

“A Language Which Is Foreign to Us”

Continuities and Anxieties in the Making of the Indian Constitution

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We are legislating in a language which is foreign to us.

—T. T. Krishnamachary, *Constituent Assembly Debates*, 2 December 1948

In 1958, only a decade after India became independent from colonial rule, and only eight years after a new constitution was adopted in the name of the people of a sovereign country, the newly constituted Supreme Court of India made a curious statement. Justice Venkatarama Aiyar, speaking for the court, stated that “[the Petitioner’s argument] overlooks that our Constitution was not written on a tabula rasa, that a Federal Constitution had been established under the Government of India Act, 1935, and though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built, and that the provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act.”¹ The Government of India Act of 1935 to which the judge referred was the last “constitutional act” passed by the British Parliament for colonial India.²

Justice Aiyar’s statement is a remarkable one. It was not an incidental observation but a principle of constitutional interpretation, one that is yet to be overruled.³ Modern constitutions, to borrow a phrase from Hannah Arendt, generally mark a “new beginning,” a founding moment when the sovereign people constitute a new political reality for themselves.⁴ In India, the Constitution had a further significance as the most important document that marked the country’s passage to freedom from colonial domination—through which “We, the People of India” formally constituted India as a “Sovereign Democratic Republic.” Yet one cannot dismiss Justice Aiyar’s statement as the egregious fallacy of one particular judge. Large parts of the Indian Constitution do indeed bear close resemblance to—if not exact reproduction of—the Government of India Act. The explicit persistence of the colonial constitutional structure—the fact of “colonial continuity,” to employ an oft-used shorthand—is a central current in the life of postcolonial constitutionalism.

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1. *M.P.V. Sundararamier and Co. v. State of Andhra Pradesh*, 1958, All-India Report (Supreme Court) 468.

2. While Justice Aiyar was not entirely accurate in stating that the Indian Constitution was “established under” the Government of India Act—it was actually the Indian Independence Act of 1947—the general point about the vast similarities between the last colonial constitution and its postcolonial successor was a valid one.

3. See Seervai, *Constitutional Law of India*, 173–76.

4. See Arendt, *On Revolution*.

The markers of colonial continuity have become the subject of a debate between those who seek to either highlight or diminish the distinctiveness of postcolonial India's Constitution from the colonial government system. There is evidence to support each of the positions, which may be referred to as “break” and “continuity,” respectively. To support the first position, scholars marshal undeniable evidence, like how the Indian Constitution was one of those rare postcolonial constitutions in the postwar era that was drafted without any direct or indirect involvement of a colonial power.⁵ Furthermore, the constitution-making process was helmed by the Indian National Congress, which had successfully led the anticolonial movement and had genuine popular legitimacy backing its claim to represent the independent nation. In other words, there should be little doubt that the Constitution was not meant to be a cynical device to transfer power from one set of despotic rulers to another. To support the second position, scholars take the explicit and implicit markers of continuity to argue that the postcolonial regime was, in Gandhi's famous phrase, “English rule without the Englishman.” All that changed with independence, they contend, was the skin color of the ruling class. Thus “independence” itself was in a sense chimerical: to borrow a much-used Communist slogan from the 1950s, “Yeh Azaadi Jhootha Hain” (This Freedom Is Not Real).

This duality of break and continuity, revolution and replacement, has been a recurrent theme in Indian scholarly and political debates since independence. However, the historical judgment one can reach about the nature of the transition from a colonial to a postcolonial order within this binary framework is inescapably reductive. One is left with the options of either a triumphal new beginning or a cynical transfer of power—neither of which is satisfactory. Nevertheless, the analytical threads of break and continuity are not unproductive. I will argue in this article that break and continuity cannot be understood as two mutually antagonistic categories, but as ones that were necessarily coex-

istent and codependent in the particular historical context of making the Indian Constitution. That is, in the given historical and ideational terrain on which the Indian Constitution was created, a break from the colonial past required, even demanded, maintaining certain continuities with the same. The continuity was meant to be constitutive of the break.

This particular formulation of the problematic allows one to analyze the distinct nature of the constitutional vision among the makers of the Indian Constitution—one that I will call “transformational constitutionalism.” Let me foreground, in brief, what I mean by that term.

If we study the discussions around the making of the Indian Constitution among those who were in charge of it, we get the sense of a unique tension between certain aspirations (of creating a democratic constitutional system) and certain necessities (arising from the challenge of creating a viable constitutional order under the given circumstances). The nature of the anticolonial struggle that led to independence, and the material conditions of Indian society at large, meant that there was no existing consensus on the nature of a new political or social order. If such a consensus could be presumed, the Indian framers could have gone on to create a constitution to institutionalize a new order without considering whether the conditions for it existed. In other words, the aspiration could have been fulfilled without having to worry about the necessities. In the case of India, as the framers themselves acknowledged, such a presumption could have been fatal (or at the very least destabilizing) for the constitutional system they sought to create. Hence the realization of the aspiration was inexorably bound to adequately taking into account the necessities. Therefore, the framers had to be attendant simultaneously to both the creation of the Constitution and the conditions that make such a creation viable. Their task could hence be defined as crafting a constitution that brings about the conditions of its own possibility. In the specific historical context of the Indian Constitution, this

5. On the other hand, “The vast majority of constitutions adopted since the Second World War, particularly those in the context of decolonization, involved the negotiated transfer of political power from a foreign state to local

bodies. Crucial to these constitution-making processes was the role of the colonial power in formally passing new post-colonial constitutions.” Klug, *Constituting Democracy*, 94.

task was understood as transforming the existing social condition through a constitutional path so that a constitutional system could become both viable and stable. The transitional process and the constitutional project were inescapably linked.

The relationship between aspiration and necessity is crucial to understanding the core dynamics of transformational constitutionalism. Making social transformation a central element of the constitutional imagination was not meant to be a position antagonistic to the more established tenets of constitutional formulations, that of a standard liberal democratic constitutional system that emerged through the democratic revolutions of the late eighteenth century. Transformational constitutionalism was a product of necessity rather than of mere ideological preferences. The makers of the constitution did not perceive themselves as choosing between a classical liberal constitutional structure, on the one hand, and one that had social transformation as one of its central goals, on the other. Rather, they felt that the feasibility and stability of having a constitutional democracy would be jeopardized if the question of necessary transformation of social conditions were ignored. This well-known passage from B. R. Ambedkar's speech at the Constituent Assembly is representative of this widely shared realization among its members. Ambedkar says that when the Constitution is adopted,

We are going to enter into a life of contradictions. In politics we shall be recognizing the principle of one man, one vote, one value. In our social and economic life, we shall, by reason of economic structure continue to deny [this principle]. How long shall we continue to live this life of contradiction? If we continue to deny it for long, we will do so by putting our democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has laboriously built up.⁶

Pursuing a social transformative agenda through the Constitution, and thereby in a controlled and structured way, was fundamental to having a constitutional order itself.

Covering all the various issues that arise from the theory and praxis of transformational constitutionalism is beyond the scope of this essay. Rather, here I am concerned with one specific aspect of transformational constitutionalism: its relationship to the immediate colonial past. The question of colonial continuity, I show here, was inseparable from one of the core aspects of transformational constitutionalism—constructing the structures for a state machinery that would be able to intervene in and transform society in a deliberate, gradual, and controlled manner, and at the same time be able to maintain the stability of the nascent regime. The particular formal and institutional mechanisms of the colonial state constituted a familiar and uniquely suitable resource on which the constitution makers could draw. However, these forms and institutions had to be reorganized to accommodate the most fundamental shift in the nature of the two regimes—from an absolutist to a democratic one. Under colonialism, the complete denial of agency to the ruled had provided unlimited authority to the ruler. The postcolonial state managers, however, had to perform their governance and transformational agenda under a system of representative democracy with a universal adult franchise. This required reconfiguration of the relationship between the state and society whereby the managers could neither fully reject nor fully embrace the legacy of the colonial state machinery. Paying close attention to the dynamic of break and continuity, rather than treating both as abstract antagonistic positions, helps delineate the particular challenges of such a reconfiguration that was attempted in India under the rubric of transformational constitutionalism.

There is one final theoretical point that I want to highlight. In the West, over the course of the nineteenth and twentieth centuries the advancement of capitalism and its attendant complexities and problems demanded newer and more expansive actions from the state. This increase in “specificity and subjectivity” from public administrative officials led to a concurrent necessity to find proper legal and normative structures for the exercise of these expanded powers.⁷ The body of

6. B. R. Ambedkar, *Constituent Assembly Debates* (hereafter *CAD*), 25 November 1949.

7. Sordi, “Révolution,” 26.

laws and norms thus produced, called “administrative law,” grew in volume and significance with the growth in the administrative powers of the state. By the twentieth century, administrative law came to be as important a category of public law as constitutional law. These two bodies of law in the West remained deeply entangled, yet often conflicted. One of the reasons for this vexed relationship has been the different genealogies of these two pillars of modern public law. While constitutional law and theory drew its most essential tenets from the democratic revolutions of the late eighteenth century, administrative law developed as an ongoing response to the increasingly complex functional demands made on the modern state machinery. The demands of transformational constitutionalism meant that the constitution makers in India concerned themselves with both constitutional and administrative legal questions when drafting the Constitution. Few other constitutions in the world say as much, and in as much detail, about the administrative and bureaucratic machinery of the state as the Indian Constitution. It is precisely in this aspect of the Indian constitutional formulation where the question of colonial continuity is most relevant. Using break and continuity as analytical axes helps highlight a significant facet of the making of the Indian Constitution—the peculiar intermingling of two constituent voices, that of the sovereign people and that of the administrator.

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As opposed to the voice of “We the People,” a phrase that would become the cornerstone of modern constitutional theory since it made its first successful claim of constitutional authorship in the aftermath of the American and the French revolutions, in the colonial constitutional discourse, the constituent voice—the authorial subject position—was always unambiguously that

of an administrator. The putative constitution of the colonial regime was a result of a new revenue regime in India in the latter half of the eighteenth century (most significant of which was the Permanent Settlement in Bengal) and the associated modernization of colonial administration.⁸ What tied together subsequent constitutional developments under colonial rule were concerns about maintaining the stability and governing ability of the regime. These developments, therefore, were driven primarily, if not exclusively, by what can be called a calculus of governance. This calculus underwent a significant shift during the two centuries of colonial rule, but those shifts were always internal to the colonial governance apparatus; that is, they emanated from the concerns of the state administrators and experts who constituted that apparatus.

The administrator as a constituent subject had a distinct constitutional language. It was a language that was marked by anxiety, one that arose out of the unknowability of and the potential dangers posed by that vast alien population it was called on to govern. The colonial state saw itself as standing at a distance from the mass of the colonized subjects. This distance was both a historical fact—it was a foreign ruler on alien shores—and a justification for its rule. Maintaining that distance is what allowed it to stand above the perceived divisions and irrationality of the colonized society—its “superstitions and prejudices”⁹—and administer a rational and “enlightened” political rule.¹⁰ Anxiety was also a product of this distance. The unknown subjugated society was filled with uncertainty and potential for chaos and instability. The formidable apparatus of colonial knowledge production sought to tame this unknown mass by formulating comprehensible and manageable categories. The certainties and predictabilities of administrative and legal categories were sought as a counter to

8. Permanent Settlement sought to modernize not only the economy, by instituting a “rule of property,” but also the administration. The permanency and fixed nature of the revenue system shaped the architecture of the fledgling colonial state. The executive actions of the state were only to be limited to the collection of revenue. Homogenous norms were to govern the relations among the economic actors, and conflicts could be resolved via a judicial

organ independent from the revenue collection apparatus. Permanent settlement was thus touted as the beginning of a modern regime of the rule of law, rather than the despotic rule of men. It was felt that the elimination of personalized executive interference into economic activities would also root out the corruption that the company was seen to have inherited from its Indian predecessors. True to the demand of nascent capitalism, greed was to be banished

from the sphere of governance and facilitated in the sphere of the economy. See Wilson, *The Domination of Strangers*, and Dirks, *The Scandal of Empire*.

9. Thomas Munro, quoted in Muir, *The Making of British India*, 285.

10. Mill, *Considerations*, 320.

the uncertainties of the chaotic colonized social form. At the same time, the always present epistemic gap between the rulers and the ruled had to be overcome through sheer force and decisive action whenever a potential threat arose—calling for a large degree of discretion on the part of the executives. The constitutional form that emerged out of this condition, then, was constituted by the language of the anxious administrator.

The constituent voice of the administrator created important, concrete outcomes at the level of constitutional praxis. The “legislature” was, obviously, rather different from its counterpart in Europe, which had taken shape through the democratic revolutions. Colonial rule was, to quote John Stuart Mill, “despotic.”¹¹ There was near complete subjugation of the colonized society by the colonial political power. Any notion of representation, where demands arising from the society shape the process of lawmaking, was emphatically denied. Instead of representatives, what spurred legislative developments in India were “experts” and administrators, in the form of either the governor general in council or a law commission appointed for specific purposes. The divergence of the demand for codification, in vogue in both the colony and the metropole in the nineteenth century, demonstrates this difference. The demand for legal codification in nineteenth-century England (as well as the other major common law country, the United States) was advanced as a part of a set of demands for furthering democratic reforms. Codification meant in that context a clear statement of the law enunciated by the people’s representative in

the Parliament, and one that undercut the power wielded by lawyers and judges well versed in the complex arcana of common law jurisprudence. In India, on the other hand, it was to be the work of a body of experts, drafting rules from the first principles with the view to providing a unified and desirable set of rules to govern the country.¹² India was seen as a “laboratory” for creating a model for modern and rational legal rules that could be then replicated in England, which proved more difficult in practice given the constraints of a democratic polity.¹³ The laboratory analogy is an important one, since the logic of the colonial codification process anticipated the way legal codification projects came to be understood in the twentieth century—as a rational technocratic endeavor rather than a democratic demand. The point of these expert-driven endeavors was to tame an alien and complex mass of social relations and practices through abstract rules and categories, thereby making them comprehensible and, crucially, governable.

Concerns regarding governability and state stability provided the primary framework through which the legal drafters understood their task. Hence, they frequently subjugated abstract theoretical concerns to the specificities and necessities of governing. For example, in the sphere of property laws, the ideology of the primacy of property rights was, in practice, always balanced with discretionary and pragmatic political considerations that dictated limits on the free exercise of those rights, driven by local administrative concerns with the specter of large-scale disturbance in the agrarian sector.¹⁴ An even starker example was the vast

11. Both Mill and Thomas Babington Macauley told the House of Commons in 1832 and 1833, respectively, that “no alternative method of governing India was yet in sight than that of an enlightened and paternal despotism.” Coupland, *The Indian Problem*, 20. The justification for despotism was sought from India’s own history. It was argued that Indians have always been ruled by despots who administered the country with a strong hand. See Cohn, “Law and the Colonial State,” 64.

12. The need for creating a unified legal code was first expressed in the Charter Act of 1833. The ambition of codification actually goes back much further, but no law resulted out of it. These were attempts to locate India’s “ancient constitution” by making into codifiable

laws the traditions and customs of the country, the most significant example of which was Nathaniel Halhed’s *Code of Gentoo Laws*. These were attempts to bridge the “epistemic gap” experienced on an alien land by a “simple feat of translation,” by turning situated practices into abstract principles using “scientific” and philological methods. See Cohn, “The Command of Language.” The ideological basis of the second, and successful, wave of codification attempt was utilitarian, the definitive history of which is narrated in Stokes, *The English Utilitarians*. However, the success was only partial. It failed in its ambition to create a unified civil code, given the sensitive and complicated nature of property laws, but did provide the Penal Code of 1860, the Criminal Procedure Code of

1861, and the Evidence Act of 1872—three statutes that are still in force in India, although in a modified form.

13. Dirks, *The Scandal of Empire*, 231.

14. See Chatterjee, *Bengal 1920–1947*, 7. After the rebellion of 1857, the focus of the colonial regime shifted from upholding the sanctity of property rights of those owning the land to maintaining political stability. The Bengal Rent Act of 1859 stipulated for the recording of tenant rights providing a modicum of security to tenants. The model of Bengal was soon followed in other parts of the country through legislations with provided security of tenant occupancy and protection from disproportionate increases in rent. In another set of laws, the

body of colonial criminal laws where special rules were made for specific segments of population in clear violation of any principle of equality before the law.¹⁵ Rule of law in the colonial context could rarely be separated from rule of administration, and as such finding a precise and particular solution for dealing with a complex social form indelibly shaped the development of colonial legality.

The other, perhaps even more significant aspect of the colonial constitutional schema was the nature of the executive. Two major themes regarding the colonial executive need to be highlighted: discretion and coherence. The need for executive discretion followed from the logic of the colonial enterprise. The logic of empire demanded a great deal of discretionary autonomy for the administration on the ground, as the complex task of ruling a foreign land had to be performed through pragmatic calculations.¹⁶ While in theory the British Parliament had the ultimate authority to pass laws and manage affairs, having the authority and exercising it were two very different things. The challenges of governing a country like India and the localized and precise political calculations required for maintaining order meant that the executive in charge had to be given a large degree of flexibility within a more general set of rules.¹⁷ Hence the Parliament was always careful to note that a robust notion of checks and balances could not be the basis of the colonial constitution, and the governor-general had to be accorded a large degree of discretionary power. A similar dynamic played out between the colonial capital and local administrative entities. From the middle and lower levels of colonial administration, faced with the contingent world of social relations and practices

they had to encounter on a daily basis, there arose continuous claims for making room for exceptions and discretion.¹⁸

Along with the acknowledgment of the necessity for discretionary power there was concern for how that power was to be exercised. The complex business of running a massive country, with administrators in far-flung districts coherent and manageable, called for procedural predictability and control. While the actions of the executive were not necessarily limited by some higher legal principle, the exercise of discretion had to be, in keeping with the functional needs of the centralized state, presented in a properly procedural form. As a result, the colonial state produced an enormous body of rules, schedules, procedures, and forms of record to impose coherence on the expansive and multifarious powers exercised by its administrative officers. Elaboration of administrative law—what these rules and procedures could properly be stated to be a part of—was an essential part of colonial constitutional development. What is crucial to understand is that discretion and coherence—the two central facets of the practice of executive authority under the colonial regime—were not antagonists in a simplistic way. Rather, precisely because the executive authority was called upon to perform specific tasks for the maintenance of the colonial order was there a simultaneous need to develop a complex procedural structure to govern the various parts of the vast leviathan. Both these aspects, discretion and coherence, were thereby tied by the logic of maintaining order and governability—which in turn formed the core of colonial constitutionalism.

The considerable institutional and discursive

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 incontrovertible right in a market system, that of alienation of land was sought to be limited when the buyers were merchants and money-lenders, who were not seen as a part of either the “traditional aristocracy” or the “landowning classes.” The deviation of the colonial regime from their stated belief about bringing in a modern form of property rights in land could be explained by the “fears which the British possessed [about] disturbing the bases of . . . traditional authority,” thereby “unleash[ing] revolt against their rule.” Washbrook, “Law, State, and Agrarian Society,” 665.

15. Almost every history of colonial criminal law stresses its deviation from the principles of the rule of law. For representative discussions see Kolsky, *Colonial Justice*; Freitag, “Crime in the Social Order”; and Yang, *Crime and Criminality*. Even outside of India, criminal law, fundamentally concerned with disciplining a population by coercion, had been the terrain of deviation from the principles of the rule of law in almost every single colonial encounter. For some representative discussions on contexts other than India, see Fitzpatrick, “Transformations of Law and Labour”; Chanock, *Law, Custom, and Social Order*; and Stoler, “Making Empire Respectable.”

16. See Cohn, “Law and the Colonial State,” 58.

17. Nasser Hussain provides an important history of executive discretion through the framework of “emergency” and its centrality to the colonial political imagination. See Hussain, *The Jurisprudence of Emergency*.

18. For a description of this disjunction as experienced by the lower level of the administration, the district collectors, see Wilson, *The Domination of Strangers*, and Woodruff, *The Men Who Ruled India*.

infrastructure of an interventionist administrative state generated under the colonial regime became available to the postcolonial elite as they grappled with their own particular concerns of governability and order. However, those concerns cannot be separated from an undeniable desire to break with the colonial past. The result was a reorganization of that infrastructure, whose logic is what we shall now turn our attention to.

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The schism between M. K. Gandhi and the leadership of Congress—especially Jawaharlal Nehru, his chosen successor—on the question of whether or not postcolonial India should continue to have a modern centralized state is one of the most well-known political and intellectual disputes during the moment of India's independence. Gandhi's unqualified critique of Western modernity had failed to convince the leadership soon to be in charge of the new nation. In their mind it was not modern institutions themselves but the compromised form in which they had come to India that was the problem. Colonialism, in their view, had distorted the process of historical progress that had been achieved by modern nations elsewhere. Nehru and the postcolonial political elites wanted to reclaim India's place within the time of modernity. When the removal of the impediment to progress—namely, colonial domination—was in sight, the solution was to correct the distortions to, rather than reject entirely, the path of modern progress. "The whole question," Nehru wrote in a letter to Gandhi, "is how to achieve [a developed] society and what its content should be. . . . We have to put down certain objectives like a sufficiency of food, clothing, housing, education, sanitation etc. which should be the minimum requirements for the country and for everyone. It is with these objectives in view that we must find out specifically how to attain them speedily."¹⁹ Gandhi's ideas were, it was felt, entirely inadequate to solving these problems.

The disagreement between Gandhi and

Nehru could be understood as one of competing visions—enlightened anarchy versus modern nation-state, small-scale village economy versus industrial capitalist development. Yet these important and well-documented ideological disagreements must be situated within the particular contingencies facing the postcolonial elite at the moment of transition. While the Congress did indeed succeed in forging an alliance between the urban elite that constituted its leadership and the rural masses of the peasantry, such an alliance was fragile and tenuous. The elite leadership of the Congress, despite the obvious successes of the Gandhian mass movement, was not successful in fully overcoming its distance from the peasant masses—remaining unable to create a new language of politics that could represent the view of the masses regarding what is "just, fair, and possible."²⁰ Hence the Indian elite in general, and Congress in particular, were unable to create a common conceptual framework for a new social and political order through the process of the anticolonial struggle itself. Evidence of this failure, and its potential costs, were available to the Congress leadership by way of the frequent uprising by peasants and the increased militancy of workers. In 1946, the very year the Constituent Assembly was convened, the biggest armed peasant rebellion in Indian history broke out in the Telangana region of the State of Hyderabad, continuing while the assembly was in session. The threat of popular uprisings, which could unsettle the nascent political order, was very much on the minds of the members of the Constituent Assembly. Members repeatedly stressed the need to be aware of the "dangers of insurrection and bloodshed."²¹

It is within the context of this unrest that the Congress leadership conceptualized a break from colonial rule. Several Congress leaders stressed that freedom from colonial domination was not merely a question of ascribing hitherto unavailable political rights to citizens, but also one of correcting the abject conditions of poverty, underdevelopment, and inequality bestowed by colonial policies.

19. Nehru to Gandhi, 9 October 1945, in Gandhi, *Hind Swaraj*, 152.

20. Amin, "Gandhi as Mahatma," 55.

21. Brajeshwar Prasad, *CAD*, 10 September 1949.

A Congress resolution drafted by Nehru stated that “the great misery of the Indian People are [*sic*] due not only to foreign exploitation in India but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. [Therefore] it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities.”²² In this narrative, transformation of the Indian social landscape was integral to making a break with the colonial past.

As one reads the deliberations in the Constituent Assembly it becomes clear how the members viewed the task at hand. They had to create a constitutional structure that could mediate a deliberate process of social transformation to cure the worst forms of underdevelopment and inequity that threatened the stability of a postcolonial political order. Making social transformation one of the central goals of the constitutional system produced a distinct horizon of possibilities for what constitutions can and should do—one that I have termed transformational constitutionalism. The threads of break and continuity from the colonial past—something that was debated widely in the assembly—can be understood through the challenges of giving this transformational constitutional vision a concrete shape.

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The demands of mediating an ambitious agenda of social transformation through the constitution required weakening what are generally known as strong “precommitment” devices in the constitution—whereby the constitution reflects a founding compact for the polity and incorporates mechanisms that prevent future legislatures or executives from violating it. In other words, a constitution sets up certain built-in safeguards and limits against future democratic impulses for change. Constitution makers who were committed to facilitating and mediating change, rather than preventing it, could not simply adopt that route. As Nehru had noted

as early as 1937, the postcolonial nation builders had “bigger decisions to take, grave choices before [them], than those of lawyers’ making.”²³ The necessary flexibility for the legislature to make those bigger decisions was reflected in the framing of the fundamental rights clause, the amendment clause, and, most significant, the property clause. The weakening of limiting mechanisms, coupled with a model of parliamentary supremacy derived from the Westminster system, was meant to allow the legislature a great degree of leeway in helming the transformative agenda envisioned by the founders.

Once there was a broad agreement about the need to transform social conditions, the question then became one of which specific measures were needed to achieve that goal. A non-state-based model of social change through moral regeneration, as suggested by Gandhi, had proven inadequate so far. In the mind of the Congress leaders the only body capable of carrying out a project of social transformation this ambitious was a well-organized state apparatus. This was all too available to the postcolonial elite in the form of the existing colonial state machinery. The Congress therefore decided to preserve it almost intact with the necessary shift of its *raison d’être*.

Nehru’s speeches to bureaucratic and police officers’ associations in the early fifties provide a good sense of how this shift was imagined. “Things changed in many ways when independence came to India,” Nehru told trainee officers who were to join the Indian Police Service. “That change was not apparent because there was a continuity, because many things appeared to go on as they had been going on previously. There was no break as such but there was an enormous break all the same under the surface of the things which seemed to be much the same. . . . That is the first thing to remember, that in a democratic state the police are different in a sense from the police in a state that is not democratic.”²⁴ While the surface of the executive machinery—its structure—had remained

22. Zaidi, *A Tryst with Destiny*, 54.

23. Jawaharlal Nehru, Speech at the National Convention of Congress Legislators, March, 1937, in Shiva Rao, *Framing of India’s Constitution*, 1:86–92.

24. Jawaharlal Nehru, “Address to the IPS Probationers at Mt. Abu, October, 1958,” in *Nehru on Police*, 21.

the same, Nehru insisted that an “enormous break” that has occurred from a nondemocratic colonial regime to a democratic postcolonial one necessitated a shift in the orientation of the executive. “They [the police] have not only to deal with crime . . . and disorder in a general sort of way, but the real additional duty of the police, as of all of us, is that of dealing with human beings in the mass, not as something to be commanded or ordered about but as something to be won over and persuaded and guided.”²⁵ Instead of maintaining order through sheer coercive force, the executive under the new democratic regime had to be prepared to guide and persuade “human beings in the mass,” to act on them in precise ways to aid in a gradual and managed transformation. Under “the previous period of administration,” Nehru went on to remind the officers, their “main duty was only to keep the state going.”²⁶ Now, however, the “major problem for India is that of development,” and “the army and the police . . . provide the background because they create the conditions in which development is possible.”²⁷ In other words, the elements of continuity from the colonial era were to be reorganized and marshaled in aid of achieving and fulfilling the promise of a break.

The fact that a large portion of the Indian Constitution was adopted from the Government of India Act of 1935 has to be understood in the context of providing what Nehru called “background.” As Balkrishna Sharma noted in the assembly, replying to criticisms of their imitating the colonial system: “Here, after all, we are framing a Constitution and the modern tendencies, the modern difficulties, the modern problems that are facing us are there and we have to provide for them all in our Constitution, and if we have leaned on the Government of India Act for that matter, then I do not think that we have at all committed any sin.”²⁸ To the charge that the Constitution is an “imitation” of its colonial predecessor, Ambedkar clarified that “the provisions taken from the Gov-

ernment of India Act, 1935, relate mostly to the details of administration.”²⁹

These defenses of the continuity of the colonial state infrastructure foreshadow the way executive power was to be dealt with in the Constitution. The flexibility granted to the legislative sphere and the supremacy granted to the Parliament—facilitating future contestations required by the logic of a democratic transformation—had a necessary counterpoint in the design of executive powers. In place of the talk of elasticity and negotiability for the former, order and effectiveness were the dominant themes for the latter. These were not necessarily contradictory strains; rather, they both flowed from the logic of a transformational constitutionalism. The need for a powerful executive arose in two principal ways from that logic. First, the state was to be the vehicle of the transformation, and hence it had to be well organized and administratively capable of the task. Second, political challenges had to be channeled into the structure laid down by the Constitution, wherein there was flexibility to assimilate them. A strong executive was required to both repress and disincentivize resistance outside the prescribed constitutional route. In other words, a transformational constitutional project required two things that only an organized and powerful executive could deliver: a body capable of carrying out the change, and a mechanism by which other—nonconstitutional—methods for demanding change could be forced into a constitutional path. We can call this the need for organization, and the need for order, respectively.

As mentioned above, preserving the entirety of the colonial state apparatus intact was motivated by the need for a well-organized executive machinery. The Constitution laid out in great detail the structure and relationship between different administrative bodies, whose job was to “assist” the elite in their “tremendous undertaking.”³⁰

At the same time, order had increasingly become a significant concern for the Congress since it took over the interim government. In part, the

25. Jawaharlal Nehru, “Speech to the UP Police Officers, Lucknow, November, 1952,” in *Nehru on Police*, 51.

26. *Ibid.*, 14–15.

27. *Ibid.*

28. Pandit Balkrishna Sharma, *CAD*, 25 November 1949.

29. B. R. Ambedkar, *CAD*, 4 November 1948.

30. Jawaharlal Nehru, “Speech to the UP Police Officers, Lucknow, November, 1952,” in *Nehru on Police*, 15.

gruesome specter of violence unleashed by the partition brought it to the fore. As A. K. Ayyar, a member of the Fundamental Rights subcommittee, wrote in a letter to the constitutional adviser B. N. Rau, “The recent happenings in different parts of India have convinced me more than ever that all Fundamental Rights guaranteed under the Constitution must be subject to public order, security, safety, though such a provision may to some extent neutralize the effect of the rights guaranteed under the Constitution.”³¹ But the need for order had a deeper rationale. For transformational constitutionalism to function, society had to “hold fast to constitutional methods of achieving social and economic objectives.”³² Consequently, it “must abandon the bloody methods of revolution.”³³ The latter, as Ambedkar clarified, included the Gandhian method of resistance, which also had to be eschewed despite its refusal to make any revolution bloody.³⁴ Because “where constitutional methods are open, there can be no justification for these unconstitutional methods.”³⁵ The possibility of transformation through constitutional means depended in part on it being the *only* feasible means of transformation. Contending groups in society had to be swayed to pursue their causes within the framework of

the Constitution.³⁶ Given the flux and the lack of “constitutional morality”³⁷—in other words, the tenuousness of the consensus about the nature of the political order—one could not take that possibility for granted. Such a presumption could be, as Patel—by then in charge of internal security—never tired of saying, “a dangerous thing.”³⁸ According to critics within the assembly, this led to a Constitution whose rights had been “framed from the point of view of a police constable.”³⁹ The starkest example was granting constitutional status to “preventive detention”—where individuals were imprisoned without the commission of a crime and without trial—a much-abhorred practice of the colonial government that Congress had specifically protested against in the past.⁴⁰

These provisions attracted criticisms from several members of the assembly, many of whom had firsthand experience of the repressive laws of the colonial state.⁴¹ Members listed the repressive laws that would be sanctioned under the new Constitution,⁴² and they complained that the Constitution merely substituted “an Indian bureaucracy in the place of a British bureaucracy.”⁴³ Many of them suggested amendments, like protection against unreasonable search and seizures and capital punishment, which were all defeated in the assembly. For

31. Austin, *The Indian Constitution*, 70.

32. B. R. Ambedkar, *CAD*, 25 November 1949.

33. *Ibid.*

34. “It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha.” *Ibid.*

35. *Ibid.*

36. The issue of labor—one of the major concerns of the elites before independence—was a good example of this shift. The Industrial Disputes Act in 1947 provided for an array of progressive rights for the workers. However, it also created a system of “recognized unions,” compulsory arbitrations, and specialized administrative and judicial machinery (tribunals) dedicated to maintaining the central government’s overwhelming role in maintaining peace between capital and labor. The point was not to repress conflicts, but to make sure that they were channeled through a constitutional path.

37. “The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It

has to be cultivated. We must realize that our people have yet to learn it.” B. R. Ambedkar, *CAD*, 4 November 1948.

38. “Proceedings of the Meeting, 21 April 1947,” in Shiva Rao, *Framing of India’s Constitution*, 2:296.

39. Somnath Lahiri, *CAD*, 29 April 1947. Lahiri was the only communist member of the assembly (though only for a short period). His observation was more than an intellectual critique, since within his short tenure, his house was searched and his possessions seized, a fact that he tried to bring to the attention of the assembly with little success. Therefore, not surprisingly, the strongest critics of the civil rights provisions in the Constitution were the socialists outside the assembly. Ambedkar, however, took an uncharitable view of these criticisms, saying, “The Socialists want that the Fundamental Rights mentioned in the Constitution must be absolute and without any limitations so that if their Party fails to come into power, they would have the unfettered freedom not merely to criticize, but also to overthrow the State.” B. R. Ambedkar, *CAD*, 25 November 1949.

40. Preventive detention was first introduced by the Bengal State Prisoners Regulation III, in 1818, and subsequently expanded to the rest of India. It was part of the infamous Rowlatt Acts, against which Gandhi had launched his first nationwide *satyagraha*.

41. These protests were generally from members who did not hold any position in either the central or the provincial governments, and tellingly, from some members of the minority Muslim community. See, e.g., Kazi Syed Karimuddin’s and Maulana Hasrat Mohani’s speeches at the assembly, *CAD*, 2 and 3 December 1948.

42. H. J. Khandekar mentioned the Goonda Act, Defense of India Act, Essential Services Act, and Public Safety Act, among others, as well as the infamous section 144 of the Criminal Procedure Code, which gives wide-ranging “emergency” powers to the local executive officers. The latter, especially, continues to be used frequently to this day. H. J. Khandekar, *CAD*, 2 December 1948.

43. Maulana Hasrat Mohani, *CAD*, 2 December 1948.

example, Kazi Syed Karimuddin suggested that a provision should be included in the Fundamental Rights section: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”⁴⁴ Ayyar countered this, and other proposals on similar lines, by suggesting that “under Indian conditions, and the distance of the interiors, preparing a warrant might take such a long time that the case might be lost.” Warrants and other similar procedural checks on police powers also were not supported by Patel, who argued that such a provision would be “a dangerous thing.”⁴⁵

Since one of the major pillars of Congress’s constitutional demands under colonial rule was the elimination of repressive executive powers, what were the reasons for this change in attitude? Ambedkar and Ayyar offered a line of argument, of a more technical variety, which suggested that limits on rights was a feature of all constitutions, including the famously liberal American one. Whereas those limitations have been formulated through years of judicial pronouncements, the Indian framers sought to incorporate them into the text itself for the sake of clarity.⁴⁶ However, that does not fully justify either the need to put down express limits on rights in the Constitution or the wholesale incorporation of repressive colonial laws. A claim that emerged from the arguments made in the assembly debates was more insightful. Freedom, it was argued, had become a settled issue once the colonial regime was deposed and the executive had been brought under the control of a democratically elected legislature.⁴⁷ Such a closure was central to the claim of a project that sought to channel all transformational aspirations within the constituted order. Certain questions had to be considered settled, and one had to proclaim that with the end of colonial rule, “it is wrong to regard the State with suspicion” since “today it is in the

hands of those who are utterly incapable of doing any wrong to the people.”⁴⁸ This is what Uday Mehta has called the “irony” of the fate of freedom in the Constitution—that freedom became a “subsidiary concern” at the very moment one became free from colonial subjugation.⁴⁹ What Mehta does not pursue is how this irony was a necessary condition for a transformational constitutional project. If transformation had to be achieved within the framework of the Constitution, contestations and dissents had to be expressed within that framework, not against it. On the one hand, the framework itself needed to be modified—through universal franchise and legislative flexibility—to incorporate such contestations. On the other hand, any political expressions unwilling to do so had to be effectively dealt with. Transformational constitutionalism, most certainly, required its police.

If the provisions dealing with executive power sought to preserve an infrastructure that was able to serve as the backdrop for the transformational agenda and neutralize any form of popular insurrection or rebellion that sought radical change through an unconstitutional path, there still remained the question as to whether this formidable state machinery, or parts of it, could be used for ends beyond those envisioned by the elites. Given the uncertainty that democracy necessarily introduces into a political system, the issue here was how to maintain a degree of control and coherence so that the levers of the state machinery would be used to execute a transformative agenda in a gradual and measured manner—the critical terms being *gradual* and *measured*. Furthermore, the very logic of transformational constitutionalism, which makes social transformation a constitutional mandate, heightened the concern in this regard. In place of a gradual deliberate remedy for only the worst forms of social problems, what if the designed system led to a thoroughgoing social revolution, sanctioned by the Constitution? In other words, if the threat of *present* popular upheavals meant that the elites could not deny the need for

44. Kazi Syed Karimuddin, *CAD*, 3 December 1948.

45. Austin, *The Indian Constitution*, 68–75, 101–12.

46. See *ibid.*, 72–73.

47. See B. R. Ambedkar, *CAD*, 4 November 1948.

48. Brajeshwar Prasad, *CAD*, 2 December 1948.

49. See Mehta, “The Social Question.”

social change, the possibility of *future* popular mobilizations meant that they wanted as much precision and certainty as possible as to how it would be achieved.

The search for precision and certainty entailed a focus on the procedural aspect of the administrative structure—the words, phrasings, steps, the relevant decision-making bodies, the system of appeal, etc. This is where the bulk of the deliberations in the assembly took place, drafting and redrafting (and then amending) the provisions several times. The elite sought certainty in legalism and proceduralism. They felt that if the precise legal meaning of provisions could be fixed, then the outcomes of constitutional disputes, decided by legal professionals, could be kept from veering too wildly into directions unforeseen. The Constitution therefore included a comprehensive and detailed set of rules and procedures stipulating the way in which different governmental bodies should function. A great degree of care and words were expended in the Constitution to ensure that the functioning of the machineries of the administrative state were amenable to precise and predictable control. Furthermore, they also focused on the centralization of this functioning, thereby creating a check against what Patel would sometimes refer to as “overzealous” governments in the provinces.

The purchase of proceduralism of this type owed a lot to the experience that the different members of the assembly had—as lawyers and administrators—under colonial rule. Colonial constitutionalism did not embody any higher values or norms organically derived from society, but it provided a language for administrative coherence and centralized control. In the face of unknown challenges arising from the governed, it sought to provide a modicum of predictability—internal to the organization of the administration—to the way in which the state was to react. The immense complexity and arcana of the late-colonial body of law, given shape through two centuries worth of political calculations, administrative practice, and local compromises, meant that to the colonial elite trained in it, it was uniquely suitable for precise and complex manipulations in the hands of skilled practitioners crafting specific solutions to social problems.

Familiarity was a crucial factor in this con-

text. Most of the Congress leadership had experience in managing state and local governments, even if in a limited way. Almost all the major figures of Congress were part of the interim government that was running the country at the time the constitution was crafted. As professionally trained lawyers or bureaucrats, most of them were well versed in the language of law and administration. Therefore, during some of the most vexing issues regarding the functioning of the state, they reached out to a colonial formulation whose effects they were relatively certain of. One of the most significant instances of this was the framing of the compensation clause under Article 31. The question of compensation for expropriation of property was one of the most contentious issues in the assembly. Land reform was the most significant aspect of the transformative agenda. Yet, the question was how to guarantee that such a reform proceeds in gradual and structured fashion without completely sacrificing the interest of property holders, especially given the strong and passionate popular support for redistribution of land. After several rounds of redrafting, amendments, debates, and postponements, a solution was suggested by Patel, who drew on his experience of acquiring land under the Government of India Act of 1935. As a result, the first two clauses of Article 31 closely followed Section 299 of the act. Additionally, to keep a check on the aforementioned overzealous state legislatures, Patel suggested the incorporation of Article 31(3), which stipulated that acquisition laws passed in state assemblies had to first receive the assent of the president to go into effect.

What was significant about Patel’s solution was how it was able to bypass any normative claims about either the sanctity of property rights or supremacy of democratically elected legislatures to decide on the proper distribution of property. The article stipulated *a* compensation—rather than a just, fair, or equivalent compensation—for the acquisition of any property. It added that the legislature would “specify the principles on which” the compensation was to be determined and calculated. In effect, it sought to create a complex and measured procedure by which the state could determine the value of compensation. In doing so, it ensured the ability of the government to make

precise calculations about gradual land reforms as well as to safeguard against the “overzealous” democratic majorities embarking on a wholesale socialization of land.

There is an interesting epilogue to Patel’s calculation based on familiarity with colonial procedures. One significant “break” with the colonial era that Patel and others in the assembly were not able to entirely foresee was vis-à-vis the place of the judiciary in the constitutional schema. Unlike their colonial predecessors, the postcolonial judiciary would claim a larger degree of autonomy for itself, and in doing so challenge the colonially derived assumption of the supremacy of the administrative authorities. This led to a series of high-profile conflicts between the government and the judiciary regarding land reform almost immediately following the adoption of the Constitution. A full analysis of that conflict is beyond the scope of this essay, but it serves to highlight the point that the synthesis of break and continuity sought by the makers of the Indian Constitution was never without its inherent contradictions.

...

Let us return to the question of break and continuity for one final set of reflections. These brief sketches of colonial and postcolonial constitutional discourse sought to demonstrate that the themes of break and continuity were inescapably linked within the conceptual constellation of postcolonial constitutional thought. One of the most significant breaks was to acknowledge the principle of representative government in its fullest form, through a universal adult franchise. A right that took more than a century and several mass political struggles to be granted in full by Western constitutions was affirmed at the very inception by the Indian Constitution, with only minimal debate. Yet this radically new political order required an ambitious plan to transform society in a deliberate, controlled, and gradual manner. It also called for mechanisms to safeguard against other contending claims for social transformation. These in turn meant incorporating mechanisms and institutions from the colonial era. While continuity was sought in service of

the break in this way, the claim of break itself was called upon to justify certain continuities. During several of the debates on executive power, civil liberties, or individual rights, arguments were made to the effect that since the government would be democratically chosen, and the executive would be controlled by people’s representatives in the Parliament and the cabinet, it would be wrong to view enhanced power of the state through the same lens as one did during colonial times.

The story of break and continuity can be delineated on yet another register. The Indian Constitution was written and adopted in the name of “We the People.” Yet throughout the assembly debates the constitution makers repeatedly adopted the subject position of an administrator, their deliberations driven overwhelmingly by a calculus of governability. The subject position of the postcolonial administrator was not in any way identical to its colonial predecessor. The former was committed to a rule by consent, rather than by coercion. Yet the problem was that this consent, even in a very basic underlying form, could not be presumed. So the postcolonial constitution makers were put in a unique position. They could not simply declare an end to a revolution and claim to institutionalize its principles through the constitution, as was done in the constituent moments following the paradigmatic bourgeois revolutions in Europe and the United States. Neither could they, like their colonial predecessors, simply seek to suppress any and all demands for change. Instead, they sought to mediate a revolution, subsume its claims, and control its outcomes. The myriad ways in which those claims might arise and the forms they might take was not known to them. Given their inability to bridge the distance between themselves and the masses they sought to represent, and given the lack of a shared consensus about the nature of political and social order, they were well aware that they were dealing with a situation over which they did not have a complete and certain grasp. Democratic rule in India was, in the words of Rajendra Prasad, an “experiment the result of which no one [is] able to forecast.”⁵⁰ The “People” in whose name the makers of the constitution sought to speak remained, in a certain

50. Rajendra Prasad, *CAD*, 26 November 1949.

way, unknown, their potential acts uncertain. This uncertainty produced anxiety, an anxiety about a “revolution [that could] take the place of evolution,”⁵¹ that could “change the face of India.”⁵² There could be, Nehru warned the assembly on more than one occasion, a potential situation that was not “entirely, absolutely within the control of law and Parliaments.”⁵³ Tellingly, whenever these uncertainties seemed the most troubling, whenever the anxiety was the most acute, the constitution makers relied on the formulas, mechanisms, and institutions that they were most familiar with: those derived from the colonial state. They sought to counter the uncertainties posed by the unfamiliar governed, through the certainties and familiarities of a known calculus of governing.

The anxiety that marked the design of the constitution did not disappear as the postcolonial political order took root in India and found ways of stabilizing itself. The afterlife of that founding anxiety can be seen in contemporary public discourse in Indian civil society about law and legality. Many political contestations in India escape the formal and linguistic structures of constitutionalism and legality, a fact that continues to generate an ever-present anxiety among the elite about “rule of law,” “law and order,” and constitutional morality. In that context, it is all the more necessary to turn our attention to the founding moment of postcolonial constitutionalism and legality in India, and to how important elements of that founding formulation drew on a language that was all too familiar to some, and all too foreign to many. ■■■■

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51. H. V. Kamath, *CAD*, 17 September 1949.

52. Jawaharlal Nehru, *CAD*, 10 September 1949.

53. *Ibid.*

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