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Outline of a 'Theory of Practice' of Indian Constitutionalism

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INTRODUCTION: SITUATING THE 'SEMI-LEARNED PRODUCTION'

This essay explores the tasks of social theory and philosophy of Indian constitutionalism at work. But these presuppose a stable discourse concerning the notions of constitutions and constitutionalisms, which is only partially.

A discourse addressed to 'the' philosophy of the Indian Constitution makes several assumptions, the most crucial being that there is a genre called 'philosophy' even in this post-modernist and post-Derridean world.¹ It assumes a 'universal' called 'political philosophy'. Admittedly, the singular here altogether misleads; all we have are genres of social and political theories/philosophies. I merely straddle this philosophical biodiversity here.

To begin with the North 'liberal' theory/philosophy genres, the distinctive foundational concerns² address normative issues of what makes prescriptively at least, a 'good' constitution, in ideal and less than, or sub-/second best, 'ideal' (and in some senses 'non-ideal') circumstances.³ Social theorists remain, in contrast, more interested/concerned with the problem of the 'constitution' of constitutions, that is, the assorted social, symbolic as well as material labours of power/governance.

In its elementary social sense, a constitution is something that stands 'constituted' by the labours of some peoples and processes. What these 'peoples' and 'processes' are at any given historic moment, how they may be named, how their labours acquire some degree of 'legality', and

social legitimation, how these fatefully configure power and resistance, and with what social futures, are some issues that eminently pre-occupy social theorists of constitutions. They remain concerned with the modes of constituting or reconstituting the 'unconstituted', and the ways of interplay and interwar between the 'constituted' and 'unconstituted', or the 'pre-constituted.'

Even assuming/hypothesizing the constitutive moment, the 'constitutive' and the 'constituted' stand in a dialectical relation. Does the constitutive limit the horizons of the constituted? How, and in what ways, that which is constituted acts back upon the agency of the constitutive? Does the constitutive agency, power, force, as it were, exhaust itself once a thing, state of affairs, or a phenomenon is constituted or does it remain alive as active residue? How does one narrate the histories of the constitutive and the constituted powers? In relation to life under actually existing political/juridical constitutions, these questions assume grave importance in terms of legitimation of power and resistance; for example, in the distinction between the 'legal' and the 'popular' sovereign, the latter attributed the plenitude of constituent power.

Second, which 'givens' (structures) are assumed in constitution-talk, and which 'givens' remain subject to the play of construction (agency)? How may social consciousness and prior histories of power and struggle shape the project of writing a constitution and the specific modes of governance and production of juridical norms? This particular question is of grave importance for constitution-making in the post-colonial, post-Cold War, and the transitional post-socialist societies.

Third, what notions of historic timespace inhere the notion of a constitution, that is, how do we construct spatial distribution of rights, the geographies of (in)justice? The construction of imperial spaces for nation-states entails a great deal of violence and social exclusion; it destroys many a plural life-worlds and worldviews. Constitutions, in their founding and developmental moments, destroy timeplaces by 'geopolitical combination, a form of articulation centred on the internal distribution of rhetoric, bureaucracy, and violence in a given legal field'.⁴ How much of this violence is jurisgenerative always remains an open question.

Fourth, is the idea of constitutional chaos at all sensible, given the notion that constitutions always enact a principle of order (of knowledge/power)? How may we describe this principle in terms other than those Nietzsche once so sharply proclaimed: 'Only where the state ends, there

begins a human being who is then not superfluous? What principle of ordering ('consensus') do constitutions translate as principles of order ('principled' repression between 'dissent' and singular 'treason')?

Fifth is the notion, in terms of history of ideas or ideas of history, a distinctively Euroamerican heritage? Put another way: are all South constitutions pre-eminently mimetic? And must (as a matter of necessity laced by 'choice') this so always remain? This qualifier 'always' is crucial, given the Fukuyama-type dogma of the 'End of History and the Last Man.'

Sixth, even when we situate the understanding of constitutions in terms of structures of governance and rights, are state constitutional orderings conceivable outside the framing notions about ideology (Marx), episteme (Foucault), and habitus (Bourdieu)? Each offers a startling critique of the 'Western' rationality; each, however, remains enclosed in contexts of progressive Eurocentric paradigm. These have no use for a Mahatma or a Mandela, or for Ambedkar, the 'Aristotle' of Dalits.

Seventh, understanding the theory and practice of constitutionalism as an assemblage of state formative practices raises issues concerning the relationship between constitutionalism and the province of state theory. How may acts of constitution-making and constitutional change affect the reproduction of state power? Is the case that various constitutions at work introduce a variety of 'stateness' (for example, the rule of law at the national level and microfascism at the level of the 'local' state)? How may one relate state formation to constitution-making practices?

Furthermore, constitutions furnish arenas of contested relationships between state and civil society. Since state formative practices are ongoing, and indeterminate, it is necessary to differentiate, at least, between three interactive meanings of constitutions as texts, constitutional law, and theory/ideology ('constitutionalism'). I have named these, not too elegantly, as C1, C2, C3,⁵ a theme I revert to later in the essay.

Eighth, in what ways may we distinguish the positive morality of constitutions by the standards furnished by critical morality? Outside some few clear examples where the positive morality is indeed ethically obnoxious (as in the case of the Nazi and apartheid constitutions) most constitutions themselves furnish some new elements of critical morality by which the very constitutional legitimacy of the operations of power-structures and political representation may be adjudged (thus for example, constitutions containing enunciation of fundamental rights, directive

principles of state or social policy, and fundamental duties of all citizens, not here further to instance the sonorous perambulatory constitutional value enunciations). Further, articulations of shared standards of critical morality by which we adjudge constitutional morality remain a contested site. Now we may fail to note what clearly is the case: indeed, many a salient feature of modern constitutions seem to remain ethically neutral: for example, the choice between unitary and federal structure, the principle and detail of the distribution of legislative and administrative powers, the presidential or Cabinet form of structuring executive power, methods and scope of amending power, and first-past-the post or proportional electoral systems. Both Habermas and Rawls⁶ address this issue in discursive terms of post-metaphysical liberal or libertarian theory. This discourse, of course, presupposes visions of the rational and the reasonable social/dialogical cooperation to produce and reproduce quest for justice in human societies but even so does not reclaim within the province of critical morality the above-mentioned issues. It also remains clear that in the approaches towards enunciation of ethical standards for judging the morality of constitutions, the non-Euroamerican other remain singularly inconspicuous in these labours, suggesting that any normative constitutionalism theory must either be 'Western' or forfeit its claims to existence.

These, and related, issues at least direct movement from the 'Constitution', an unexamined notion of a constitutional formation, a mass of heterogeneous constitution generative, sustaining, defying and denying practices, and the order of expectations and experiences. Constitutional formations are at once 'tradition-constituted' and 'tradition-constitutive'.⁷ But the MacIntyre 'constituted' tradition here only refers to the Enlightenment and its derivatives and active residues. Important as all this is, it ignores the role of the 'traditions' of non-European Enlightenment in Asian and African constitutional formations.

The circumstance of globality⁸ named by Lenin as 'juridical world outlook'⁹ of course shapes constitution-making practices; that outlook was thought to be exhausted by bourgeoisie and socialist models of constitutionalism. This is no longer the case as manifest in the first contemporary post-colonial Indian Constitution enacted in the middle of the twentieth century CE, and as the South African Constitution towards its end now fully remind us. Further, we also ought to acknowledge that theocratic constitutionalism becomes problematic when it occurs outside Christendom, as has been the

case with Ayatollah Khomeini's shari'a-based Constitution of Iran, which inaugurated the shari'a as containing the potential for the development of Islamic public law. This innovation is scarcely exhausted by name—calling such as 'fundamentalist' or 'revivalist' constitutionalism, which does not in the dominant discourse somehow extend to the Israeli Basic Law. Comparative constitutional studies need to practice the virtue of humility in understanding juridical world outlooks thus constituted outside the Euroamerican 'Enlightenment traditions. The former far from constituting eclectic and mimetic constitutional borrowals from the latter traditions often constitute an epistemological break from these, which surely deserve the dignity of reasoned discourse.

It remains, of course true that a new emergent form of global economic constitutionalism now enforces a new mimetic reproduction of innovative constitutionalisms. We note this dimension a little later, as globalization, now defines 'democracy', 'good governance', 'rights' and 'development' not so much with a solicitude for the nation-peoples as for the community of foreign investors. The South State is increasingly conceived of as a host state, held hostage by movement of global capital. Contemporary globalization then offers constitutional narratives of hostage states.

SITUATING CONSTITUTIONALISMS AMONG THE KABYLE

Pierre Bourdieu was fortunate in finding the Kabyle who helped him to contribute, germinally, to the renewal of much of contemporary social theory.¹⁰ The emergent traditions of comparative constitutional studies are not so privileged. Ethnographical approaches to the understanding of the making, working, and unmaking of constitutions are still not in sight. The hegemonic traditions¹¹ of constitutional studies, at their very best, address histories of comparable normativity, that is, the hermeneutics of constitutional law, and at their worst prescribe universalistic approaches to constitutional interpretation.¹²

The Kabyle-Bourdieu perspective, in its potential extension to constitutionalism,¹³ entails at least two kinds of epistemological breaks: first, the break 'with native experience, and the native representation of that experience' and second a break that 'calls into question the presuppositions inherent in the practice of an "objective observer..."'¹⁴ This requires an entirely fresh approach to tasks of understanding constitutions at work or put to sleep.

The first 'break' invites many-sided social theoretical understanding of the inaugural practices of constitution-making, through which some epistemic communities represent themselves as invested somehow (by force of circumstance) with the power to enunciate a constitution. Almost all constitutions carry historic burdens of democratic deficit at the point of origin. Never directly elected and usually constituting an enunciative oligarchy, constitution-makers legitimate their narrative monopoly as the voice of whole people. Rarely made with peoples' participation (the only major exception being the post-apartheid South African Constitution), the career of constitutions stands deeply affected by the original constitutional choices already made. Constitutions usually archive basic decisions made by elderly, homophobic, non-tribal, gender-biased, metropolitan, professional, political, and propertied males; their practices necessarily reflect special interests and specific constellations of power and ideology.

Broadly, democratic (including erstwhile socialist)¹⁵ constitutions thus remain historically burdened by the need to transcend the basic legitimation (democratic) deficit. What is of interest is not so much the overall unity of original intendment but its deeply conflicted character. The hegemonic logic of constitution-forming practices that attempts the representation of militant particularisms (to evoke David Harvey's notion from another context) into a universal norm is never free of contention. Yet the histories of politics of desire that sculpt the constitutions remain usually well-kept secrets.

The second break entails interrogation of the 'living' constitution beyond the presuppositions and postulates of those practising constitutional theory, which elaborates standards for evaluation of native practices of constitutions, whether in the languages of 'constitutional essentials'¹⁶ or ways of production of 'legitimate law'.¹⁷ In this universe, self-sufficient epistemic communities that articulate normative constitutional theory assume 'god'-like functions; to borrow the language of Bruno Latour, from another context, 'they even produce natures and societies they need only themselves' by 'strange bootstrapping operations' that 'produce references internal to their discourse and to the speakers installed in within discourse...'¹⁸ The daily practices of lawpersons¹⁹ and the everyday experience of life under actually existing constitutions count for little or nothing in the production of understanding of constitutions at work, or preferred universalistic prescriptions mandating how these ought to work; it is not surprising that much of normative constitutional

theory, and much of comparative constitutionalism, is South-annihilating.²⁰

In contrast, and to begin with, philosophical anthropological understanding of constitutions directs attention to the internal logics of the practices of lawpersons—adjudicators pre-eminent among these. How may one outline the 'theory' of practice of constitutions at work? Is the labour of locating the 'logic of practice' of constitutionalism at all worthwhile? Are contemporary lawpersons (legislators, justices, jurists, and legal administrators) capable of providing insights as theoretically profound as the Kabyle of Algeria? And, if so, is the heritage of contexts in which law is thought (jurisprudence/legal theory) sufficiently self reflexive to harness this learning? Or, rather, is it the case that much of constitutional theory/discourse is no more than a "'semi-learned" production', a 'theoretical artefact totally alien to practice?'²¹ How then may one, if this feat is at all possible, seek to overcome the 'theory effect'²² of varieties of normative constitutionalism discourses?

The 'theory effect' not only fails to archive the plurality and multiplicity of practices of representation generated by a whole variety of lawpersons, but also more importantly, obscures from view the perspectives of non-lawpersons, people bearing the cumulative weight of the constitutional practices that they often seek to shed, even overthrow. How may we grasp different types of citizen interpretive practices that insist on a redirection of ways of production of constitutional meanings? May we include within this range militarized forms of insurgent citizen interpretation? How may we grasp forms of meaning that strategize confrontation between expectations and experience of constitutionality against the constitution itself? How may we observe and relate the impact of citizen interpretive practices with native official ones? May one, then, with appropriate caution, speak of the 'dominant' and the 'subaltern' practices of constitutional theory?²³

In all its protean senses, ethnography of constitutionalism has still to emerge. This is a mixed blessing, for its belated birth helps us avoid wholly state-centric and heavily globalized approaches to understanding of the theory of constitutional practice. Constitutions are, all said and done, codifications of heterogeneous dominant practices of state power, but never wholly so unitedly a success story because they do not quite 'tame' the jurisgenerative constituent power of people's insurgent practices. How else, may one ask, do we grasp the passive revolution of the post-Marcos Philippines or the more recent critical events in Indonesia?²⁴

This essay explores issues relating to construction of an Indian constitutional anthropology, in the hope that this may have some relevance for comparative constitutional theory. It endeavours to do so by recouring the shades of distinction between the expectation and experience of Indian constitutionalism. This insufficient Bourdieu-like way of articulating the habitus and the hiatus guides us, however, to an interlocution that generates a whole crowd of distinctions.

The first set invites us to make general and necessary distinctions between constitutions, constitutional law, and constitutionalism; the second pertains to the notions of expectation and experience; the third invites close attention to the practices of citizen constitutional interpretation. The fourth (without being exhaustive) impels some concern about career and future of constitutional practices in a globalizing/glocalizing world. (For reasons of space, this last aspect is not directly addressed in this essay.)

CONSTITUTIONAL FORMATIONS: GENERAL AND NECESSARY DISTINCTIONS

I have distinguished indeterminate and ongoing state formative practices as compelling differentiation, at least, between three interactive meanings of constitutions as texts, constitutional law, and theory/ideology ('constitutionalism'). I have named these, not too elegantly, as C1, C2, C3.²⁵

C1 names the corpus of texts, historically inaugural inscriptions of 'original intention' that seek to fashion a unified semiotic description of a new political formation, usually described as a 'nation-state'. The prime function of C1 is to 'rightfully "write society" through law', to present the state as provider of social cohesion, mystifying 'its...secrets, sources of violence, and evil', its 'hidden resources, designs and immense power'.²⁶ C1 is a corpus, containing diverse genres of texts. Most C1, even extreme situations of 'constitutions without constitutionalism'²⁷ and military constitutionalism, contain governance as well as rights/justice texts. Some convey a sense of constitutionally desired future social orderings; preambles furnish a standard genre of aspirational overreach. A few texts emerge as justice and rights texts; slender in comparison with the governance texts, in practice these often avenge them.

C1 is, however, never wholly written; indeed, the unwritten all too often animates that which stands codified. Thus, and summarily put, C1 is always a conflicted site, a battlefield, marking struggles for ascendancy between, first, the texts of governance and rights and justice texts and,

second, between the written constitution at play and war with the unwritten. The unwritten often cancels the written texts; and often enhances the aspirational aspects of the written.

But this comforting general proposition masks the ferocity of the struggle between unwritten. To experience this, one has to go beyond from Their Lordship's fancy prose, their eloquence about the rule of law to literature, to Mahasweta Devi's *Bashai Tudu*²⁸ and to Saddat Hasan Manto's epigrammatic story of a rickshaw puller who elated by the news of the new Indian Constitution had to learn in the police station that it was still the old one: the uncomprehending police exclaimed:

What rubbish are you talking? What new constitution? It is the same old constitution, you fool!

Then they locked him up.²⁹

C2 offers sites of ongoing and endless interpretive practices of variegated authoritative interpretive communities, resulting in what is commonly called constitutional law. Authoritative interpretive practices deploy different means, methods, and modes of interpretation, practices that overall create stable orders/networks of meanings. Of these, the adjudicatory practice have received the most attention, even though in life under actually existing constitutions the executive and the legislative practices often determine dominant configurations of meaning.

C3 designates the practices of reflexive understanding of C1 and C2. In its dominant liberal theoretical forms, it stands expressed in the practices that enunciate standard narratives concerning the rule of law, both in its normative and institutional senses.³⁰ The contemporary (post-Cold War) constitutional theory and practice that dismisses as 'pathological' all alien forms (socialist, Islamic, and related constitutionalism) invites anthropological gaze, especially on the site that self-constitutes the 'normal'.³¹

This apart, C3 also opens itself to view as 'cultural software'³² programming performative acts of power as well as resistance. C3, as cultural software, is programmed both by practices of national (and subnational) politics as by differing circumstances of globality. Understanding of patterns of global politics, in the unitary foundational as well as many a diverse developmental, moment remains central to a nuanced grasp of C3. The term 'post-colonial', as well as the 'transitional', emerges in this context as somewhat hegemonic, as it reduces diverse circumstances of globality to a somewhat flattened perception of historic time that give birth to C3.³³

The notion of C2 is severely impoverished when it ignores interpretive practices of non-authoritative communities. Social movements, including human rights movements as social movements,³⁴ remain anchored in citizen interpretations of texts of C1 and contexts of alternate C3, often deeply at variance with C2. The power these movements gather often result in the change, not just in but also of both C1 and C2.³⁵ If we were to view all constitutional formations as so many recombinations of the rule of law and the reign of terror inherent in the social reproduction of the power to rule, these manifest different forms of the Gulag statenesses. Catastrophic politics of cruelty inhere all forms of state power; only in some constitutional formats are these writ large.

At the same time, we may note that the relationship between C3 and C1, C2 remains not linear but dialectical. If C3 is a forming practice (in the sense that Georg Simmel describes³⁶ enclosing practices in the domain of C1 and C2, it is also the case that C3 is often shaped by the latter practices. In Bourdiean terms, C3 provides the habitus outside of which the juridical constitutional practices remain wholly insensible.

These distinctions provide no final vocabularies for constitutions put to work or to sleep. But these provide registers of practices, and ledgers of logic 'sustaining' these practices, even if in complex and contradictory modes of understanding.

EXPECTATIONS

The making of a constitution heralds, to use a cliché, 'the revolution of rising expectations'. But we lack analysis that situates the making and interpretation of constitutions to the dialectics between the law, as politics of state desire, and the law as articulating insurgent orders of social expectations.

Jeremy Bentham offered an inaugural understanding—in *The Theory of Legislation*—of all law as an endeavour to negotiate a 'multitude of expectations', the law even when providing systems of 'conciliation and concession' also modulated and rearranged these, at times by the process of creation of new expectations.³⁷ He described expectations as a 'presentiment', which endows human beings with the power of forming 'a general plan of conduct', such that 'successive instants which compose the duration of life are not isolated and independent points, but become continuous parts of the whole'.³⁸ Bentham, of course, counselled that the legislator follow, on the whole, the general course of social expectations; laws rooted in common expectations carried greater prospect of willing compliance and the legitimation of the legal order in

general. But he also realized that legally induced social change entailed 'shocking', 'deranging', and 'disappointing' common (dominant?) expectations. He counselled gradualism:

Men who are rendered free by gradations, will be much more capable of being so than if you had taught them to tread justice under foot, for the sake of introducing a new social order.³⁹

Violent 'deranging' of a general course of common expectations, on this view, produces a disproportionate sum of evil. From a Benthamite perspective, then, revolutionary constitutionalism remains problematic; all violent reconstructions of state and society entail the loss of capacity, even capabilities, to exercise freedom as well as signal erosion of languages of justice. This is an attractive proposition, until we begin to realize that all constitutions are orders of violence in that they entail 'shocking', 'disappointing', and 'deranging' expectations of large classes of people who remain progressively disenfranchised (though formally possessed of rights) by structures and practices of lawless governance.

I may here add that Niklas Luhmann's fascinating (though unself-conscious) renovation of Bentham invites us to think of law's role to expectations in contexts of its radical complexity and contingency, where conduct has to orient itself not just to one's own expectations but also to the 'expectation of other people's expectation'.⁴⁰ He guides us to a germinal distinction between 'cognitive' and 'normative, expectations'. The former promote social learning from disappointments; the latter, in contrast, signify 'the determination not to learn from disappointments'.⁴¹ For, when people begin to respond to failures in constitutional governance as an experience to which they must somehow adjust, constitutions in losing all normative efficacy also tend to reaffirm legitimate expectations. The existential loss of human capabilities to exercise control over governance practices paradoxically renews the power of political hope still arising Phoenix-like from the ashes of disappointed/disestablished normative expectations. Refusal to learn from disappointment of existential expectations defines the very struggle for recovery of the rule of law and human rights.

Constitutions respect social expectations differentially; they endow only *some* people, here and now, with the power of forming a 'general plan of conduct,' in ways that creates *fate* for others. In this, both Bentham and Luhmann lead us to the understanding the time-dimension of

constitutionalisms. People living under actually existing constitutionalisms that orient legitimation of state conduct towards popular expectations, they differentially suggest, are better off across generations than those living under regimes not concerned *at all* with these. Non-revolutionary constitutions accomplish, to invoke a phrase of Bourdieu, 'the work of time'. There is then no way that helps avoid the enormous human violation and tragedy in the acts of *making* and *reading* constitutions that mark the passage from normative constitutional *expectations* to lived constitutional *experience*. In what follows, I trace in the Indian contexts the dialectics of expectation and experience. While I essay the first in the next two sections, I must here leave the notion of 'experience' somewhat inarticulate.⁴²

THE FORMATION OF ANTERIOR EXPECTATIONS: THE FLAWED INVENTION OF CITIZENSHIP?

The habitus⁴³ that shaped Indian Constitution-making was the product of the highly diverse national independence movement. Already, the tyranny of the singular is in place; we totalize the independence movement, an extraordinary series of formation of experience (a protean shaping practice may not be exhaustively codified and whose readings may never be exhausted). Axiomatic constitutional enunciations already, on this description, cancel the plurality and multiplicity of movements. We run this narrative risk every time when we talk about the formative histories that bring constitutions into being.

The makers of the first Indian Constitution⁴⁴ were all, even if unselfconscious, Benthamites. The nationalist/self-determination movement had created a mass of 'anterior expectations', not all of which could be fulfilled by modes of instituting non-revolutionary constitutionalism. The movement raised a whole lot of diffuse expectations concerning stability and change in Indian society. The constitution-makers had then to embody 'subaltern' expectations in ways that negotiated avoidance of wholesale derangement of dominant expectations. They accomplished this in a whole variety of compromistic ways, by a mix of the 'symbolic' and 'instrumental' strategies.

Most crucial for the Indian C3 was the notion that free India would be constituted as a republic, enunciating the equal worth of all citizens. The idea of a republic was not entirely unknown to ancient/classical

political theory but the idea of citizenship was. That idea was constructed by serious political practice during the freedom struggle; Indians were no longer to be subjects of an imperial power but were constituted as beings with a range of powers in relation to state and civil society. The Indian Constitution remarkably extends the idea of citizenship beyond operations of governance to everyday transactions and interactions in society and economy. Anterior expectations determined this construction in ways that had few parallels in the history of modern C3.

The invention of republican citizenship is indeed momentous; it defines arenas of struggles to de-symbolize ritual hierarchy, based on notions of purity and pollution. The social bases of a radically heterogeneous freedom movement, generating a mass of anterior expectations, creates the necessary bases for the proclamation of the constitutional outlawry of the practice of untouchability (as a fundamental human right: Article 17), forms of agrestic serfdom (Article 23), and discrimination of the grounds of sex (Articles 14, 15).

The invention of 'citizenship', in the traumatic events of the partition of India, also generates a special regime of solicitude for minority rights (Articles 25–30). Constitutional secularism that mandates radical reform of the 'majority' Hindu religious traditions also results now in a cautious, piecemeal charter, based on communitarian-oriented, consensual bases for reform of the 'personal law' system of minority communities. The social constitution of Indian citizenry stands constructed, with fateful impact, along 'communal/communitarian' bright lines, providing the very sites for the eventual gender—respecting constructions of citizenship. So do, though with much ambivalence, concerns for the plight of the non-Bharat/Indian indigenous communities; falling short of radical self-determination, autonomous governance (the Fifth and the Sixth Schedules of the Constitution) recognizes civilizational, not just cultural, pluralism, thus going beyond the contemporary yet wholly conventional disputations concerning 'multiculturalism'.⁴⁵

All this having been acknowledged in fullness, we now proceed to the recognition that the Indian C1 constructs citizenship variously. First, citizenship is defined in state-centric ways; the state determines who is (by birth or descent) to count as an Indian citizen.⁴⁶ Second, the right to adult suffrage constructs citizenship via assurances of constitutional rights, though not declared as 'fundamental' in Part III of the

Constitution. In a sense, this right relates more to the legitimation needs of governance than to active agency of citizens. Citizens, as individuals, have the right to contest and vote regardless of their socio-economic position but do not have, collectively, any constitutional right to a system of free and fair elections.

Third, not all citizens have an equal right to contest elections. Initially a decade-long, but by now almost irreversible system of legislative reservations for Scheduled Castes and Scheduled Tribes differentiates the right to adult franchise; Indian citizens not belonging to these categories may not offer themselves as candidates in reserved seats. This limitation has now acquired self-evident legitimacy, although the political and social cost-benefit analyses suggest cause for concern.⁴⁷

Fourth, while all Indian citizens have access to the same normative order of rights, the division of rights through the device of parts III and IV of the Constitution ensures that enjoyment and achievement of fundamental rights stands differentially distributed among Indian citizens. This original distinction in India's first Constitution has been subsequently, though perhaps not substantially, mutated principally in the domain of Indian C2.

Fifth, citizens do not enjoy any collective right, outside the representation constituted by electoral verdicts, to shape national policy thorough referenda, plebiscites, and related devices (for example, recall of elected representatives); legislative majorities without any popular participation can accomplish even changes in, and of, the Constitution. This suggests an impoverished understanding of the idea of a republic.

The Indian C3 is also somewhat incoherent concerning the relationship between the idea of a republic and the idea of citizenship. The Preamble of course proclaims all the five values of a republic: equality, liberty, justice (social, economic, and political), dignity, and fraternity. Yet, the C1 as it emerged and in the long history of the Indian C2, retained structured innocence concerning the values of dignity and fraternity in terms of relationship between the governors and the governed. Structures and processes of governance remain least constitutionally obligated to respect individual or associational dignity of Indian citizens.⁴⁸ In their dealings with governments, the bulk and generality of Indian citizens stand reconstituted as subjects all over again. The idea of respect for fellow-citizens constitutes (as I understand it) the

very notion of republic. In a republic, as Aristotle taught us very long ago, citizens emerge as beings that know how to rule and how to be ruled, an assemblage of virtues that at least entail equal respect for all co-citizens.⁴⁹ Do we understand the insufficiency of the grasp of these republican virtues as a failure of decolonization or as an integral part of anterior expectations that led to the very making of the Constitution of India or even as genetically coded in the conceptions of republic in classical Indian political thought?

C3 has been somewhat more assured in the elaboration of the value fraternity finds through the anti-untouchability provisions of C1. Legal and constitutional enforcement of fraternity, in this context has, however, comprehensively failed, when measured in association with the value of dignity.⁵⁰ The Indian C1, C2, and C3 put together, have failed to create an authentic practice of the idea of republican citizenship.

HUMAN RIGHTS IN THE SHADOW OF GOVERNANCE: STATE SECURITY AND CIRCUMSTANCES OF RIGHTLESSNESS

The practices of the Indian freedom struggle shaped, in many ways, the logics and languages of contemporary human rights, the most stunning being the fashioning of the human rights to self-determination. Neither classical nor modern political theory/discourse fully anticipated such a world historic practice of enunciation of this kind of human right.⁵¹ The Gandhian practices of shaping the protean notion of Swaraj were exercises in practical reason par excellence. There is simply no way of grasping Indian C3 outside these practices, even though these till today remain un-theorized. Its constitutive elements did not mimetically spring forth from the Euroamerican Enlightenment discursive traditions; nor were these grounded in the extant traditions of 'Indian' political theory or practice. This formation of autonomous, originary fields of political praxis generates a new episteme, whose national and global significance is far from exhausted.

If the practices of swaraj in colonial India, charismatically instituted but mass practised, constituted the 'point of departure', the tasks of governance of an independent nation, 'the point of arrival',⁵² provide a register of practices of dissipation. Swaraj notions now get re-constructed in the idiom and grammar of the 'unity and integrity' of the new Indian state. The birth of the Indian Constitution also signals the end of potent practices of swaraj. The right to self-determination now gets scattered in intricacies of the difficult practices of the so-called Indian federation.

The constituted 'Indian' self permits no derogation by way of secession, even when it furnishes space for relatively autonomous practices forming sub-national regional identity politics. The enforcement of 'constitutional patriotism' (to borrow a notion now so dear to Habermas) sets boundaries to the Indian post-swaraj languages and logics of human rights; the right to free speech and expression, conscience and belief, movement and association must be held within the bounds of sedition/treason, and draconian security legislations routinely and tragically sustained by the Supreme Court of India.

The creeping militarization of the Indian state and polity begins simultaneously with enunciation of basic rights. The Indian C1 enshrines in Article 21 the rights of all persons against predatory practices of power that invade life and liberty; the very next article provides for constitutionality of the preventive detention system! The Indian C2 provides an extraordinary narrative of 'detention jurisprudence' (unparalleled in the annals of modern constitutionalism) but judicial valour stops short of invalidation of draconian security laws. The union home minister, even as I write, makes a strong plea for constitutional immunity for manifest, ongoing, and massive violations of human rights in national 'security' operations, even when they configure citizens as vermin: as in the languages of law and order that speak to us of 'Naxalite/terrorist/'dacoit'-infested arenas of law enforcement. The militarized practices of governance continuously reproduce patterns of confiscation of Indian citizenship; those whom the Indian state apparatus can successfully stigmatize as constitutional outlaws stand thus wholly denied of their rights as citizens and as human beings.

All this raises the question of what meaning may we give to notions of the rule of law in the context of what Hannah Arendt termed, in a different context the 'rightless peoples'.⁵³ The constitution of rightless peoples does not speak to the limits of rights; rather, it is one of the impossibility, or the intelligibility, of human rights assertions under situations where state officials monopolistically determine threats to the life of the 'state'. Indian constitutional theory and practice urges us to examine the notion that human rights remain intelligible only within contexts of creation of conditions of rightlessness. In this, it comes closest to Carl Schmidt's notion that the power to determine the exceptional gives legibility to the normal. 'Sovereignty' here manifests itself as excess, within which alone may we meaningfully situate the three Cs.

'Subaltern' perspectives (in the nature of things there cannot be the subaltern perspective), however, question the sovereign monopoly over

constructions of security and integrity of a 'nation'-state. Its complex notions about 'state terrorism' seek to delegitimize state monopoly over violence and deconstruct its logic, clothed in the languages of national unity and integrity by alternate conceptions, even visions, of these. Even pacific subaltern perspectives urge that human rights may not be silenced amidst the clash of arms. Constitutional policing of 'excesses' of peoples' human rights praxes must remain just that—constitutional policing—and no more. Subaltern critiques also insist on practices of state differentiation, practices providing scope for reflexive concerns involving the reproduction of forms of statenesses and rightlessness. It demands, thus, that the adjudicatory form of state power (through C2) inveigh against creation of circumstance of rightlessness, created singly or in combination by executive and legislative power. The 'subaltern' perspective contests Althusserian rendering of the bourgeois constitutionalism doctrine of separation of powers as a mask for the centralized unity of state power by its insistence on differentiation of state powers and purposes.

No known genre of contemporary constitutional theory takes this contestation seriously. I believe, though, that understanding of Indian constitutional practice holds potential for making a beginning in this direction.

DEVELOPMENTALISM AND REPRODUCTION OF RIGHTLESSNESS

The situation gets complicated, however, as we move from the 'security, integrity, and unity' of Indian discourse to theologies of 'development'. Practices of development programmes, policies, and priorities remain paranoiac, to a lesser degree, than state security policies although, from time to time, 'anti-developmental' citizen activism gets constructed, even decreed, as 'anti-national'. Developmentalism, as state ideology, constitutes the very 'being' of South constitutionalisms. Non-participatory developmental practices of politics also create circumstance of rightlessness, celebrating the power of the few as the destiny of millions of human beings.

Ideological practices of development entail hard constitutional or political labour, producing 'symbolic capital' and well as material conditions of ongoing human deprivation. A chief characteristic of these practices is that these create, almost constantly, circumstance of rightlessness. A subaltern outline of constitutional theory will necessarily

read into the original Indian C1's division of rights, reinforced by fifty years' long constitutional practice, into Part III and Part IV. The fulfilment of conditions and capabilities that in practice affirm the equal worth of all citizens stands here eternally deferred.

Yet this distribution of rights into those judicially enforceable and those casting a paramount obligation on the legislature or executive in the making of law and policy (Article 37) was not informed at all by Indian C3. The practices of the freedom movement do not, on any responsible reading of it, warrant this structure of postponement; nor does any reading of developmental economics suggest logics other than those of intense engagement in the pursuit of social and economic rights. I have seen no argument in the Constituent Assembly Debates, and in the varieties of state planning discourses that followed, stating the case for the Indian state's disability to pursue the only time bound Directive Principle contained in Article 45, providing free and compulsory education for children below the age of fourteen;⁵⁴ nor is any exorbitance argument available for non-implementation of the sensible Directive Principle urging, inter alia, for maternity relief (provision for which is made only, and in wayward ways, in 1961 Parliamentary Act, requiring as late as the year 2000 the Supreme Court to direct that casual/daily wage labouring women were entitled to such benefits under that Act).⁵⁵ At least we had a national asset, not historically replicable, for the implementation of Article 45 in the charismatic figure of Jawaharlal Nehru, fondly called by the children of India as Chacha Nehru, who loved them as much as he did; yet, this grand constitutional avuncular presence did not move the cause even by a historic centimetre! I need not here multiply instances of constitutional immiseration of the large mass of Indian citizens⁵⁶ beyond an utterance in Mahasweta Devi's *Bashai Tudu*:

The Indian Constitution respected every citizen's fundamental right to become whatever he could become by the dint of his guts. The poor therefore had the right to become poorer still.⁵⁷

The experience of development planning results in whole varieties of 'democratization of disempowerment'.⁵⁸ Large irrigation projects (from Bhakra Nangal to Narmada and Tehri), projects of urban development and siting of heavy industries, Green Revolution of which Bhopal catastrophe is the archetype, and related 'developmental' programmes, have created simultaneously infrastructures for Indian

development as well excess in social reproduction of rightless peoples. It is this economy of excess, confiscating constitutionally enshrined human futures of large masses of Indian citizens, which defines practices of developmentalism, now contested (through social action litigation), with depressing turns of Fortuna, before the Supreme Court of India and the high courts. Judicial activism is sensible only as codifying archives of the 'logic' of reconstruction of Indian C3, responsive to human rights denying political practices of Indian 'development'.

Judicial activism (C2 in its postures of contemporary restlessness) sites itself at a point of protean contestation concerning constitutional conceptions of 'development'. What the dominant discourse construes as the economy of scarcity, the subaltern discourse knows as the economy of excess. The practice of Indian Constitution consists of this violent translation of the democratically enfranchised citizens into rightless peoples. Judicial activism inaugurates a new constitutional register, archiving transactional discourse between state practices that forever create classes of rightless peoples and state-adjudicatory practices that seek to limit the range of disenfranchised Indian citizens. In its variegated accomplishments,⁵⁹ judicial activism remains sensitive to the problem of transaction costs in accomplishing the reversal of the phenomenon of reproduction of rightlessness. In so doing, it constantly risks its (now notoriously Arundhati Roy induced) legitimacy with activist as well as state managers constituencies. In its manifold negotiation of this legitimization contingency,⁶⁰ the Supreme Court of India remains insecure, parlous, and at times schizo-paranoid. So does the involuted elite discourse concerning the nature, future, and range of judicial activism. Amidst all these forms of intra-state/elite conversations, unsurprisingly, rightlessness grows apace.

PRACTICES OF CITIZEN INTERPRETATION

The power of practices of citizen interpretation lies un-theorized in constitutionalist discourse in India. Unlike the events of May 1968, or campus anti-Vietnam protests in the 1970s, which catalysed political thought in Euroamerican societies, 'critical events' (in a Lyotardian sense) have left no trace in the doing of constitutional and political theory in India. Movements of profound social significance bearing pivotally on constitutional experience and development remain at best on the margins

of theory. I have traced elsewhere, in some detail, the Gandhian/neo-Gandhian, parliamentary communist and the Naxalite, communal and communitarian, and the subaltern citizen interpretive approaches to Indian constitutionalism.⁶¹ Yet, these bear the burden of additional reflection in the context of this essay.

First, (and so far noted) the very notion of citizen interpretation pluralizes the notion of interpretive communities. Constitutions are not arenas of practices of state power; they also provide registers of interpretive practices of active citizenry. Second, citizen interpretations often remain contradictory to the canonical state interpretive performances. Third, to deploy Stanford Levinson's germinal distinction between 'Catholic' and 'Protestant' approaches to reading constitutions,⁶² citizen interpretation is typically Protestant, in which the privilege of reading the sacred text belongs to each and every member of the community of belief. The Protestant mode questions the production of constitutional meaning as narrative monopolies of the privileged few. Fourth, by definition such interpretive mode produces very different ways of reading. Women citizens read constitutions in ways different than men. Ecocitizens read constitutions differently from the class of 'developmentalists'. Capitalists read C1 differently than trade unionists. So do indigenous peoples and related communities of *atisudras*. The diversity of patterns of citizen interpretation remains bewildering in comparison with whatever embarrassment de riches authoritative interpretive communities, the gourmet diet of constitutional theorists, may have to offer. Fifth, in sum, practices of citizen interpretation offer a chaos to the ordered universe of authorized interpretive/epistemic communities. The latter, however special interests driven, in all their moments of contingency/expediency, do end up with constructions of 'common' or the 'public' good or interest. Citizen interpretive practices remain irredeemably diverse, conflicted, and contradictory. Thus, active citizenry interrogates judicial activist postures on environmental protection at the bar of the rights of livelihood of ordinary citizens; antidam activists (and those cause-lawyering the plight of the urban impoverished) protest state 'logic' concerning 'developmental' decisions; feminist interpretive strategies interlocute the hidden patriarchy in the languages of law reform movements; the lesbian movements question the homophobic state/law, and at times the logics and languages of human rights oriented social movements. This astonishing diversity ambushes, at vital moments, the

fragile legitimacy of state/law social reproduction. Sixth, these establishment and insurgent modes of interpretation, in turn produce, moments of constitutional stupidity and tragedy.⁶³

Overviewing practices of citizen interpretation runs large narrative risks. Not all citizen interpretation stands possessed of an equal power of social articulation; constitutionally 'valid laws'⁶⁴ and conflicted notions of political correctness⁶⁵ set effective boundaries. Not all citizen interpretation marshals the power of social movement and in turn social movements often define frameworks for citizen interpretation, for example, as is the case with the feminist and ecological movements. Citizen interpretation, initially free of practices of party politics, may be co-opted by power brokers. What matters in the Indian constitutional experience is the regime-sponsored appropriation of modes of citizen interpretive practices. Dominant structures of interpretation often convert the poetry of aspirational contest over production of constitutional meanings into the prose of governance.

Finally, without being exhaustive, the bases of judgement concerning the progressive/regressive character of citizen interpretation remain always deeply contested. Thus, we have no agreement, even among activist communities, concerning the progressive nature of violent citizen interpretation such as provided by an assortment of 'Naxalite' movements; even non-revolutionary, at least in their modality as pacific civil disobedience, interpretive movements like the Total Revolution movement, remain exposed to inconclusive contention when they (as Jayaprakash Narayan did in the early 1970s) urge security and armed forces to disobey unconstitutional orders. The *kar sevaks* who wantonly destroyed Babri Masjid even today do not see the 'counter-revolutionary', even reactionary, potential of citizen interpretation; for them the shaking of the foundations of Indian constitutional secularism, in profound human rights violative modes, emerges as constitutional necessity! And what shall we say of the elite citizen interpretation in the 1990s, which so volubly begrudged the legislation of reservations for backward classes in federal public services?

The allied question of impact of citizen interpretation on the structures of production of authoritative meanings of constitution stands partially answered by the fact that the its power, for weal or woe, is most remarkably resilient in the domain of the Indian C2; the histories of its impact in grasping transformations in C3 still await the birth of its raconteurs.

NOTES

1. See, for example, within the traditions of liberal political discourse, Bhikhu Parekh, *Rethinking Multiculturalism* (London: Macmillan, 2000).
2. Such as justifications for political authority and obligation; the aporias of rights and justice; notions of citizenship; fidelity to constitutional values, standards, and norms; and constitutional conceptions of individual, associational, and political good life.
3. See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).
4. See Bouaventura de Sousa Santos, *Towards a New Commonsense: Law, Science, and Politics in the Paradigmatic Transition* (London: Routledge, 1995), p. 113.
5. Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of (In) justice', in S.K. Verma and Kusum (eds), *Fifty Years of the Indian Supreme Court: Its Grasp and Reach* (Delhi: Oxford University Press & Indian Law Institute, 2000), pp. 156-209.
6. Jürgen Habermas, *Between Facts and Norms: Contributions Towards a Discourse Theory of Ethics* (Cambridge: MIT Press, W. Rehg, trans., 1995). Also see Rawls, *Political Liberalism*.
7. To borrow the phrase regime of A. MacIntyre, *Whose Justice? Which Rationality?* (Oxford: Oxford University Press, 1988).
8. By this phrase, I signify ways in which unequal international power relations and structures, including the modes of production of knowledge, which shape the national practices of enunciation of constitutions. Leading (or misleading?) terms of comparative constitutional discourse that refer us to post-colonial constitutional formations and more contemporaneously of the so-called 'transitional constitutions' are insensible outside fields of play of world hegemonic state actors.
9. V.A. Tumanov, *Bourgeois Legal Thought: Marxist Evaluation of Basic Concepts* (Moscow: Progress Publishers, 1974).
10. Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press; R. Nice, trans., 1977); also see Bourdieu, *The Logic of Practice* (Stanford: Stanford University Press; R. Nice trans., 1987).
11. I name these as 'hegemonic' because traditions of doing comparative constitutional studies remains, even today, irredeemably Eurocentric. One looks in vain, for example, in the corpus of Ronald Dworkin, Jürgen Habermas, and even Antonio Negri for even the remotest understanding of the constitutional jurisprudence of the South.
12. Notions concerning activist judicial role responsibilities, an issue of traumatic importance for South justices, stand prescribed (even proselytized) in terms of democratic deficit of judicial review power. South justices must always stand in mimetic relationship with the high discourse on what North justices may or may not legitimately accomplish from the judgement seat.
13. Three notions need careful distinction: C1 (the text that make the constitution), C2 (interpretation of texts), and C3 (constitutionalism, the theory or ideology

underlying, as well as shaped by forms of C1 and C2). For further elaboration, see Section II of this essay.

14. See Bourdieu, *The Logic of Practice*, p. 27.
15. These too represented themselves as manifestations of alternative conceptions of democracy.
16. See Rawls, *Political Liberalism and A Law of Peoples* (Cambridge: Harvard University Press, 1999).
17. Habermas, *Between Facts and Norms*.
18. Bruno Latour, *We Have Never Been Modern* (London: Prentice Hall; C. Porter trans., 1993).
19. By this term, I designate the wielders of constitution-making powers, and those upon whose creative energies the development of constitutions mostly depends. These include justices, jurists, and self-authorizing interpreters of constitution, people possessed, mainly, of the executive power of the state. This dominant frame of reference excludes citizen, and dissident/subaltern, interpretive communities, which at least count in my understanding of 'lawpersons'.
20. The celebrated corpus of Rawls, Habermas, and Dworkin, for example, carries not a single reference to South constitutionalism from India to South Africa.
21. To adopt the phrase regime in Bourdieu, *The Logic of Practice*, p. 103.
22. Pierre Bourdieu and L.J.D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992), pp. 235–53.
23. If we were momentarily to elevate justices to the privileged status of 'local informants' to the constitutional ethnographer, how then may we deal with the problem of 'the true nature of their practical mastery as learned ignorance, *docta ignorantia*, that is a mode of practical knowledge that does not contain knowledge of its own principles?' See Bourdieu, *The Logic of Practice*, p. 102. Put another way, how may we unravel constitution-making, and interpretation, as a 'kind of acquired mastery, functioning with the automatic reliability of an instinct' that makes it possible to 'respond instantaneously to all the uncertain and ambiguous situations of practice?' See Bourdieu, *The Logic of Practice*, p. 104. Indeed, the nascent 'theory' of comparative constitutionalism, or more precisely comparative constitutional adjudication, such as it is, does not quite guide us to understanding of the distinction between 'the objectivist model and the habitus, between the theoretical schema and the scheme of practical sense...shadowed by practical rules, partial and imperfect statement of principles'. See Bourdieu, *The Logic of Practice*, p. 107. Normative constitutional theories about adjudication do not leave much room for contingency of practical reason, which offers unlimited scope for strategies exploiting the opportunities for manipulating the peace of action—holding back or putting off, maintaining suspense or expectancy, or on the other hand, hurrying, hustling, surprising, stealing of a march, not to mention the art of ostensibly giving time...or withholding it (*ibid.*).
24. I must here clarify that my use of the term 'practice' is derived more from Louis Althusser than from Pierre Bourdieu (although a closer study may reveal

a kinship between the two discourses). For Althusser, practices, as material labour, assume primacy: 'all levels of social existence are sites of practices.' Practices are distinct and relatively autonomous and stand possessed of an 'element of knowledge' of prior practices; all types of practices (economic, political, ideological, technical, scientific/theoretical) constitute 'a complex unity...of a determinate human society.' In this sense, Althusserian notions of practice are as egalitarian as Bourdieu's. The parting of ways occurs when Althusser insists that the different internal structures of a whole variety of practices relate, in the last instance (howsoever one may choose to regard this lonely hour of the last instance) to 'the structure of production'. See Louis Althusser, *For Ma*, Ben Brewster (trans.) (London: Allen Lane, 1977), pp. 166–7. Although Bourdieu's notion of 'structuring structures' (partly, the *habitus*) deftly avoids traces of 'determination', for both thinkers practices are at once symbolic and material. Constitutions are then sites of (in the Althusserian sense) both ideological and repressive practices or apparatuses of power; Bourdieu will not accept this characterization but there is much in his discourse that, at the end of the day, reworks this categorization, at least in my reading of him. In any case, Althusser speaks more readily to concerns of constitutional theory and practice.

25. Upendra Baxi, 'The Avatars of Indian Judicial Activism'.
26. See pp. 34–5 of T.B. Hansen, 'Governance and the Myths of State in Mumbai', in C.J. Fuller and V. Beneri (eds), *The Everyday State & Society in Modern India* (New Delhi: Social Science Press, 2000), pp. 31–67.
27. Oketh-Ogando, 'Constitutions without Constitutionalism: Reflections on an African Paradox', in Shivji G. Issa (ed.), *State and Constitutionalism: An African Debate on Democracy* (Harare: Southern Africa Political Economy Series, 1991).
28. Mahasweta Devi, *Bashai Tudu* (Calcutta: Thelma Publication, 1990).
29. Saddam Hasan Manto, *The Mottled Dawn*, Khalid Hassan (trans.) (Delhi: Penguin Books, 1997), p. 175.
30. The normative dimension, in liberal constitutionalism includes elaboration of 'values' that ought to inform both C1 and C2, such as equality before the law, due process of law, basic human rights; the institutional dimension includes the doctrine of separation of powers, autonomy for judicial independence, and powers of judicial review over executive and legislative action, free and fair elections. The ways in which these dimensions are elaborated offer the angst of contemporary forms of normative constitutional theory, as readers of Rawls and Habermas well know.
31. If we were to view all constitutional formations as so many recombinations of the rule of law and the reign of terror inherent in the social reproduction of the power to rule, all constitutional orderings manifest different forms of the Gulag statenesses. Catastrophic politics of cruelty inhere all forms of state power; only in some constitutional formats these become writ large.
32. In the sense in which Balkin views all law, see J.M. Balkin, *Cultural Software* (New Haven: Yale University Press, 1998).

33. Thus, one needs to decompose the term 'post-colonial' into different historical moments. The Indian Constitution of 1950 is 'post-colonial' in a very different temporal register than, for example, Asian and African constitutions enwombed in the practices of the Cold War; post-Cold War constitutions, the so-called transitional 'constitutions' of the former Soviet Union led state orderings may be described as post-colonial in a wholly different, if at all appropriate, sense.
34. Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2008), 3rd edn.
35. It is impossible to understand developments in American constitutional development, outside the framing power the civil rights movements and to grasp Indian development outside the Total Revolution movement. Every activist Indian justice is a lineal descendent of Jayaprakash Narayan; so are leading American activist justices heirs of Martin Luther King Jr.
36. George Simmel, *Essays on Sociology, Philosophy and Aesthetics*, Kurt H.E. Wolff (ed.) (New York: Harper Row, 1959), p. 33. Also see Baxi, 'The Avatars of Indian Judicial Activism'.
37. Jeremy Bentham, *Theory of Legislation*, Bombay: N.M. Tripathi, 1975, pp. xvii–xxii, 90.
38. See Bentham, *Theory of Legislation*, p. 68.
39. Bentham, *Theory of Legislation*, p. 75.
40. Niklas Luhmann, *A Sociological Theory of Law*, Elizabeth King-Utz and Martin Albrow (trans.) (London: Routledge, 1985), p. 108.
41. *Ibid.*, p. 33.
42. I leave to the interested Reader of this essay the obscurity of the concept of experience that Hans Georg Gadamer insightfully invites us to consider in his *Truth and Method* (New York: Crossroads, 1989), pp. 55–87, 347–79. Obviously, what I present as lived constitutional experience straddles several aspects of *Erlebnis/Ergebnis*, that which is 'positively experienced' and that which is the result of experiencing, oscillating between the 'permanent content of what is experienced' and 'transience of what is experienced' or the way in which this yields 'lasting result' (*ibid.*, pp. 61, 64.)
43. Systems 'of durable, transposable dispositions, structured structures, predisposed to function as structuring structures...principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming of ends or an express mastery of the operations in order to attain them', see Bourdieu, *The Logic of Practice*, p. 53.
44. When we attend seriously to the internal logic of dominant constitutional practices, we destroy the nominalist regimes of representing the Indian Constitution. Even from that perspective, India has at least five constitutions:
 - The original text of 1950;
 - The Ninth Schedule Constitutionalism: 1950–1964 Nehruvian Constitution elevating executive understanding over judicial interpretation;

- The State Finance Capitalist Constitution (marked by Bank Nationalization Case);
 - The 1975–1976 Emergency Constitutionalism;
 - The Basic Structure Constitutionalism (from Golak Nath, and Kesavananda Bharathi to Bommai and beyond);
 - The globalization (WTO/post-WTO) Constitutionalism.
45. Bhikhu Parekh, *Rethinking Multiculturalism* (London: Macmillan, 2000).
 46. Upendra Baxi, 'Conflicts of Laws', 8 Annual Survey of India Law 146, 1972.
 47. Marc Galanter, *Competing Equalities* (Delhi: Oxford University Press, 1984); Upendra Baxi, 'Legislative Reservations for Social Justice', in R.B. Goldman and J. Wilson (eds), *From Independence to Statehood: Managing Ethnic Conflicts in Five African and Asian States* (London: Pinter, 1984), pp. 210–24. See also Upendra Baxi, 'Justice as Emancipation: The Legacy of Babasaheb Ambedkar', in Upendra Baxi and Bhikhu Parekh (eds), *Crisis and Change in Contemporary India* (New Delhi: Sage, 1995), pp. 122–49.
 48. The various oaths of offices that the Constitution prescribes remain singularly innocent of enunciation of the duty to respect citizens. At less symbolic, but no less important, levels civil service codes of conduct entail no acknowledgment of treating fellow-citizens with respect.
 49. I do not here invoke the more complex association of the idea of republic with notions of popular sovereignty.
 50. Large numbers of Indian citizens remain officially and socially treated as subhuman as any reader of Rohinton Mistry's *A Fine Balance* (London: Faber and Faber, 1995) surely knows. Fifty years, and more, of Indian constitutionalism at work have not improved in the least bit the plight of scavengers and sweepers, the real Dalits. Much the same may be said concerning the *atisudras* (as Babasaheb Ambedkar used to designate the social and economic proletariat)—the bonded and attached labourers, sex-workers, people in state and private custodial institutions, 'beggars' and street children, the 'dammed' peoples, the disabled, and those violated by political catastrophes ('communal' violence, people affected by the Bhopal gas tragedy).
 51. In the era of colonialism, it remained more concerned with the elaboration of a Divine Right to Empire than with ideas of a human right to self-determination. See P. Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2000); Bhikhu Parekh, 'Liberalism and Colonialism: A Critique of Locke and Mill', in *The Decolonisation of Imagination* (Delhi: Oxford University Press, 1997); U. Mehta, *Liberalism and Empire* (Chicago: University of Chicago Press, 1998).
 52. Partha Chatterjee, *Nationalist Thought and the Colonial World* (Princeton: Princeton University Press, 1986).
 53. See Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Bruce, 1950) and Baxi, *The Future of Human Rights*.
 54. The Supreme Court rendered this provision into a judicially enforceable right as late as 1993: see *Unnikrishnan v. State of Andhra Pradesh* (1993) 1 SCC 645.

55. *Municipal Corporation of Delhi v. Female Workers* (Muster Rolls) AIR 2000 SC 1278.
56. Even as regards republican rights, enshrined in Part III, affirming fraternity and dignity of all citizens political practices respecting state obligations corresponding to the fundamental right against exploitation (Articles 23 and 24) remain marginal to the practices of constitutional development.
57. Mahasweta Devi, *Bashai Tudu*, p. 87.
58. C. Ake, 'The Democratisation of Disempowerment in Africa', in *The Democratisation of Disempowerment: The Problem of Democracy in the Third World* (London: Pluto Press, 1995), pp. 70–89.
59. Baxi, 'The Avatars of Indian Judicial Activism'; S.P. Sathe, *Judicial Activism in India* (Delhi: Oxford University Press, 2001).
60. Upendra Baxi, *Judicial Activism, Legal Research and Legal Education in India* (Delhi: Capital Foundation of India, 1996).
61. Upendra Baxi, 'The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism', in Sridharan et al. (eds), *India's Living Constitution: Ideas, Practices, Controversies*, Delhi: Permanent Black, 2002.
62. Stanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1987).
63. See the interesting anthology by Levinson, *Constitutional Faith*, p. 19.
64. Laws that penalize free articulation of conscientious opinions such as the Official Secrets Act, the security legislation, contempt of court, law of parliamentary privileges, and offences against the state in the Indian Penal Code mainly, sedition.
65. Illustrated vividly by the current controversy over the revelation that the intrepid journalists of tehelka.com allowed the services of commercial sex workers being made available to army officers in a sting operation, which also recorded live the acts of intimate sexual relations.

5

A Text Without Author Locating the Constituent Assembly as Event

Aditya Nigam

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

— H.V. Kamath¹

Now Sir, we have inherited a tradition. People always keep on saying to me: oh, you are the maker of the Constitution. My answer is I was a hack. What I was asked to do, I did much against my will.

— B.R. Ambedkar²

INTRODUCTION

In a sense, all constitutions can be said to be texts without authors—or at any rate, texts with many authors, such that no singular authorial voice can be attributed to them. Constitutions are normally written, or one may say, they write themselves, in the course of major upheavals and transformations in the lives of societies. Be it the American Civil War or the French Revolution, the Russian Revolution or the Chinese, the Indian nationalist struggle or the innumerable other national liberation struggles around the world, constitution-making represents in some sense a crystallization and codification of the aspirations that have dominated these movements. Yet, constitutions are rarely about change; they are