, they came to be approached later on in an integrated manner as deeply interlinked with one another, a move which then paved the way for the subsequent activism of the judiciary from the 1970s and 1980s. The Court is appreciated by proponents of this view for orienting particular constitutional laws to the higher values embedded in the constitutional text, and is also criticized whenever its decisions fail to evince any engagement with precepts of public reason.

In contrast, political scientists believe that the resort to normative principles does not suffice to explain the so called phenomenon of 'judicial sovereignty', as its legitimacy is ultimately dependant upon the empirical or sociological acceptance of the people in a democratic society.³⁷⁷ They understand the Court not so much as an expounder of the constitutional text or binding precedents of the past, but more as a sovereign meaning creator, instrumentally deploying the legal form to arrive at a substantive compromise between competing concerns and interests without provoking a significant backlash from other representative institutions. This move from public reason to reason of state thinking in assessments of the judicial role no doubt offers a better approximation of the ground reality than is possible under the thick prescriptivism of a purely normative approach. However such a view runs the risk of equating law with pure efficacy, and as a consequence overlooking its constitutive role in fashioning a collective constitutional imagination for postcolonial India.

I would instead take as my starting point a third view which seeks to connect the emergence of judicial activism to the Supreme Court's assumption of an extraordinary jurisdiction of reviewing Parliamentary exercises of constituent power by asserting what Upendra Baxi has called a concurrent constituent power of its own as a co-ordinate authority in respect of

³⁷⁶ Sathe (2006: 215-265); for a Hartian corrective to Sathe's formulation, see Krishnaswamy (2009: xxiv-xxv).

³⁷⁷ Mehta, PB (2007: 70-83); Mehta, PB (2015: 233: 260).

constitution making.³⁷⁸ Much akin to Paul Kahn's richly illuminating account of the Supreme Court of the United States, the Supreme Court of India no longer speaks merely in an adjudicative, executive or even legislative voice, but is in fact increasingly claiming to speak in the constituent voice of the people themselves.³⁷⁹ Their anchoring in sovereignty is best manifested in a commonly shared culture of power and authority, which is markedly distinct from the culture of principled justification associated with the constitutionalization of administrative law and the administratization of constitutional law accompanying the post-sovereign European and global standard of proportionality review.³⁸⁰ Besides this nominal convergence however, little else is similar in the engagement of both courts with constituent power, for unlike in Kahn's story, it is difficult to establish a directly equivalent relationship between the languages of popular sovereignty and rule of law in the Indian context. We can rather discern over here an unbridgeable gap between the voice of law and the voice of the people, owing essentially to the irresolvable rivalry between the two conflicting hegemonic formations of social law and political law that have been separately seeking to bring them together in a tighter fusion with one another. In order to make sense of the judicial engagement with their irreconcilable contradictions however, I must begin by first connecting the constitutional jurisprudence of the Supreme Court with the reason of the Indian political.

This chapter is divided into three parts. Part one traces the theological antecedents of the basic structure doctrine introduced in the *Kesavananda Bharati* case (1973) to the essential practices doctrine enunciated in the early jurisprudence on freedom of religion. It complicates the easy constitutionalist rendition of the Supreme Court as committed to the autonomy of law and legal formalism in the initial years, and establishes that the judiciary had also aligned with other organs of the government during this period to pursue a commonly shared goal of social reform, by interpreting law as revelation in line with law as command and law as reason. With a view to persuade religious communities about the need for reform, the Court ended up offering them internal reasons from within their own tradition, a phenomenon which in turn supplied an appropriate template for the subsequent sacralization of the constitution itself. Part two argues in a similar vein that basic structure limitations on the constituent power of Parliament came to be legitimized only on the touchstone of the internal reason of the Indian political. This

³⁷⁸ Baxi (1985:107); see also Baxi (1978:122-143).

³⁷⁹ Kahn (2011A: 13-17); Kahn (2016).

³⁸⁰ For a cultural reading of the difference between the US and European approaches to judicial review, see Cohen-Eliya and Porat (2013).

implied that the Court was no longer able to talk about the transcendentalism of fundamental rights, and had to instead resort to the founding vision of social transformation under an open democracy in all of its power generating judgments of the 1970s and 1980s. The constituent power thus generated by speaking and acting in the name of the people paradoxically equipped it to even move beyond the limitations of ordinary constitutional legality in public interest litigation cases. But rather than supporting a proceduralist and normativist critique of this exercise, I engage with it in more substantive and political terms, and in part three finally turn to the judicial response to the repoliticization of religion and caste from the 1990s onwards. My contention is that the judiciary has managed to portray itself as a successful agent of constituent power, by negotiating with these developments and their inherent contradictions in the rival incompatible languages of social reason grounded in the positive theology of being on the one hand, and political reason grounded in the negative theology of becoming on the other.

1 The theological antecedents of basic structure constitutionalism

In the 1973 case of *Kesavananda Bharati v. State of Kerala*, a thirteen judge bench of the Supreme Court set out to ascertain whether there were any inherent or implied limitations on the constituent power of Parliament to amend the Constitution under Article 368. Put briefly, Article 368 had laid down that most constitutional provisions could be amended by a two thirds supermajority in both Houses of Parliament, except those provisions dealing with federal arrangements which additionally required ratification from at least ten State Legislatures. By a seven to six majority, the Court famously decided that as long as these procedural prescriptions were being followed, Parliament was authorized to amend each and every provision of the constitutional text, without however altering the essential features of its basic structure. The wide sweep and amplitude of amending power could not have the effect of abrogating the basic structure of the existing constitution, as this tantamounted to destroying its very identity. As explicated in H.R. Khanna, J.'s holding opinion,

‘The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the

retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution.³⁸¹

This basic structure was read into the constitutional text even though no explicit limitations had been imposed on the scope of amending power by the founding framers. The legitimacy of the new doctrine, and the identification and interpretation of its essential features therefore remain open questions, which have unsurprisingly attracted considerable scholarly attention in the last four decades or so. There exists a broad agreement among supporters of the doctrine that the essential features of the constitutional basic structure refer to systematic principles underlying and connecting the various provisions of the constitution and making it a coherent document. However, two completely different strands of opinion have emerged about the nature of the basic structure within this expansive field of constitutionalist consensus.

While the first view considers the doctrine to be mirroring the continental European experience in pointing to constitutional principles as imperatives of optimization with standards admitting of some flexibility, the second commends a distinctly common law technique for discovering these principles through a structural and multiprovisional reading of the constitutional text.³⁸² On the contrary, critics associate the doctrine with the counter majoritarian difficulty of judicial review and worry about its impact on the functioning of democracy as a whole.³⁸³ They also remind us that India's constitution makers had categorically rejected strong entrenchment provisions, and so the *Kesavananda* judgment could only signify a break from rather than a continuation of the original vision of transformative constitutionalism.³⁸⁴

My problem with the former approach is that it seeks to theorize constitutional practice in India by drawing from global models of normative constitutional theory, and not from within the internal point of view of the Indian political, which remains a necessary precondition for any new intervention to garner legitimacy in the final analysis. Although the second approach purports to take the internal point of view seriously, it either reduces democracy and constituent power to participatory institutions of government, or refuses to countenance the possibility of a judicially sponsored augmentation of the original constitutional vision of the founding

³⁸¹ Khanna, J. in *Kesavananda*, para 1480.

³⁸² For the continental perspective, see the three influential articles of Dietrich Conrad on constituent power and basic structure, republished in Conrad (1999); for the common law approach, see Krishnaswamy (2009).

³⁸³ Ramachandran (2000: 107-133).

³⁸⁴ Dasgupta (2014: 227).

framers. I would therefore move beyond both of these positions, and instead treat the basic structure doctrine as a judicial innovation internal to the Indian political, whose antecedents can in fact be traced back to the Supreme Court's development of the essential practices doctrine in its 1950s and 1960s jurisprudence on the freedom of religion.

1.1 Religious freedom and social reform

It is convenient to present the constitutional history of early postcolonial India as one involving a perennial tension between an activist legislature and a formalist judiciary. Such may certainly have been the case in respect of land reform and affirmative action, but not necessarily so when it came to the question of social reform, which had in fact brought the two organs closer together from the very beginning of the constitution. This is because the judiciary shared the legislative interest in reforming the Hindu religion, even if it required infringing upon the autonomy of religious denominations. My contention will however be that the theological voice of persuasion adopted by the Supreme Court in freedom of religion cases later cleared the path for a similar exercise aimed at convincing the Government in Parliament in cases dealing with constitutional amendments.

The right to freedom of religion guaranteed to individuals and communities under Articles 25 and 26 of the Constitution was specifically made subject to public order, morality, health, and other provisions of Part III pertaining to fundamental rights. It could further be curtailed by laws enacted for the purpose of regulating or restricting any economic, financial, political or secular activity associated with religious practice, or providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. By vesting such an enormous competence in governmental authorities over matters of religion, India's constitutional text in effect prepared the ground for its thorough depoliticization, without conclusively determining whether secularism or some other ideology was at all required to fill in the void thus created. Not even did the judiciary contest this constitutionally enshrined supremacy of government over religion in the name of group rights, but the manner in which it came to portray itself as an ally of social reform holds instructive lessons for the future course of constituent power in the country.

One of the earliest instances of judicial deference towards the legislative programme of social reform was the Bombay High Court decision in *State of Bombay v. Narasu Appa Mali*.³⁸⁵ This case involved a challenge to the constitutional validity of a law criminalizing bigamous marriages among the Hindus of Bombay, on grounds of violating the right to equality and the right to freedom of religion under Articles 14, 15 and 25 of the Constitution. It was argued by a convict under this law that the legislature could not regulate the sacramental institution of Hindu polygamous marriages, especially so without subjecting Muslim men contracting polygamous marriages to a similar prohibition. The Court rejected his objections by holding that religious freedom could not come in the way of a social reform measure promoting monogamy, enacted into law by a legislature composed of the ‘chosen representatives of the people’.³⁸⁶ Such a measure did not become unconstitutional only because Muslims were excluded from its purview, as the legislature ‘may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise.’³⁸⁷ Muslim family law permitting polygamy did not become void at the inception of the constitution for the reason of discriminating against women, as uncodified personal law did not fit the definition of ‘law’ and ‘laws in force’ under Article 13, and was thus by itself deemed unamenable to fundamental rights review. Only customary and statutory forms of law were believed to have been brought under the jurisdiction of Part III, and not so the personal laws of different religious communities, which although administered by courts in India, ultimately derived their origin from a divine rather than an earthly source: ‘The foundational sources of both the Hindu and the Mahomedan laws are their respective scriptural texts.’³⁸⁸ So the constitutional scheme in respect of personal laws was to leave them largely unaffected, barring a few exceptions relating to the abolition of untouchability and the throwing open of Hindu religious institutions. It was not for the judiciary to strike down personal laws on the touchstone of fundamental rights, but for the legislature to improve, modify or abolish them, and eventually fulfil the constitutional directive of securing for the citizens a uniform civil code throughout the territory of India.³⁸⁹

As various legislatures continued to pursue their constitutionally prescribed social reform agenda by intruding into different aspects of Hindu personal law, the Supreme Court began engaging more carefully with the freedom of religion argument, and developing a theologically

³⁸⁵ AIR 1952 Bom 84.

³⁸⁶ Id., para 7.

³⁸⁷ Id., para 10.

³⁸⁸ Id., para 20.

³⁸⁹ Id., para 13.

inflected essential practices doctrine to justify these interventions. A more convenient alternative for the Court would have been to authorize such legislative enactments by reading into the constitutional text a Protestant distinction between belief and action familiar from colonial jurisprudence, and extending the protection of religious freedom to the former in the private sphere, whilst strictly regulating the latter in the interest of public welfare wherever necessary.³⁹⁰ In the *Shirur Mutt* case, it instead opted to emphasize that this right not only guaranteed the freedom of religious opinion alone, but the freedom to practice religion as well:

‘A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.’³⁹¹

This expansion in the scope of the right at one level was however accompanied by a greater curtailment at another level, such that it gradually came to be restricted merely to those practices which were deemed integral or essential to a particular religion. What is more, these essential practices were to be determined not so much by the faithful themselves, but by the Court assuming upon itself the priestly responsibility of deciding on behalf of every single community contesting social reform.³⁹²

Among the more effective expositions of this theological voice in the first two decades of the Supreme Court was the judgment of P.B. Gajendragadkar, CJ. In *Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya or the Satsangi* case.³⁹³ The *satsangis* were followers of the religious teacher and saint Swaminarayan (1780-1830), and claimed exemption from the Bombay Hindu Places of Public Worship (Entry Authorization) Act 1956 on grounds that their sect did not form part of the Hindu religion. This legislation had opened up Hindu temples in Bombay for the ‘Harijans’, that is the Dalit community of former untouchables, to worship in the same manner and to the same extent as other Hindus. In order to prevent non-*satsangi* Dalits from entering their temples, the *satsangis* presented themselves as a distinct denomination separate from the Hindus, on the basis that they worshiped Swaminarayan as supreme God, established temples for his worship and not of any traditional Hindu idols,

³⁹⁰ For the Protestant paradigm of colonial legal engagement with religion, see Yelle (2009: 141-171).

³⁹¹ *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, para 17.

³⁹² Dhavan and Nariman (2000: 256-289).

³⁹³ AIR 1966 SC 1119.

propagated the ideal that worship of any God other than Swaminarayan was a betrayal of his faith, and admitted new devotees through a procedure of initiation called *diksha*. Gajendragadkar could have followed the model of a previous decision on temple entry in which the Court sought to balance and harmoniously interpret the two apparently conflicting constitutional provisions on the right of religious denominations to manage their own affairs in matters of religion and the governmental duty to carry out social reform.³⁹⁴ However in this case, he proceeded further to hold that *satsangis* belonged to the Hindu religion itself and were therefore not entitled to protection from social reform in the name of special denominational rights.

In Gajendragadkar's opinion, the Swaminarayan sect was included within the broad ambit of Hinduism, interpreted not so much as a narrow religion or creed, but more as an expansive way of life:

‘Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.’³⁹⁵

Its enormous heterogeneity was understood to be unified in the different philosophies of monistic idealism, one of which was the *Visishtadvaita* or qualified monism of Ramanuja, whose teachings Swaminarayan approved and followed. What unambiguously brought Swaminarayan within the Hindu fold was his ‘acceptance of the Vedas with reverence, recognition of the fact that the path of bhakti or devotion leads to moksha, and insistence on devotion to Lord Krishna.’³⁹⁶ He was in fact proclaimed to be a Hindu saint and religious reformer, who fought the irrational and corrupt practices that had crept into the religion, and gave birth to a new sect with its distinct tenets which were ultimately grounded in Hindu theology and philosophy. Gajendragadkar went on to observe that the *satsangi* apprehension about Dalit entry in their temples was ‘founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.’³⁹⁷ As if to commend itself to the

³⁹⁴ See *Sri Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255.

³⁹⁵ Sastri Yagnapursdasji, para 29.

³⁹⁶ Id., para 52.

³⁹⁷ Id., para 57.

collective selfhood of the Hindus, the judgment contextualized the temple entry issue within the transformative changes taking place on India's constitutional landscape, and concluded on this expectant note:

'While this litigation was slowly moving from Court to Court, mighty events of a revolutionary character took place on the national scene. The Constitution came into force on the 26th January, 1950 and since then, the whole social and religious outlook of the Hindu community has undergone a fundamental change as a result of the message of social equality and justice proclaimed by the Indian Constitution. . . . In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights,, for let it always be remembered that social justice is the main foundation of the domestic way of life enshrined in the provisions of the Indian Constitution.'³⁹⁸

This judgment shows how the judicialization of religion paradoxically resulted in the theologization of the judicial function, so much so that the Supreme Court did not mind occasionally indulging in scriptural exegesis for the purpose of isolating and sanctifying the essential features of a religion purified of all corrupt, irrational and superstitious accretions. It is easy to be critical of such an exercise from a purely normative point of view for moving beyond constitutional principles of adjudication, and also from a sociological point of view for prioritizing doctrinal interpretations of classical Hinduism over messy details of lived experience and social reality.³⁹⁹ I would however emphasize that this development was very much a plausible explication of the anticolonial movement and its irresistible attraction for the theologico political. So even if the judicial entanglement with religion may have deviated from constitutional secularism and resulted in coercion and domination over customary forms of life, what is important for my argument is that its justifications were framed in the persuasive voice of national sovereignty offering Hindu religious communities reasons internal to their own cultural imagination for reforming themselves in consonance with India's evolving constitutional imagination. Only after deriving legitimacy from this pro-governmental intervention in the religious life of the country could the Court subsequently branch off into other areas, extending even to the domain of constitutional amendments and constituent power.⁴⁰⁰

³⁹⁸ Id., para 59.

³⁹⁹ For critical treatments of the essential practices doctrine, see Dhavan and Nariman (2000: 256-287); Sen (2010: 1-72); John (2013).

⁴⁰⁰ After a careful study of Gajendragadkar CJ's activist judgments, P.K. Tripathi made the following remarks: 'Possibly the most vulnerable aspect of Gajendragadkar's opinions has been the process of decimating the sanctity of the constitutional text they seem to have inaugurated ... As is well recognized the dividing line between

1.2 Law as revelation, law as command, law as reason

We may now link the jurisprudence on freedom of religion with constitutional amendments by drawing upon the three conceptions of law which were available to different actors in these constitutional debates—law as revelation, law as command, and law as reason. When couched in such terms, it is not difficult to explain why the judiciary sided with the legislature and upheld the constitutionality of social reform over concerns of religious freedom. This was largely because the legislative law as command and judicially elucidated law as reason were both equally interested in sublating the influence of divine law as revelation on the constitutional culture of the Indian political. But inter-institutional conflicts became unavoidable as soon as positive law and natural law confronted each other on opposite sides of the constitutional divide, in the tension between land reform and the right to a just compensation, and that between affirmative action and the right to formal equality. As courts started invoking fundamental rights to strike down governmental interventions in the property question and the imposition of caste based quotas in public education, the Parliament responded by amending the constitutional text in order to overturn such judicial decisions which failed to persuade its nationalist imagination. In particular, it inserted into the Constitution Article 15(4) authorizing special measures for ‘socially and educationally backward classes’, Article 31-A enabling the legislative abolition of Zamindari, and Article 31-B creating the Ninth Schedule for the purpose of according a blanket protection to laws specified therein from fundamental rights review. The constitutional tussle did not end over here however, and was only transferred from the ordinary domain of constituted power to the more foundational and extraordinary domain of constituent power itself.

While initially in *Sankari Prasad*⁴⁰¹ and *Sajjan Singh*,⁴⁰² the Supreme Court conceded that constitutional amendments enacted in exercise of ‘sovereign constituent power’ could not be subjected to substantive judicial review, it later opined in *I.C. Golaknath v. State of Punjab* that the amending power of Parliament was merely a species of legislative power, and could not be deployed to abridge fundamental rights which had been accorded a ‘transcendental position

interpretation and alteration is tenuous and deceptive. Constitutional interpretation can take the place of constitutional amendment and the interpreter that of sovereign authority invested with the power of amending.’ Tripathi (1972: 99).

⁴⁰¹ *Sankari Prasad v. Union of India*, AIR 1951 SC 458.

⁴⁰² *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

under the Indian Constitution'.⁴⁰³ After oscillating between upholding constitutional amendments as supreme positive law and protecting fundamental rights as supreme natural law, the Kesavananda Bharati Court unanimously overruled *Golaknath* by endorsing the validity of the Constitution (Twenty-fourth Amendment) Act 1971, which had declared that constitutional amendments were not included within the definition of 'law' under Article 13. *Kesavananda* did not seek to restore the status quo of the pre-*Golaknath* position, but to entrench only those features which could be regarded as essential for sustaining the 'identity' of the constitution. Starkly reminiscent in fact of the various judicial pronouncements on the essential practices of religion, two judges in *Kesavananda* had this to say about the nature of the constitutional basic structure:

'Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. ... The personality of the Constitution must remain unchanged.'⁴⁰⁴

Thus in effect, *Kesavananda Bharati* can be seen as having prepared the ground for the sacralization of the constitution in subsequent years, a crucial point which often gets overlooked in the burgeoning literature on the judgment. The theological dimension of basic structure constitutionalism has been mostly neglected so far because of a widely prevalent tendency in constitutional scholarship to reduce its legitimacy either to legal and moral normativity on the one hand, and sociological efficacy on the other. Looking beyond these two positions, I shall instead continue my analogy with the freedom of religion, and argue that just as religious denominations were given reasons internal to their own cultural tradition to pursue social reform, the rise of juristocracy similarly drew its legitimacy from reasons of persuasion which could in the final analysis be regarded as internal to the Indian political.

⁴⁰³ AIR 1967 SC 1643, para 24.

⁴⁰⁴ K.S. Hegde and A.K. Mukherjea JJ., in *Kesavananda Bharati*, para 690.

2 Reason of the Indian political

My thesis about the theologization of constitutional identity in India invites attention to a germinal controversy relating to the idea of the constitution itself. If we briefly borrow from the famous inter-War German debate on the subject, the constitution can be understood either as an abstract order of legal unity, or else as a concrete order of political unity, as was to be found in the conflicting intellectual positions of Hans Kelsen and Carl Schmitt respectively. While Kelsen viewed the constitutional system as a hierarchical arrangement of legal norms unified by the presupposition of a *grundnorm* or basic norm,⁴⁰⁵ Schmitt in contrast equated the constitution with the political conditions of a pre-established or dynamically emerging collective unity which the practice of legality could itself not guarantee.⁴⁰⁶ These competing legal and political conceptualizations of the constitution in fact determined for the two thinkers which institutional agent was to be regarded as its chief guardian, that being the constitutional court in Kelsen's scheme, as opposed to the executive president in Schmitt's account.⁴⁰⁷

In India's case however, I would argue contra Kelsen that the sacralization of the formal constitution derived legitimacy from the collective imagination of the Indian political, and contra Schmitt that the Supreme Court managed to claim a share in its guardianship by speaking in the constituent voice of the people themselves. But inscribing the judiciary in a political constitution throws up another complicated paradox, that unlike Schmitt's political theology which was premised upon the Heideggerian dictum that 'existence precedes essence', the Indian Supreme Court appeared to be protecting the constitution from legislative and executive incursions precisely by harping upon its 'essential features' as a normative court of superlegality.⁴⁰⁸ It is this conundrum that I seek to address by connecting the constitutional jurisprudence on basic structure with the counterlegality of public interest litigation in this section.

2.1 Democracy and the legitimization of *Keshavananda Bharati*

That the judicial innovation of basic structure constitutionalism could not have been anticipated by India's constitution makers is hardly deniable. Nevertheless, we must also remember that

⁴⁰⁵ Kelsen (1992: 57).

⁴⁰⁶ Schmitt (2008/1928: 61).

⁴⁰⁷ For the Kelsen-Schmitt debate on constitutional guardianship, see Vinx (2015).

⁴⁰⁸ Schmitt (2005).

this doctrine emerged only as a distinctive response to two contrasting concerns which had very much been part of its founding constitutional imagination. As can be gaged from the initial few cases on constitutional amendments, the Court had an unenviable task of negotiating between the governmental assertion of unlimited constituent power and the non-governmental defence of unamendable fundamental rights, with both sides purporting to be equally anchored in competing concerns of the founding framers pertaining to the prevention of extraconstitutional revolution at one end and anticonstitutional dictatorship at another. After aligning either with the government or the opposition in the first three cases, it enunciated the basic structure doctrine in *Kesavananda Bharati* to arrive at a provisional reconciliation between the two positions, an outcome which has ever since been able to withstand the test of ordinary and extraordinary constitutional time.

It may be suggested with the advantage of hindsight that *Kesavananda Bharati* has remained salient in India's constitutional jurisprudence because of the Court's willingness to disown the *Golak Nath* ratio about the sanctity of fundamental rights. Although a majority of seven judges unprecedentedly did strike down one part of the Constitutional (Twenty-fifth Amendment) Act 1971 inserting Article 31-C into the constitutional text, their action was aimed not at reversing its authorization of legislative measures giving effect to directive principles laid down under Articles 39(b) and 39(c) even by denying the right to equality, freedom and property, but rather at ensuring the availability of judicial review of legislative declarations proclaiming to be in compliance with these directives. In Khanna's opinion, natural rights were positivized and made subject to statutory and constitutional amendments:

‘It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. ... [These] rights, having been once incorporated in the Constitution or the statute, can be abridged or taken away by amendment of the Constitution or the statute.’⁴⁰⁹

This determination had the specific effect of decentering the right to property from judicial imagination, although the fate of other fundamental rights was still left unambiguously undecided. What it did succeed in anticipating, was that the judges would from then on, cease to argue about the unamendability of fundamental rights in general, and instead debate as to

⁴⁰⁹ *Kesavananda Bharati*, para 1509.

whether particular fundamental rights were part of the basic structure or only their core and essence.

The basic structure doctrine was legitimized in the very first case of its judicial application, requiring the Supreme Court to connect the rule of law not with the contentious issue of rights or essence of rights, but with the more uncontested postulate of democracy which had nominally unified most of the different voices of consensus and dissensus at the founding moment. *Indira Nehru Gandhi v. Raj Narain*⁴¹⁰ came up for adjudication during the national emergency (1975-1977), and involved a constitutional challenge to the Constitution (Thirty-ninth Amendment) Act 1975. Put briefly, this constitutional amendment had voided an Allahabad High Court decision invalidating Prime Minister Indira Gandhi's election to the lower House of Parliament in 1971, and had further withdrawn the election of the Prime Minister from the purview of judicial review.

A majority of four out of the five judges on the Constitution Bench struck down the new Article 329A(4), which was in effect enacted only for the purpose of preventing Mrs. Gandhi's removal from the office of Prime Minister. While M.H. Beg, J. partially differed with the majority and read the impugned provision in such a way that it did not oust the jurisdiction of courts, even he remained committed to the sovereignty of the constitution rather than that of any governmental organ:

‘All constitutional and “legal” sovereigns are necessarily restrained and limited sovereigns. . . particularly as the dignitaries of State, including Judges of superior Courts, and all the legislators, who have to take oaths prescribed by the Third Schedule of our Constitution, swear “allegiance” to the Constitution as though the document itself is a personal Ruler. This accords with our own ancient notions of the law as “The King of Kings” and the majesty of all that it stands for.’⁴¹¹

In the majority were voices like that of K.K. Mathew, J., who problematized the constituent exercise of a judicial function without enacting an enabling law as an act of ‘irresponsible despotic discretion’:

‘A sovereign in any system of civilized jurisprudence is not like an oriental despot who can do anything he likes, in any manner he likes and at any time he likes. That the

⁴¹⁰ 1975 Supp. (1) SCC 1.

⁴¹¹ Id., para 557.

Nizam of Hyderabad had legislative, judicial and executive powers and could exercise any one of them by a firman has no relevance when we are considering how a pro-sovereign—the holder of the amending power—in a country governed by a constitution should function. Such a sovereign can express ‘himself’ only by passing a particular kind of law; and not through sporadic acts. ‘He’ cannot pick and choose cases according to his whim and dispose them of by administering ‘qadi-justice’.⁴¹²

Related with this rule of law argument was the argument of procedural democracy most forcefully articulated by Khanna, who held Article 329A(4) to be violative of the principle of ‘free and fair elections’ for failing to provide a machinery for the resolution of an electoral dispute:

‘Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion. . . . To confer an absolute validity upon the election of one particular candidate and to prescribe that the validity of that election shall not be questioned before any forum or under any law . . . [on grounds of] improprieties, malpractices and unfair means . . . is subversive of the principle of free and fair election in a democracy.’⁴¹³

These powerful pronouncements notwithstanding, what became immediately significant for the ruling regime was that all five judges unanimously upheld Mrs. Gandhi’s appeal against the High Court decision on merits by validating the retroactive amendments made to the ordinary election law, and thus allowing her to stay on as Prime Minister. Except in Khanna’s judgment, the basic structure doctrine was after all deemed applicable only to constitutional amendments, and therefore as a result, that which could not be accomplished by resorting to constituent power, was curiously permitted under legislative power itself. But far from producing an anomalous situation, such an attempt at combining strong persuasive opinions with a relatively weak decisional outcome provided the Supreme Court a useful template to try perfecting in subsequent years, in order to enhance its own credibility vis-à-vis other institutional actors on the constitutional field.

Emergency rule ended two years later, after fresh elections in early 1977 deposed Mrs. Gandhi’s Congress government and replaced it with the coalition government of the Janata Party. But this was not before the passage of the Constitution (Forty-second Amendment) Act

⁴¹² Id., para 325.

⁴¹³ Id., paras 198-201.

1976, unarguably the most extravagant constitutional enactment in the history of independent India. Among its other far reaching clauses was Section 4, which amended Article 31-C to provide for the absolute primacy of all the directive principles over the fundamental right to equality, freedom and property, and Section 55, which amended Article 368 to declare that there were no limitations what so ever on the constituent power of Parliament to amend any provision of the Constitution. These changes to the constitutional text in effect sought to nullify the ratio in *Kesavananda Bharati* and dispense with the basic structure doctrine altogether. As a result, the very survival of the doctrine was at stake when the Forty-second Amendment came up for judicial scrutiny in the post-emergency period, albeit only after the Janata government had enacted the Forty-fourth Amendment Act 1978, repealing the right to property from the chapter on fundamental rights and converting it into an ordinary constitutional right instead.

*Minerva Mills v. Union of India*⁴¹⁴ was a five judge Constitution Bench decision, in which Sections 4 and 55 of the Forty-second Amendment Act were struck down as unconstitutional, on the basis that a limited amending power and a harmonious relationship between fundamental rights and directive principles were both essential features of the constitutional basic structure. Writing on behalf of himself and three other colleagues, Y.V. Chandrachud, CJ. who had previously rejected the idea of a basic structure now fervently propagated in the spirit of a convert:

‘The theme song of the majority decision in *Kesavananda Bharati* is: Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.’⁴¹⁵

Rather than insisting on prioritizing one over the other, he spoke about balancing and harmonizing the ‘means’ contained in Part III with the ‘ends’ of Part IV, which when read together constituted the ‘core’ and ‘conscience’ of the Constitution. Since the controversial right to property was no longer in contention, he was able to make a more eloquent case in favour of pursuing directive principles by adhering to the discipline of equality and liberty:

‘Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that

⁴¹⁴ AIR 1980 SC 1789.

⁴¹⁵ Id., para 21.

golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.⁴¹⁶

This abstract formulation of balance and harmony between Parts III and IV was not merely intended to limit governmental action alone, but implicitly also gestured to a growing judicial confidence in finally willing to own up to the concrete conditions of the Indian political. A more explicit expression of faith in the continuing legacy of the founding constitutional imagination followed in Chandrachud's qualified validation of Article 31-A, Article 31-B and the unamended Article 31-C in *Waman Rao*'s case, which was actually decided at the same time as *Minerva Mills*.⁴¹⁷ After quoting from Prime Minister Jawaharlal Nehru's Parliamentary speeches in defence of the First and Fourth Amendments, Chandrachud acknowledged that

'these amendments, especially the 1st were made so closely on the heels of the Constitution that they ought indeed to be considered as a part and parcel of the Constitution itself. They are, in the truest sense of the phrase, a contemporary practical exposition of the Constitution.'⁴¹⁸

He observed that the goal of economic redistribution was very much enshrined in Articles 39(b) and 39(c) of the directive principles, and invoking the collective singular perspective of constituent power, retrospectively declared that amendments aimed primarily at removing hurdles on the path of land reform in the agricultural sector only strengthened the constitutional basic structure rather than weakening it:

'We embarked upon a constitutional era holding forth the promise that we will secure to all citizens justice, social, economic and political; equality of status and of opportunity; and, last but not the least, dignity of the individual. [If] there is one place in an agriculture-dominated society like ours where citizens can hope to have equal justice, it is on the strip of land which they till and love, the land which assures to them the dignity of their person by providing to them a near decent means of livelihood. The provisions introduced by [the First and Fourth Amendments] for the extinguishment or modification of rights in lands held or let for purposes of agriculture or for purposes ancillary thereto, strengthen rather than weaken the basic structure of the Constitution.'⁴¹⁹

⁴¹⁶ Id., para 79.

⁴¹⁷ *Waman Rao v. Union of India*, (1981) 2 SCC 362.

⁴¹⁸ Id., para 26.

⁴¹⁹ Id., paras 29-30.

2.2 Social activism of PIL

While owing up to the Indian political may have required a considerable degree of judicial deference towards the legislative and executive organs of government, it also enabled the Supreme Court to move beyond insisting upon the autonomy of law from politics, and instead emerge as an autonomous agent of constituent power through a creative appropriation of the discourse of social transformation. The Court in particular began to make a growing number of directive principles indirectly justiciable, by reading them into a substantially expanding right to life and personal liberty under Article 21 of the Constitution. It further abandoned the certitude of legal formalism, relaxed the adjudicative criterion of locus standi, and instituted a procedurally unrestrained mechanism of public interest litigation for the realization of social rights.

Public interest litigation or PIL can by no means be regarded as a uniquely Indian phenomenon, as similar procedural and substantive changes have contributed to the rise of juristocracy across much of the globe from the latter half of the twentieth century.⁴²⁰ What does distinguish India from the so called global model of constitutional rights however, is that its higher judiciary is neither interested in performing the classical countermajoritarian function of upholding minority entitlements, nor merely in providing a deliberative space for the participation of a manifold of citizens, but rather more ambitiously in presenting or representing ‘we the people’ as a holistic political unity.⁴²¹ The longterm sustainability of this representational gesture was in turn dependant upon the fashioning of a convincing negotiation between the different yet interrelated pulls and pressures of legality and popularity, as can be gaged from perhaps the most well known social rights judgment of the Supreme Court in *Olga Tellis v. Bombay Municipal Corporation*.⁴²²

Decided in 1985, *Olga Tellis* involved a constitutional tension between the rights of slum and pavement dwellers residing in the city of Bombay, and the local government’s interest in removing illegal encroachments from public spaces under the Bombay Municipal Corporation Act 1888. The petitioners had migrated to Bombay from various places in search of bare

⁴²⁰ Hirschl (2009).

⁴²¹ On the difference between a politics of participation and a politics of constituent power, see Lindahl (2008: 9-24); for the global model of constitutional rights, see Möller (2012).

⁴²² AIR 1986 SC 180.

subsistence, and had no option but to take shelter in slums or on pavements. They claimed that the forcible demolition of squatter settlements without any offer of alternative accommodation violated their residential and occupational rights, as well as the right to livelihood which was necessary to make the right to life meaningful. In response, governmental authorities contended that the Constitution did not grant anyone the licence to trespass upon public property, that municipal authorities had an obligation to remove obstructions from pavements, public streets and other public places, and that the impugned provisions of the BMC Act merely sought to facilitate the performance of this obligation. Furthermore, it was pointed out that although measures had been taken for the provision of housing and employment to the poor, these efforts were bound to be limited by the serious paucity of financial resources at the disposal of the government.

The five judge constitution bench spoke through Chandrachud, CJ., and offered a vivid description of the plight of the lakhs of slum and pavement dwellers who constituted nearly half the population of Bombay and approached the Court for the recognition of their rights. With a demonstrable show of sensitivity for the petitioners, it proceeded to read the right to livelihood and employment provided under Articles 39(a) and 41 of the directive principles into Article 21 in these terms:

‘The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. That, which alone makes it possible to live, leave aside what makes life livable (*sic*), must be deemed to be an integral component of the right to life’.⁴²³

However, this determination did not prevent Chandrachud from endorsing the government’s position by observing that

‘footpaths or pavements are public properties which are intended to serve the convenience of the general public. No one has the right to make use of a public property for a private purpose without the requisite authorization, and therefore it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon.’⁴²⁴

⁴²³ Id., para 32.

⁴²⁴ Id., para 43.

It was possible for the Court to side with the executive establishment as the Constitution did not put an ‘absolute embargo’ on the deprivation of life and personal liberty, and only stipulated that such deprivation ought to proceed in accordance with a ‘procedure established by law’. The judgment in fact upheld the constitutional validity of Sections 312-314 of the BMC Act under which evictions were legally authorized, by construing them as ordinarily requiring adherence to a just fair and reasonable procedure, entailing the issuance of notice and the right to be heard, before the removal of trespassers from public spaces could be actually initiated.⁴²⁵ Since the petitioners had been given an ample opportunity to present their case before the judges, their eviction could no longer be deemed illegal or unconstitutional. But although no general remedy was granted in this case, the Court did enjoin the provision of alternative accommodation for one group of petitioners, whom the Government of Maharashtra had promised to resettle after deciding to allot some vacant land to slum dwellers in 1976. A census was carried out for the purpose of enumerating slum dwellers spread in about 850 colonies all over Bombay, and nearly two thirds of them were issued identity cards. While pavement dwellers censused in 1976 were to be given alternative pitches albeit not as a condition precedent to the removal of encroachments committed by them, slum dwellers who were thus censused and given identity cards had to be provided alternative accommodation before they could be evicted. In addition, the government was required to make good its other assurances by refraining from demolishing slums that had been in existence for a long period of twenty years or more, and had been improved and developed, except when such removal was required for a public purpose, and alternative sites of accommodation were provided to those who had been dispossessed.⁴²⁶

By thus reading directive principles into fundamental rights, the Court managed to defuse a historical constitutional tension between law as command and law as reason. But rather than producing a new synthesis between positive law and natural law at a higher level of abstraction, this only enabled the judiciary to posit itself as a co-equal constitutional actor in the concrete context of the Indian political. While the remarkably weak remedies usually made available in social rights cases were indicative of the judicial willingness to afford considerable leeway to governmental discretion on the social question, they paradoxically also created the conditions

⁴²⁵ Id., paras 42, 44-49.

⁴²⁶ Id., para 53.

for the emergence of the Court as a strong ventriloquist of the weakest sections of society, with a powerful voice of legitimacy which was not as easily repudiable as it had been in the past.

After prevailing over the initial divergence between the legalistic outlook of judges who had previously served the colonial regime, and the nationalist aspirations of politicians connected with the anticolonial movement for liberation and freedom, the 'Supreme Court of India' was in Baxi's famous words, 'at long last becoming, after thirty two years of the Republic, the Supreme Court for Indians', by reorienting itself as the 'last resort for the oppressed and the bewildered'.⁴²⁷ What especially contributed to the growth of judicial power in the 1970s and 1980s was the convenient coincidence of the socialist, communist and postcolonialist sympathies of the more activist judges like V.R. Krishna Iyer J. and P.N. Bhagwati J., happening to resonate with the aims and objectives of India as a welfare state. However, such a close entanglement with the prerogatives of the establishment has also meant that ever since the 1990s when the economy was opened up to liberalization, privatization and globalization, PIL was transformed from an adjunct of social activism to an instrument in service of neoliberal developmentalism.

Critical postcolonial scholars construe this turn as signifying a clear shift in judicial emphasis, from previously being committed to speaking on behalf of a political society comprising non-corporate subaltern populations, to now espousing the concerns of a civil society largely made up of corporate capitalist elites.⁴²⁸ But a more recent trend in interdisciplinary studies of the adjudicative enterprise is to jettison the consequentialism of the previous generation, and instead problematize the institutional mechanism of PIL from the very inception itself, for having converted the Supreme Court into a procedurally unencumbered and all powerful agent of antidemocratic populism.⁴²⁹ While sharing this scepticism for a purely consequentialist critique of PIL, I would nevertheless argue that the formal normativism of the new scholarship does not suffice to capture the dynamics of constituent power within which the judiciary sought to carve a role for itself as a guardian of the Indian political.

We must not forget that the Supreme Court was able to arrive at a political understanding of the constitution in a context where sovereignty and governmentality were already deeply

⁴²⁷ Baxi (1985: 107).

⁴²⁸ See the critical essays published in Narrain and Suresh (2014); see especially Nigam (2014: 22-38).

⁴²⁹ Bhuwania (2014: 314-335); a booklength version of this argument was later published in Bhuwania (2017).

imbricated with one another. Coupled with the absence of a neat separation between the legislative, executive and judicial functions of government, was the impossibility of establishing a clear distinction between these constituted voices and the constituent voice of the people themselves. No wonder then that the legal informalism of PIL equipped the Supreme Court to depart from the constitutional principle of non-arbitrariness, and in turn get ironically called out for practicing *qadi* or *panchayati* justice, a charge that it had itself levelled against the supreme executive while formulating the basic structure doctrine. However the Court here was only behaving as an archetypal agent of constituent power, seeking to assume upon itself the task of distinguishing between norm and decision on the one hand, and normativity and normalcy on the other.⁴³⁰ It was in fact able to acquire a surplus of legitimacy precisely by emulating other equally powerful constitutional actors, and even managing to operate in a populist register in tune with the changing political climate of the country. Constitutionalist apprehensions about judicial populism taking over the polity are somewhat farfetched, especially at a time when the ever increasing caseload of the Court has meant that it is left with no option but to function through a multiplicity of disaggregated benches, capable of giving voice merely to a dispersed rather than a unitary or quasi-dictatorial form of constituent power.

I would instead suggest that a critique of the Supreme Court ought to be couched less in procedural and normative terms of constituted legality, and more in substantive and political terms of constituent power familiar to its own intellectual imagination. PIL must certainly be problematized for its judicialization of social rights, which had the effect of converting an expansive question of redistributive sufficiency into one pertaining to the minimum provision of bare necessities.⁴³¹ This contributed substantially to India's transition from social welfarism to economic neoliberalism, with the complicity of all organs of government as well as of the different political forces occupying each of them. Welfare was thus depoliticized, with most contending parties on the right and the left gradually coming to share in the new consensus about the primacy of guaranteeing basic needs, rather than struggling for the structural transformation of the entire political economy. But the depoliticization of welfare did not result in the depoliticization of constitutional society as a whole. The political in fact returned back to its theological origins, as issues of religion and caste began to gain in prominence from the

⁴³⁰ For a distinction between norm and decision, and normativity and normalcy, in the institutional theory of law as concrete order, see Lindahl (2015: 38-64).

⁴³¹ I follow here Samuel Moyn's scepticism regarding the judicialization of social rights in his recent book on the failure of the global human rights movement to respond adequately enough to the social question of welfare entitlements. Moyn (2018).

1990s onwards. Since they invariably ended up in courts in some form or another, their judicial determination will be my focus of attention in the final section of this chapter.

3 Social reason versus political reason

In order to make sense of the judicial response to the changing political climate of the 1990s and beyond, we would do well to start with the dissenting view in *Kesavananda Bharati*, and in particular look at the basis of its opposition to the imposition of any substantive limitation on the constituent power of Parliament to amend the constitutional text. ‘At bottom’, wrote Dwivedi J. in his minority opinion, ‘the controversy ... is ... whether the meaning of the Constitution consists in its being or in its becoming.’ He invited attention to the national symbols of the Hindu Upanishadic motto ‘satyameva jayate’ or ‘truth shall triumph’ and the Ashokan *dhammachakra* or the Buddhist wheel of law, as encapsulating the two constitutional ideals of being and becoming respectively. The Supreme Court could fulfil its oath of loyalty to the Constitution only by giving expression to both of them simultaneously. To put it in his own words,

‘The chakra is motion; satyam is sacrifice. The chakra signifies that the Constitution is a becoming, a moving equilibrium; satyam is symbolic of the Constitution's ideal of sacrifice and humanism. The Court will be doing its duty and fulfilling its oath of loyalty to the Constitution in the measure judicial review reflects these twin ideals of the Constitution.’⁴³²

As was made more explicit in other dissenting judgments, the movement spoken about over here alluded to a constitutionally authorized social revolution under the institutional mechanism of parliamentary democracy, envisaged either as a hypothetical *grundnorm* or as an efficacious rule of recognition accepted by the community at large.⁴³³ It was therefore impermissible for judicial review to come in the way of constitutional amendments endeavouring to ‘wipe out every tear from every eye’, and enacted by Parliament as the real repository of constituent power.⁴³⁴

⁴³² Dwivedi J., in *Kesavananda Bharati*, para 2019.

⁴³³ *Kesavananda*, para 813 (as per A.N. Ray, J.) and para 1635 (as per K.K. Mathew, J.).

⁴³⁴ *Id.*, paras 2018-2019.

So while opposing the construal of the constitution in consonance with principles of natural law, the minority opinions in *Kesavananda* ended up conflating the normativity and facticity of supreme positive law with the constitution conceptualized as the fundamental law of the Indian political. However, this categorial confusion had to be rectified soon, as constitutional becoming threatened to annihilate the very being of the constitutional enterprise. Even the most sceptical detractors of the basic structure doctrine were now convinced about its legitimacy, when confronted by constitutional amendments tinkering with parliamentary democracy, declaring constituent power to be unlimited, and providing for the absolute primacy of directive principles over fundamental rights.⁴³⁵ But while such attempts to set at naught the constitutional being were successfully domesticated if not repelled comprehensively, other more intriguing challenges began to surface on the horizon with the fresh repoliticization of the social questions of religion and caste from the 1990s onwards. My contention will be that the judiciary has dealt with these questions by deploying the two rival incompatible languages of social reason grounded in the positive theology of a non-sectarian Hindu being, and political reason grounded in the destabilizing negative theology of lower caste becoming, which is neither reducible to being nor to non-being.⁴³⁶ Let me explicate by focusing on the changing meanings of secularism and equality, unarguably two of the most essential features of the constitutional basic structure.

3.1 Hindutva

That there is no clear line of separation between religion and the state has almost become an incontestable truism in the ever proliferating literature on Indian secularism. India did not become a theocratic state at the time of independence, but its preferred model of secularism was best articulated by the Gandhian expression ‘sarva dharma sama bhava’ or the ‘equal respect for all religions’. As discussed in chapter three, in M.K. Gandhi’s distinctly religious politics suffused with Hindu symbology, this formulation came to be translated into an ethical injunction requiring the asymmetrical recognition of the other in general, and of the Muslim in

⁴³⁵ For the ‘pilgrim’s progress’ of Chandrachud, CJ. on the path to affirming *Kesavananda Bharati*, see Baxi (1985B: 64-112). Among legal scholars, contrast H.M. Seervai’s rejection of judicial review of constitutional amendments after *Golak Nath* in Seervai (1967: 1117) with his approval of the basic structure doctrine in Seervai (1996: 3109-3170); S.P. Sathe’s initial rejection of *Golak Nath* in Sathe (1969: 33-42) with his subsequent acceptance of basic structure review in Sathe (2002: 63-98).

⁴³⁶ I am partially influenced over here by Peter Fitzpatrick’s formulation of legal theology. Fitzpatrick (2018/19); for a contrary normative account of the being-becoming distinction in constitutional identity scholarship, see Jacobsohn: 2010).

particular. The Congress under Prime Minister Jawaharlal Nehru applied the equal respect ideal differently, by creating some temporary exceptions in favour of religious minorities, who were granted a greater degree of cultural autonomy including the freedom to follow their own personal laws, even as the Hindu majority was subjected to progressive social reform in pursuance of the goals of transformative constitutionalism.⁴³⁷ This momentary refusal to invoke constituent power in a spirit of equitable generosity towards the Muslim community ravaged by the heavy losses of partition, has however been interpreted by later proponents of Hindu ethno cultural nationalism purely as a pseudo-secular concession of minority appeasement. The Hindu nationalist project in brief is to displace the ‘religious neutrality’ of ‘*dharma nirpeksh*’ secularism with the ‘denominational neutrality’ of ‘*pantha nirpeksh*’ secularism. What its major ideologues have sought to accomplish by substituting *dharma* with *pantha* in their definition of secularism, is to subsume the radical diversity of sectarian denominations inside and outside Hinduism under the blood and soil nationalism of Hindutva or Hinduness as the hegemonic social religion of the Indian political.⁴³⁸

For understanding how Hindutva came to be legitimized by the judiciary, we must first appreciate that it had begun more as a social movement rather than as a purely legal one. It was premised upon a fine distinction between Hindu *dharma* as the religious beliefs and practices of the various orthodox and heterodox sectarian denominations among the Hindus and non-Hindus of India, and the common cultural civilization of Hindutva or Hinduness, anchored in a sacred reverence for the territory of Hindustan both as fatherland (*pitrabhu*) and holyland (*punyabhu*).⁴³⁹ The conditions of possibility for its constitutional normalization were created by opinions of the Supreme Court such as those in the *Satsangi* case, which distinguished the plurality of Hindu sects and denominations from the essence of Hinduism envisaged as a way of life thought to be giving them their unity. Although Gajendragadkar J. had offered such a definition of Hinduism for the social domain of temple entry from the rationalist entry-point of Nehruvian secularism, even anti-Nehruvian Hindutva was later endorsed by the Court precisely in these terms as a non-sectarian non-denominational ideology entitled to be represented in the political domain of electoral campaigning.

⁴³⁷ Bilgrami (2014: 48-50); for a normativist construction of the Indian model of principled distance secularism, see Bhargava (1998).

⁴³⁸ For a useful extracts from the Hindu nationalist Prime Minister A.B. Vajpayee’s views on secularism, see Jaffrelot (2007: 313-341).

⁴³⁹ For the distinction between Hindu *dharma* and *Hindutva*, see Savarkar (1969).

As many as seven cases decided in 1995 dealt with the question whether appeals to Hindutva in election speeches violated Section 123 of the Representation of People Act 1951, in so far as it specifically prohibited election candidates from asking for votes and promoting enmity among citizens on grounds of religion. While a few of the leaders on trial were held guilty of corrupt practices for appealing to the Hindu religion and promoting enmity with Muslims, the leading opinion in *Ramesh Yeshwant Prabhuo v. Prabhakar Kashinath Kunte*⁴⁴⁰ delivered by J.S. Verma, J. nevertheless protected Hindutva by arguing that it was a way of life which could not be equated with narrow fundamentalist Hindu religious bigotry. To put this in Verma's own words,

‘Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words 'Hinduism' and 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith.’⁴⁴¹

He proceeded to clarify that only the mischief resulting from the misuse of these expressions for the promotion of communalism had to be checked and not their permissible use, and found it unfortunate that

‘in spite of the liberal and tolerant features of ‘Hinduism’ recognised in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage. Fundamentalism of any colour or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation.’⁴⁴²

So Verma evidently read Hindutva in sync with the earlier judicial definition of Hinduism, and drew upon the liberal language of free speech and expression to defend its invocation in electoral politics. However, his opinion was unsurprisingly celebrated by Hindu nationalists of the Bharatiya Janata Party (BJP) and other regional outfits as a ringing endorsement of their struggle to fashion a socially grounded theological sovereignty in the country.⁴⁴³

⁴⁴⁰ AIR 1996 SC 1113.

⁴⁴¹ Id., para 43.

⁴⁴² Id., para 44.

⁴⁴³ See for example, BJP (1996).

Apart from legitimizing Hindutva's discursive claim to sovereignty, the judiciary has also shown a propensity to affirm the specific programmatic demands which have propelled it into national reckoning. Two of the most controversial demands of the BJP and its Hindu nationalist affiliates which have come up for adjudication pertain to the securing of a uniform civil code and the building of a Ram temple in Ayodhya. Although the securing of a uniform civil code is a constitutional directive, there is no consensus about its efficacy across the religious divide and even in the women's movement. Yet the courts have on occasion sympathized with this demand, by indulging in a stereotypical rhetoric about the inegalitarian and gender unjust features of Muslim personal law in particular.⁴⁴⁴ The dominant trend has however been to bring law as revelation increasingly in line with law as reason, and silently work towards uniformity across the various personal law regimes without waiting for their codification in more general terms.⁴⁴⁵ With the judiciary gaining in confidence in fact, a few judges are even trying to look beyond justificatory reasons internal to a religious community, and talk about the abstract reason of constitutional morality instead.⁴⁴⁶ But this move can succeed only if the institution of personal law is fully depoliticized, a possibility which is difficult to predict in a constitutional society like India where family, religion and politics are deeply entangled with one another.

A similar ambiguity is discernable in the judicial response to the Ram Mandir issue, which became politically salient on 6th December 1992, after thousands of Hindutva volunteers unlawfully demolished the Babri Masjid, a sixteenth century mosque believed by them to have been built by the Mughal Emperor Babar on Lord Ram's birthplace. In *S.R. Bommai v. Union of India*,⁴⁴⁷ the Supreme Court initially upheld the Congress dismissal of two provincial BJP governments under Article 356 of the Constitution, on the ground that their support for the Rama Janmabhumi movement was violative of the constitutional principle of secularism and its criterion of equal respect for all religions. But more recently in 2010, the Allahabad High Court treated the Hindu mythological belief about Ram's birthplace as a fact of history, and prioritized it over the Muslim right to pray in mosques since this was deemed to be an inessential feature of Islam. By a two to one majority, the Court divided the disputed land into three parts, and distributed two of them to the Hindu side whilst leaving only one for the

⁴⁴⁴ *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531.

⁴⁴⁵ See for example, *Danial Latifi v. Union of India*, (2001) 7 SCC 740.

⁴⁴⁶ For the most recent instance, see the judgments of Dhananjay Chandrachud, J. in *Shayara Bano v. Union of India* (2017) and *Indian Young Lawyers Association v State of Kerala* (2018).

⁴⁴⁷ AIR 1994 SC 1918.

Muslim claimant to the property.⁴⁴⁸ Its resolution of the title suit which is presently in appeal before the Supreme Court, is the most extreme illustration of how a judicial action can simultaneously appear to be arbitrary from one perspective, and a vindication of sovereignty from another.

3.2 OBC reservation

The secularist reaction to Hindutva's politics of inclusion and exclusion has been to normatively fall back upon the tried and tested formula of state neutrality towards religion. What it fails to realize is that Hindu nationalists tend to thrive precisely in such an elitist intellectual climate, by depicting state neutrality towards religion as the indifference of the state towards *dharma* as the fundamental law of the political. But this does not necessarily mean that *dharma nirpeksh* secularism must be replaced by *pantha nirpeksh* secularism, or that the liberal constitutionalist distrust for the political must give way to enmity with the real externality of the Muslim other. Hindu nationalism must rather be exposed only as a degenerated version of the same mainstream nationalist imagination which it professes to be so critical of. Hindutva's sovereign selfhood is problematic not merely because it seeks to replace the composite culture of civic nationalism with the Hindu culture of ethnic nationalism, but more germinally also because its conception of sovereignty continues to remain tethered to the presupposition of a fixed, immutable and permanent selfhood, how so ever defined in contrast with the past. If its notion of a pre-existing collective selfhood is to be destabilized, we must move beyond concerns of neutrality and non-neutrality, and instead focus on the originary challenge posed to the hegemony of Hindu *dharma* by the counter hegemony of Buddhist *dhamma* as the rival ethical lifeworld of the Indian political. This requires us, especially when examining the judicial role in the context of the 1990s and thereafter, to shift from an engagement with the theology of religion mediated by secularism, to an engagement with the theology of caste as mediated by different ideas of equality.

The tension between competing conceptions of equality has featured most prominently in India's constitutional jurisprudence on caste based quotas in public education and employment, Union and State Legislatures, and local self governing institutions. It is common for judges to debate whether the special provisions enabling or prescribing reservations are to be considered

⁴⁴⁸ *Sunni Central Board of Wakfs v. Gopal Singh Visharad*, All 2010.

as temporary exceptions to the norm of formal equality and non-discrimination under Articles 14, 15(1) and 16(2), or whether they can themselves be normatively defended by resorting to another related notion of substantive equality. While the Supreme Court was initially inclined to favour the former approach, it has gradually come around to accepting the latter position ever since the 1970s.⁴⁴⁹ But it still continued to view formal and substantive conceptions of equality from the legal-moral prism of corrective and distributive justice, even as the changing political scenario was opening up the possibility of thinking about radical equality as a discursive expression of the phenomenon of lower castes claiming a share in state sovereignty.⁴⁵⁰ I have already emphasized in the previous chapter that such a linkage of equality with sovereignty is exactly what B.R. Ambedkar was striving to establish, while drafting a strong reservations policy into the constitutional text itself, so that members belonging to the Dalit community of former untouchables could come to occupy offices of power and authority in the new postcolonial republic. As a true reflection of his imagination of an impermanent Indian becoming which was neither reducible to an eternalist being nor to a nihilist nonbeing, this equalitarian sovereignty has not remained limited in reach to the Scheduled Castes (SCs) and Scheduled Tribes (STs) alone, and is also extended now to a much larger majority of socially and educationally backward castes, which have however not faced the historical experience of untouchability. The extension of reservations to the so called Other Backward Classes (OBCs) did not go uncontested, but with upper caste opponents beginning to lose some of their influence in the democratic arena of electoral politics from the late 1980s, they have increasingly tended to prefer challenging its legality and legitimacy in the constitutional arena of judicial politics instead. The Court has by and large repelled these challenges, albeit only after inserting itself as a contending regulatory agency auditing the entire affirmative action exercise.

Indra Sawhney v. Union of India,⁴⁵¹ which was decided by a nine judge Constitution Bench in 1992, has in retrospect turned out to be the most impactful among all judgments delivered by the Supreme Court on the reservations issue thus far. This case pertained to the constitutionality of the executive decision of Prime Minister V.P. Singh's National Front government to implement the recommendations of the Mandal Commission in 1990, reserving 27% of the

⁴⁴⁹ For the former approach, see *M.R. Balaji v. State of Mysore*, 1963 (Suppl) 1 SCR 439 and *T. Devadasan v. Union of India*, (1964) 4 SCR 680; for the latter approach see *State of Kerala v. N.M. Thomas*, 1976 (1) SCR 906.

⁴⁵⁰ On radical equality see Kumar (2015); for the most authoritative account of affirmative action from the justice point of view, see Galanter (1984).

⁴⁵¹ 1992 Supp (3) SCC 212.

seats in public employment under the Government of India for the OBCs, to add to the 15% and 7.5% reservations being already enjoyed by the SCs and STs respectively. The Court in brief was required to determine whether India's liberal and secular Constitution could in any way authorize the government to identify the beneficiaries of affirmative action on the basis of a nonsecular identitarian marker like caste. A majority of six out of the nine judges held that caste could certainly be taken as a useful starting point in the Indian context, provided it was then supplemented with additional sociological data about social and educational backwardness, before the benefits of reservations were extended to particular groups or communities. What justified this relative prioritization of caste over the more secular and purely economic marker of poverty in the Court's understanding, was the inextricability of the problem of backwardness from the inescapable social reality of an inequalitarian Hindu theology. Thus while talking about the background conditions of historic injustices and inequities against which India's transformative constitutional project was inaugurated, B.P. Jeevan Reddy, J.'s leading opinion made the following observations:

‘... the Hindu religion—the religion of the overwhelming majority—as it was being practiced, was not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this four-tier system (chaturvarna) were the outcastes (Panchamas), the lowliest. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, unconnected with their deeds. There was to be no deliverance for them from this social stigma, except perhaps death. They were condemned to be inferior. All lowly, menial and unsavoury occupations were assigned to them. In the rural life, they had no alternative but to follow these occupations, generation after generation, century after century. It was their 'karma', they were told, the penalty for the sins they allegedly committed in their previous birth. Poverty there has been—and there is—in every country. But none had the misfortune of having this social division—or as some call it, degradation—superimposed on poverty.’⁴⁵²

All of the majority opinions recognized that the founding framers had sought to overcome this degradation of the lower castes by making them equal partners in state sovereignty with their upper caste counterparts, principally through the constitutional device of reservations. While Jeevan Reddy held that Article 16(4) enabling the government to provide for the adequate representation of backward classes in public employment was a mechanism for the ‘sharing of state power’,⁴⁵³ Pandian, J., deplored that this ‘fundamental right’ had not yet been enforced at

⁴⁵² *Indra Sawhney*, para 636.

⁴⁵³ *Id.*, para 693.

the centre and in many states even after forty two years from the enactment of the Constitution.⁴⁵⁴ P.B. Sawant, J. noted that the undeniable gains made by the lower castes in electoral politics had not sufficed to bring about the desired social transformation, largely because of an unsympathetic administrative machinery still being dominated by the upper castes, and operating at crosspurposes with the concerns of political power. Such an administrative status quo had proved ‘ruinous’ for the country and therefore had to be remedied through appropriate action:

‘One of the major causes of the backwardness of the country in all walks of life is the denial to more than 75% of the population, of an opportunity to participate in the running of the affairs of the country. Democracy does not mean mere elections. It also means equal and effective participation in shaping the destiny of the country. Needless to say that where a majority of the population is denied its share in actual power, there exists no real democracy. It is a harsh reality. It can be mended not by running away from it or by ignoring it, but by taking effective workable remedial measures.’⁴⁵⁵

It was clear to Sawant that backward class reservations had to form an integral part of these remedial measures, in a society with a history of centuries of cent per cent reservations for the upper castes:

‘... hitherto for centuries, there have been cent per cent reservations in practice in all fields, in favour of the high castes and classes, to the total exclusion of others. It was a purely caste and class-based reservation. [Instead] The [OBC] reservations are aimed at securing proper representation in administration to all sections of the society, intelligence and administrative capacity being not the monopoly of any one class, caste or community. This would help to promote healthy administration of the country avoiding sectarian approaches and securing the requisite talent from all available sources.’⁴⁵⁶

Although the *Indra Sawhney* decision thus upheld the constitutionality of OBC reservations in public employment by connecting equality with a political conception of sovereignty, a differently constituted majority in the judgment also attempted to put in place a strong regulative regime to govern its implementation, as if in continuation with the Court’s earlier approach of reducing equality to the social conceptions of corrective and distributive justice. It laid down for instance that reservations extended only to initial appointments and not to matters of promotion, that their total quantum in a year including carried forward vacancies could not

⁴⁵⁴ Id., para 6.

⁴⁵⁵ Id., para 404.

⁴⁵⁶ Id., para 408.

exceed 50% under ordinary circumstances, and that a ‘creamy layer’ of advanced sections were to be identified from the OBCs on the basis of some socio-economic parameters and excluded from the purview of the policy. While these rules were broadly accepted by other political actors in so far as they applied to the OBCs, their collateral implication on the already prevailing reservations scheme for the SCs and STs continues to remain a live constitutional issue even today.

In developments which were somewhat reminiscent of the initial inter-institutional tussle on the right to property, the Parliament enacted four constitutional amendments to overturn adverse judicial rulings on affirmative action, and restore SC/ST reservations in promotion with consequential seniority, exclude the carrying-forward of their unfilled vacancies to subsequent years from the 50% ceiling limit, and permit relaxations in qualifying marks and standards of evaluation in matters of their promotion, notwithstanding concerns relating to the compromise of administrative efficiency. All of these amendments were once again upheld as valid and not violative of the basic structure doctrine by a five judge Constitution Bench in *M. Nagaraj v. Union of India* decided in 2006.⁴⁵⁷ The Court reasoned that specific details of the governmental policy on reservations were derived from service law jurisprudence, and could not be elevated to the status of higher constitutional principles beyond the amending power of Parliament. Their insertion or deletion did not abrogate or destroy ‘width and identity’ of the equality code contained in Articles 14, 15 and 16 of the Constitution.⁴⁵⁸ But even though the amendments were not struck down, it was nevertheless declared that SC/ST reservations in promotion were permissible only if the government complied with the constitutional stipulation of identifying backwardness, establishing inadequacy of representation, and maintaining overall administrative efficiency, coupled with the judicial stipulation of the 50% limit and the creamy layer rule.⁴⁵⁹ This stipulative part of the *Nagaraj* opinion can by no means be regarded as the last word on SC/ST reservations, as the government is considering the introduction of a constitutional amendment to undo the difficulties arising out of its judicial application in later decisions of the Court.

Finally, the next big episode in the affirmative action story occurred when reservations were extended to the OBCs in higher educational institutions including private aided and unaided

⁴⁵⁷ AIR 2007 SC 71.

⁴⁵⁸ *Nagaraj*, paras 54, 67.

⁴⁵⁹ *Id.*, paras 81-82.

educational institutions and excluding minority run educational institutions in 2005. Just as in public employment, the total quantum of reservations in higher education now reached 49.5%, with SC/STs and OBCs entitled to be admitted on 22.5% and 27% of the seats respectively. The legislation providing for these reservations and the constitutional amendment enabling this legislation through the incorporation of Article 15(5) into the Constitution were both upheld as constitutionally valid by the Supreme Court in the *Ashoka Kumar Thakur and Pramati Educational and Cultural Society* judgments.⁴⁶⁰ Particularly in respect of the basic structure challenge, a majority of judges in the two cases applied the width and identity tests from *Nagaraj*, and found that the new Article 15(5) was valid as it did not entirely do away with other related provisions on equality and freedom such as Articles 14, 15(4), 19(1)(g) and 21. The Court nevertheless continued to interfere in the implementation of the policy, by insisting upon compliance with the creamy layer rule in OBC reservations. In this way, the judges have sought to transfer their liberal secularist suspicion towards the dangers of affirmative action for the idea of a ‘casteless classless society’ in India, from the domain of sovereignty where the reservations policy could no longer be questioned, to the domain of governmentality where it could at least be regulated.

Conclusion

In this chapter, I have engaged with the ever expanding role of the judiciary and argued that the legitimacy of the Supreme Court as an agent of constituent power is ultimately dependent upon its ability to give voice to the story of the Indian political and the inherent contradictions contained therein. My endeavour has been to show that the theological antecedents of its basic structure constitutionalism and subsequent social activism can be traced to the essential practices doctrine enunciated in the early jurisprudence on freedom of religion. Replicating the persuasive logic of offering internal reasons for religious communities to pursue social reform, the Court succeeded in convincing other constitutional actors about the nature and scope of their limited power only by moving beyond the transcendentalism of fundamental rights, and instead resorting to the symbolic reason of an open democracy which could in some way be regarded as internal to the founding vision of the Indian political itself. This in turn required a more enthusiastic owning up of the transformative constitutional enterprise, with its own inner tension between the positive theology of a fixed, immutable and permanent being, and the

⁴⁶⁰ *A.K. Thakur v. Union of India*, (2008) 6 SCC 1; *Pramati v. Union of India*, (2014) 8 SCC 1.

negative theology of a dynamic becoming, which was neither reducible to an eternalist being, nor to a nihilist nonbeing. The chapter has explained how the Court sought to negotiate such an irresolvable conflict in cases dealing with Hindutva and lower caste reservations by deploying the rival incompatible languages of social reason and political reason respectively. While there is a discernable preference in the constitutional jurisprudence of the Supreme Court for social reason over political reason, it is also evident that tilting too heavily in one direction would likely pose a serious threat for the hard earned legitimacy of the judiciary. So in spite of increasingly adopting a strong interventionist posture in most cases, it has sagaciously left enough space open for other political forces claiming to be speaking and acting on behalf of the people. Perhaps herein lies the reason why only six constitutional amendments have been struck down so far in more than forty five years from the *Kesavananda* judgment, most of which were in fact coincidentally related with issues of judicial review and judicial independence. The Court has accorded Parliament considerable latitude on all constitutional questions of fundamental importance, but is in principle unwilling to accede to the slightest of intrusions on its autonomous functioning, even if no constitutional essentials are fundamentally abandoned in the process.⁴⁶¹ This autonomy can however be meaningfully sustained only so long as it continues to remain in service of preserving, upholding and augmenting the very autonomy of the Indian political.

⁴⁶¹ The most recent such instance was the Court's invalidation of the setting up of a National Judicial Appointments Commission composed of both judicial as well as nonjudicial members, and restoration of the collegium system of appointments to the higher judiciary exclusively by the judges themselves. See *SCAORA v. Union of India* 2015. This appears to be at odds with the fundamental abandonment standard of review proposed by Yaniv Roznai in his global study of unconstitutional constitutional amendments. Roznai (2017).

CONCLUSION

My thesis is that the story of the Indian political, or of the imaginary institution of society in India, has been shaped at every juncture of its development by the constitutive antagonism between social law and political law, which can originarily be traced back to two fundamentally irreconcilable symbolic lifeworlds of Hindu *dharma* and Buddhist *dhamma* respectively. This has meant that there is more to the Indian career of constituent power besides a representational agent moving beyond ordinary constitutional legality and extraordinarily speaking in the name of the constitution making capacity of the people themselves. Although the specific ritual and comportmental content of both Indic languages of law may no longer be of much relevance for the postcolonial constitutional order, they continue to supply the conflicting conceptual frameworks of legitimacy within which constituent power is claimed and exercised by different governmental and non-governmental actors even today. In thus inviting attention to indigenous understandings of law and sovereignty, I have not sought in any way to juridically vindicate a celebratory narrative about an authentic nationalist self realization. Rather, the thesis has only translated the contradictions inherent in India's experience of fashioning a constitutional society in terms drawn from its own political self imagination.

While conflicts and contradictions are endemic to the human condition in general, they tend to play out differently in different socio-political conditions across space and time. Modern constitutional regimes usually respond to these conflicts and contradictions by functioning on the basis of some distinction between the inside and the outside, and then working out exclusive and inclusive strategies of annihilation, assimilation and accommodation to deal with them. Who is to be included in and excluded from the national community, and precisely on what terms, are questions that have frequently been raised in India as well just as in any other contemporary constitutional jurisdiction. But this inside-outside distinction has manifested over here in a more germinally irresolvable rivalry between a social conception of law oriented to the inner domain of the domestic householder, and a political conception of law oriented to the outer domain of the wandering ascetic (chapter one).

I have shown in the thesis that this originary tension has in fact remained at the heart of the most crucial constitutional debates associated with the prefoundation, foundation and postfoundation of the modern Indian political. During the anticolonial movement leading up to the establishment of the new postcolonial constitution in the mid twentieth century, it had

particularly mutated into a rivalry between two interrelated yet distinct concepts of *swaraj* or self-rule, as competing local articulations of the globally circulating concept of constituent power (chapter two). Their deep entanglement was attributable to the simultaneous socialization of political law and politicization of social law that accompanied the processes of modernization, secularization and democratization in India. However, what distinguished the two concepts of *swaraj* from the tension between subjectivity and law in revolutionary and constitutionalist traditions of constituent power, and its provisional resolution in the relational paradigm, was their allusion to a profound opposition between social law and subjectivity intending to counter the negative externality of the colonial legal order on the one hand, and political law and subjectivity intending to counter the negative externality of the Hindu caste order on the other.

The dissensus between both of these ethical lifeworlds has subsequently been reflected in most substantial aspects of the constitutional enterprise in postcolonial India, ranging from the making of the collective constitutional subject and the determination of its normative point of joint action, to identifying the appropriate agent which could articulate, monitor and enforce this normative point on behalf of the constitutional subject. While unity in diversity was nominally accepted as the commonly shared paramount principle of national sovereignty, its instantiation did not merely entail negotiating with the agonistic pulls and pressures of a homogenous universality and a heterogenous particularity, but also more fundamentally with two antagonistic iterations of the ideal as a whole, anchored either in the social domain of familiarity or in the political domain of contract (chapter three). Furthermore, although no constitutional actor could disagree with the goal of collective self transformation, the task of bringing together democracy and constitutionalism or sovereignty and governmentality necessary for its accomplishment, has been pursued over the years by resorting to two apparently correlative but intrinsically divergent means of social duties and political rights (chapter four). Finally, even as the Supreme Court joined the legislative and executive organs of government in implementing the founding vision of transformative constitutionalism by claiming to speak in the constituent voice of the people, its judicial decisions have been able to garner legitimacy only by acknowledging the irreconcilable tension between social reason grounded in a positive theology of being, and political reason grounded in a negative theology of becoming, which is neither reducible to being nor to non-being (chapter five).

After reading all of these developments together, it can be said that the persistent hegemony of nationalist *dharma* threatens the very autonomy of the Indian political. We may find here a superficial resonance with Hannah Arendt's apprehensions about the damaging consequences for the political sphere of freedom whenever it is invaded by agents inhabiting the social sphere of necessity. But my difficulty is not with social subjectivities and their genuine aspirations for emancipation getting politicized, for constitutionalization of the social question of human misery has indeed been an integral part of India's postcolonial model of transformative constitutionalism. The problem is more discursive in nature, with all constitutional questions being reproducible now in conceptual terms drawn entirely from the vocabulary of social law. If such a prospect were to ever eventualize, the political would end up being thoroughly subsumed by a social ontology of substances. That is, the collective selfhood at its symbolic centre would come to be identified with determinate attributes and qualities related either with the composite culture of civic nationalism or with the Hindu culture of ethnic nationalism, and no longer serve as an empty signifier of sovereignty which is so critical for India's survival as an open democracy. Only when the hegemony of nationalist *dharma* is effectively interrupted by the counter hegemony of a non-nationalist *dhamma* has the Indian political come close to realizing its full potential.

I must however also emphasize that if social law were to be completely subverted by a *dhamma* derived constellation of concepts, the resulting supremacy of political law would run the risk of destroying the very conditions of its own possibility. In other words, an all powerful political law would likely be entirely disconnected from the context of nationalist politics, only within which does it possess any coherent meaning as a resistive counter hegemony. This would paradoxically prepare the ground for its eventual depoliticization, and instead open up the possibility of producing an autonomous legality altogether denuded of the political. Much like in Hans Kelsen's legal theory, the law of the constitution would then have to be sourced ultimately from the higher principles of pure normativity alone, irrespective of whether these norms themselves comply with the collective imagination of popular sovereignty in India or not.

There is a fairly common tendency among lawyers in India to talk about the sovereignty of the constitution precisely in terms of the autonomy of law rather than the autonomy of the political. Sovereignty of the constitution is usually understood by them as referring to the sovereignty of the constitutional text, of its official and non-official interpretations, and especially after

Kesavananda Bharati, of the essential features of its basic structure, binding not just the three co-ordinate branches of government, but increasingly even ordinary citizens and populations, as well as their numerous non-governmental institutions dotting the constitutional landscape. However, such a view fails to appreciate that sovereignty is in the final analysis not as dependent on principles of legality and superlegality, as it is on the legitimacy that flows from the active acceptance of the people themselves conceived as a political unity. That the constitution has managed to become so enormously influential over the last seventy years is not merely because of the undeniably rich jurisprudence on each of its individual provisions and the document as a whole, but more importantly also because of its growing legitimacy across all the major ideational and ideological fault lines of political society in India. I therefore believe that this legitimacy can be sustained only so long as the people continue to see in the constitution a representation of their own image as an empty signifier of the sovereignty of the Indian political.

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