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Introduction

This book contains papers on struggles for realising the core values of the Indian Constitution, namely, liberty, equality and justice. This was thought to be an apt theme for a book which commemorates the celebration of the Platinum Jubilee of the ILS Law College, Pune, in the year 2000-2001. ILS Law College is one of the oldest institutions imparting legal education with a commitment to quality legal education. It has been a witness to India’s struggle for political independence and also her struggle for sustaining democracy, secularism and social justice. It has been a witness to the Quit India Movement of 1942, the dawn of independence in 1947 after the painful partition of the country, struggles for linguistic states including the struggle for Maharashtra, struggle against the emergency of 1975 which had eclipsed democracy and the post-emergency energisation of civil society through the growth of a number of voluntary organisations raising issues of development, environment, human rights, women’s rights, rights of the dalits and adivasis, etc.

India attained political independence after a long struggle against colonialism and imperialism. The National Movement for independence did not keep its goal limited to gaining political independence. The Movement also aimed at the liberation of the people from poverty, ignorance, social and economic injustice and exploitation. The Constitution of India made by the Constituent Assembly was a continuum of the social revolution which the National Movement had started. That was not going to be easy because although the Preamble of the Constitution spoke in the name of "the people of India", the enlightenment as well as empowerment of the people to make them worthy of democracy had to follow the Constitution and had not preceded it. Various pessimistic prophecies of the Indian experiment with democracy had been made by eminent persons in the West as well as in India. Some of them had been vindicated by the failure of democracy in many Asian and African countries which became free after the Second World War. In India the State came first but the Indian nation had yet not arrived. The two-nation theory which resulted in the creation of a separate nation for Muslims was not accepted by the Indian leaders (except those who subscribed to the two-nation theory through their demand for a Hindu nation). Even after partition, India continued to cherish pluralistic nationalism consisting of diverse religions, ethnicity and cultures. Its Constitution adopted secularism as a political creed. Even after partition, India had a large Muslim population, perhaps largest second only to Indonesia. The first and most formidable challenge to Indian democracy was of creating a pluralistic nationalism. The first Prime Minister of India, Jawaharlal Nehru, hoped that with economic development, social modernisation and creation of just social order, the narrower loyalties to religion and region would be overwhelmed by pan-Indian loyalty. Nehru could inspire the people by his vision and therefore the Hindu nationalist forces had to lie low after they witnessed the tremendous reaction to the assassination of Mahatma Gandhi in 1948.
The struggle for life and liberty is a daily battle in our courts on all of the people. Versatile processes and novel modes of relief have made judicial pharmacopoeia a serendipitous jurisprudence. Judges, feel, with fessional pride and human rights drive, that you are writing the history of rights and integral to the odyssey of Freedom's Forward Charge. You are the y of liberty. When life and liberty are in jeopardy, judges shall vigilantly revere. On the power of the court to issue a writ to liberate a person from stvice, is writ large the jurisprudential obligation to see that the liberty of the en is vigilantly defended by the State.

Chapter II

Violence, Constitutionalism and Struggle: Or How to Avoid Being a Mahamoorkha!

—Upendra Basi

I. THE OBVIOUS

Without being ungracious, I respond in this contribution to a conspicuous lack in the design of this Platinum Jubilee Volume. That design addresses all crucial themes save one: the troublesome but integral relationship between the development of Indian constitutionalism and the practices of political violence. The relationship is almost made invisible in the narratives of Indian constitutionalism.

The dominant discourse concerning the half a century of the working of the Indian Constitution offers a privileged understanding concerning governance, development, rights, and justice. In a sense, it is a triumphant discourse, celebrating the abiding achievements of India's constitutional democracy. We remain presented with a progress narrative, narrative of movement ahead towards a secure and expansive post-colonial democracy, worthy of adoration and emulation.

In this genre, constitutional development is presented as unfolding a series of normative contexts within which the practices of politics may be explained and adjudged. And these contexts inaugurate the theory and practice of liberal post-colonial constitutionalism. If the Indian Constitution marks the beginning of a break from the model of classical liberal constitutionalism (summed by the world's two bicentennial constitutionalisms) in the middle of the Twentieth century C.E., the post-apartheid South African Constitution, towards the end of that century, completes that process.

Post-colonial liberal constitutionalism typically enunciate the ideals and the visions of constitutionally desired social order. Their visions of the rule of law address the tasks of making progressively the state ethical, governance just, development humane, and power (in all its habitats) accountable. Constitutional development stands directed not merely to state formative practices in the circumstance of the post colony, but also to the tasks of societal transformation towards the values of rights and justice. Rights enunciations provide more than a corpus of constraints on the powers of state apparatuses; these also extend to transformation of tyrannical formations of power within the civil society. The Indian Constitution thus, normatively, constitutes a declaration of war against unjust social practices such as untouchability, and related multitudes and nefarious religiously sanctioned violent social exclusion, gender discrimination, and the feudal practices of agricestic servitude. Institutionally, the Constitution entrenches provisions for affirmative action as an integral aspect to right to equality; these provisions extend beyond quotas in education and employment to reservation of seats (for the Scheduled Castes and Tribes) in the federal and state legislatures, as well as institutions of grassroots governance. Rights languages
dialectically, as it were, disempower the New Leviathan as well as empower a ‘progressive’ state. They also define development as those processes of planned social change that disproportionately benefit the masses of impoverished citizens.

In the ineluctable contestation aimed at controlling the proliferation of meanings of social rights and justice, judicial power and process acquire an extraordinary social salience. Activist adjudication began its historic journey in the seventies when the justices of the Indian Supreme Court invented the doctrine of the basic structure of the Indian Constitution by which they asserted a unique judicial power to pronounce upon the validity of constitutional amendments. The subsequent rise of social action litigation (still called ‘public interest litigation’) has irreversibly, and for the greater good, transformed the Supreme Court of India into the Supreme Court for Indian people. Judicial co-governance of India is now an inescapable feature of Indian democratic development.

II. IS VIOLENCE RELEVANT?

In the dominant discourse, violence does not figure, even as a guest artist, on the stage enacting the overwhelmingly peaceful script of Indian national development. The eminent textbooks and treatises expounding constitutional (or more broadly public law) theory and practice hardly ever mention histories of violence that undergird constitutional ‘development’. No leading textbook or treatise on constitutional or administrative law provides any sensible account of collective political violence. The legal histories of such violence still await Foucauldian labours. Violence abounds; its narrators remain conspicuous by their absence. All my individual attempts to install a sense of relevance of collective political violence to public law writing have been scrupulously ignored by the virtuoso exponents of the state of public law in India.

For half a century, then, students of Indian Constitutionalism have been taught as if state or insurgent practices of violence simply do not matter for an understanding of the Constitution at work as a lawyer. Even social action litigation, which at last brings to fore the relevance of the suffering of the Indian impoverished to the discourse of governance, rights, justice, and development has not made the slightest change in the narrative disposition. Taught law, as Roscoe Pound memorably said, is tough law.

It is the ‘toughness’, the remarkable resilience of doing constitutional theory in India that cries out for explanation. How is it that violence, and human violence, so endemic to Indian political development commands so little relevance to the practice of constitutional theory in India? Do citizen scholars owe no obligation to acknowledge the truths about human violence? Should their epistemic labours be bereft of any fiduciary obligations towards their suffering co-citizens? Why is the craft of constitutional narration so alienating and alienated? Why is the narratology of public law in India so single-minded in its devotion to the erasure of public memory concerning the practices, often catastrophic, of the politics of cruelty? What kind of constitutional futures stand thus reassured?

There are many easy, surface explanations for this: narrative persistence. I name these explanations thus, because once stated, they claim the truth of the obvious. The obvious then needs no labour of explanation. The obvious is, all the same, not unimportant, even when needs to grasp depth as more than a (to use Michel Foucault’s phrase) fold on the surface.

III. IT HAS BEEN ALWAYS SO

One immediate response to these questionings is that constitutional law narratives nowhere in the wide world address such issues. Their task is to articulate the normativity of constitutions. Their task is to explore, not expose, the shifts in interpretive meanings within a coherent framework of ‘the meaning’ of the Constitution itself. Put another way, the genre of public law writing foregrounds constitutional interpretation, or constitutional law. Interpretation develops, to be sure, in a whole variety of political contexts, and contexts even of violence; but the province and function of constitutional theory narratives remain relatively autonomous of these contexts, even when impregnated by them.

Constitutional law thus constituted, as an autonomous field of social enquiry must, it may be said, respect its disciplinary boundaries and burdens. To add understanding and explanation of social and political violence would be to
reconfigure this field, transform the craft, and overrun the boundaries of the
division of social/human science labours. Constitutional law scholars are not
usually trained as historians, political scientists, sociologists, anthropologists;
they are trained in legal hermeneutics in a way that their normative cousins
in other fields are not.

By way of comparative evidence, one can easily demonstrate that no
authoritative narration of constitutional law in the comparable Euro-American
discursive tradition (the magisterial corpus of an A.V. Dicey, Edward Corwin or
a Bora Laskin, for example,) has ever anemipated to relate constitutional practice
to the practices of political and social violence. Nor does the dominant discourse
of contemporary normative constitutional theory. 5

All this is sensible, as far as it goes. It goes to show how things are as they are.
But it has been always so type of argumentation does not guide us as to why it
ought to be so. Perhaps, the only self-evident ground is offered by the division
of social/human social science labour. But this at the same time invites reflexion on
why disciplines are constituted and what forms of human suffering they all put
together exclude from the sum of knowledge and reflection. This is too large a
sociology of knowledge type enquiry, for this essay to explore here. All I can
attempt here is to suggest the ubiquity of violence in constitutions, laws, and
interpretations. To the extent the showing is persuasive, the justification for
excluding violence from the sway of normative and empirical constitutional theory
loses its coherence and opens up ways for epistemic innovation.

IV. CONSTITUTIONAL AND LEGAL VIOLENCE

The dominant discourse relates understanding of constitutions, both the
historical ones and those at work to histories of ideas concerning governance,
rights, development, and justice; it is a discourse concerning the ideology of
the constitutional order, its endless normativity. At another level, it is a discourse
concerning the identity of the constitution as a higher law, a Kelsenite
grandnorm, whose prime function is to authorize the existence (validity) of all
other legal norms. At neither level it seems appropriate to theorise violence.

Violence is as antithetical to development of concepts and conceptions
inherent to any notion of constitutionalism and to the very notion of the
grandnorm. At the threshold then, violence is presented as anti-normative and
anomie, subversive of peace and good order within which alone constitutions,
and constitutional development, become sensible. The very rationale of
constitutional ordering and theorizing is to create spaces for peaceful contention
concerning the ways in which may (or may not) order conditions of collective
social and political existence in a well-organized nation-society. If constitutions are
at all to remain true to their etymological sense of providing frameworks and basic
structures for relating governance to rights, justice, and

7. By theorizing violence I mean the ways in which constitutional theory/discourse may seek
to understand the relationship between orders of violence and orders of constitutieality
in their complexity and often contradictory relationship. By violence I mean to designate
primarily the ways in which authoritative public decisions consciously inflict or tolerate (the
latter by designating ‘private’ domains beyond the reach of coercive regularity) irreparable
harm or hurt on the citizens subject to these decisions. By orders of violence, I seek to
convey a sense of suffering and deprivation experienced by individuals, groups, and
collectivities bearing histories of hurt and harm. By ‘histories’ I wish to signify the specific
and cumulative, intended and unintended (manifest/latent) experience of the impact of public
decisions on the people affected by these. I also include in my notion of orders of violence
harmful or hurtful choices made by ‘non-state’ actors, the paradigmatically insurrectionary
citizens, whose choices of methods and means of delivery of violence stand possessed of a
potential for a ‘rival’ history of cumulative intended/ unintended effects.

8. By this distinction, I refer to the Enlightenment linkage between ‘modern’ constitutionalism
and the idea of progress: see Preuss, U., Constitutional Revolution: The Link Between
Constitutionalism and Progress ( Humanities Press, New Jersey, 1995). This idea stands
revived in the rush to introduce models of liberal constitutionalism to ‘transitional societies’
(whether of Eastern and central Europe or Indochina), such as Cambodia and Vietnam.


10. See Preuss, U., supra note 8.

11. Contra Derrida, foundational violence is not a once-for-all happening; it, too, is reiterative,
thus weakening the binary dyad between the ‘foundational’ and ‘reiterative’ violence of
constitutional and legal ordering.

5. See Rawls, J., Political Liberalism (Columbia University Press, New York, 1993); Habermas,
J., Between Facts and Norms: Contributions Towards a Discourse Theory of Ethics, (The
Haven, 1996).
Constitutional self-preservation also provides the basis for justification of constitutional violence. All constitutions authorise the supreme executive to defend the State against external aggression and internal ‘subversion’, the former through the unlimited executive discretion to wage ‘war’ and the latter exemplified by the power to proclaim state of emergency entailing extraordinary forms of suspension of constitutional and human rights. The justification, in principle, consists in the claim that a constitutional order ought to be defended against forms of externally or internally organised sources and threats against its very existence, both normative and institutional. Violence in defence of the basic structure of constitutional order is then presented as self-evidently justified. Of course, the context, scope and the means of constitutional violence remain subject to public debate, and even judicial review. But these remain constrained, overall, by the legal and moral obligations directed to constitutional self-preservation.

At a less obvious plane, it remains the key function of constitutions everywhere to justify everyday practices of normative and existential practices of legal violence, that is, the dedication of resources of state sovereignty to prevent outbreaks of popular illegitimations and criminal conduct. Neither rights nor ‘justice’, still less ‘development’, may be assured in the absence of constitutionally authorised practices of routine legal violence. The ‘rights’ and ‘justice’ constitutional texts, of course, have a powerful potential to interrogate the actual practices of legal violence. But this potential nowhere poses any real limits to what political actors may choose to legislate as criminal, and politically subversive, conduct.

One principal way, then, to look at constitutional theory/discourse is to say that its principal avocation is to develop justificatory schemas for legitimate and legal modes of constitutional and legal violence. This is noble, though not in practice always an empowering, avocation. For, this schema also simultaneously delegitimises, as almost instantly anti-constitutional and illegal, recourse to practices of violent protest by people against unconstitutional governance.13

12. By ‘constitutional’ violence, I mean the intentional infliction of hurt and harm upon citizens and persons in the title of the preservation of the State security.

13. ‘Unconstitutional governance’ here signifies intentional infliction of hurt or harm embodied in institutionalised patterns of state/official action which:
   - Manfully subvert constitutionally guaranteed rights to life and liberty (for example, custodial torture, extra-judicial executions, illegal incarceration, enforced sterilisation, and gender based aggression, within and outside custodial institutions)
   - Systematically under-enforce social and economic rights enshrined in the constitution (for example, the right to literacy, shelter, health, and social security and welfare).
   - Provide organised immunity for acts of corruption by political actors and governmental officials.
   - Tolerate genocidal practices of power by state officials and aggressive formations in the civil society (for example, caste-based atrocities, violence against women, special powers given to military, paramilitary and related security forces in dealing with autonomy movements).
   - Deny minimal rights of the organised and (dis)organised labour.
   - Construct perennials bypasses to due process-oriented administration of criminal justice by various forms of national security and preventive detention laws.
   - Systematically ignore international human rights obligations imposed by the customary law of human rights and by human rights treaties to which a constitutional state is a party.

This outlawry of (what Foucault named as) ‘popular illegitimations’ denies articulation to the normativity of peoples’ voices that struggle to speak to us concerning the justice of their practices of violence, anti-foundational and routine. People living under actually existing constitutions, especially those socially disenfranchised by histories of Constitutional politics, tend to develop beliefs in constitutional legitimacy of popular violence, pitched in real life against the first order justifications of constitutional and legal violence developed through the cosmopolitan theorising concerning ‘deliberative democracy’.

While much that gets said here touches these deeply discordant discourses, I do not explore in this essay the unravelling of political desires that animate their specific histories. Rather, I look at the little details of the various itineraries of exceptional and routine violence of Indian constitutionalism, in the hope that this may have a wider comparative reception.

V. THE DISCOURSE OF THE CONSTITUTIONAL ‘HAVES’

To start with, let us ask: who are the principal practitioners of the discourse on constitutional development? And who are the more sustained beneficiaries? Clearly, they are in the main the constitutional ‘haves’, not the ‘have-nots’. Understandably, those who benefit or seek to benefit from prevailing constitutional arrangements may not conform to Kalidas’ description of Mahamanoorkha, literally the Great Fool an archetypal figure who, in the folly of his wisdom, laboured to cut down the very branch of the tree on which he was securely perched.

In this perspective, those who disproportionately benefit by constitutional arrangements ought not to jeopardise the underlying ‘legitimacy’ of the Constitution itself. To give salience to violence in the construction of narratives of Indian constitutional politics, and development, constitutes just such a narrative risk. It tends, moreover, to render vulnerable one’s, more or less, secure Constitution-constituted subject positions. The bhadrakal constitutional theorist may now and then laugh at constitutional stupidities and, though rarely, weep at constitutional tragedies. But the tears of joy and sorrow must not be allowed to become flash floods that wash away the foundations of the basic structure of the Indian Constitution. The overall notion here is simple: bringing in violence that primarily affects the life project of the have-nots, in narratives of constitutional development and politics, is simply not functional to the preservation of one’s dominant or at least secure constitutional position.

The difficulty with this sort of functional explanation is that it homogenises the constitutional ‘haves’. But the ‘haves’ include a vast range: those who form governments and those who form the ‘opposition’; the ‘haves’ also comprise the mass media and relatively knowledge-based professions; those in business,

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Footnotes:

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The difficulty with this sort of functional explanation is that it homogenises the constitutional ‘haves’. But the ‘haves’ include a vast range: those who form governments and those who form the ‘opposition’; the ‘haves’ also comprise the mass media and relatively knowledge-based professions; those in business,
industry and learned professions and those in social and human rights movements and markets.\textsuperscript{14} Surely, then, the subject positions of these various constitutional haves vary and so must their pursuit of strategic interest. For those in political opposition, in mass media, learned professions (especially lawyering) and social and human rights movements, occasions of ‘violence’ remain important. They highlight these from time to time and seek accountability for acts and situations of violence. This certainly happens. And it is also true that these actors protest with a degree of moral altruism; they protest violence towards the constitutional ‘have-nots’.

But the functionalist explanation may still maintain that public exposé and social action against such violence remains instrumentalist, serving a cluster of regime- and ‘class’ specific interests. This is certainly true of party political actors who deploy narratives of violence to ends of escalation of their power. It is a notable fact that words of anguish constitutional anger at the violence towards the have-nots that move the parties in opposition rarely become deeds of governance, when they become the ruling parties. In that role, they condone and promote considerable degree of practices of political violence that even justify Paul Brass’ description that governance in India has acquired traits of an ‘institutionalised riot system’.\textsuperscript{15} Examples are legion.\textsuperscript{16}

May we say much the same about the other altruistic actors mentioned above? It is arguable for example that much of the activist media interest in ‘violence’, when not obtuse, is episodic and ephemeral; the best of investigative journalism remains indifferent to ultimate outcome of political and legal, even constitutional, contestation for the violated. I return later to some narratives that substantially, though not conclusively, vindicate this observation, because the play of social intentionalities and impact of social action is indeed complex. With similar complexity much the same may be said, from the standpoint of the violated, concerning human rights movements and judicial activism. For the time being, let me suggest that the functionalist explanation remains relevant, even in the face of this diversity.

In broad outline, then, constitutional have-nots do not fundamentally question the legitimacy of constitutional politics as a means of violence, and violence, of the constitutional have-nots, although concerned from time to time with their amelioration within the means of politics of accommodation. In sum, the argument points to professional appropriation, even commodification of violence and suffering.\textsuperscript{17} The fact that these processes episodically empower the ‘powerless’ is of enormous real-life significance to the individuals and groups concerned. The appearance of structural transformative impact that such forms of social action possess, however, invites sustained reflexivity.

VI. EPISTEMIC/INTERPRETIVE VIOLENCE

The fact that constitutions and laws authorise epistemic and interpretive violence is as well-known as it is removed from narratives of constitutional law and jurisprudence. As normative orders, constitutional and legal orderings everywhere articulate the power of the State as codes of authority to inflict violence. The making of law, its interpretation and enforcement entail construction of subjects and forms of conduct that remain liable to routinised application of the force monopoly of the State and the regimes in power. Constitutions encode standards of legitimation for the justification of use of state force against citizens. Constitutional development signifies a site of contestation over these standards, and ways in which they stand invested with stable networks of operative meanings. As already noted so far, many forms of political violence in India transgress upon this vision.

The production of meaning is routinely considered as non-violent; at any rate, interpretive violence, the violence perpetrated by epistemic communities, is not of any direct concern or consequence to the constitutional or political theorist. Or, more accurately, this concern is both episodic and eclectic. But we need to constantly return to the elementary truth (with Robert Cover) that judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is the law and destroy or try to destroy the rest. Legal interpretation mostly on the plane of ‘pain and death’. In this sense, judicial office is jurispathic. But judges are also men of peace. Among the warring sects, each of which wraps itself into a mantle of law of its own, they assert a regulative function that permits a law of the realm rather than violence. The range of violence they could command (but generally do not) measures the range of the peace and the law they constitute.\textsuperscript{18}

Professor Cover’s notion of ‘jurispathic’ judicial power is of very great importance in terms of adjudication as the carrier of the centralised unity of the state. It provides, in acts of interpretive violence as well as peace, for an

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\textsuperscript{14} See, Baxi, Upendra, The Future of Human Rights (Oxford University Press, Delhi, 2001).


\textsuperscript{16} I may mention here a few salient illustrations. ‘When atrocities’ against the dalits (the constitutionally protected Scheduled Castes and Tribes) regularly occupy the commanding heights of political rhetoric, I knew of no political party in India that has moved with significant determination to punish the perpetrators, or to compensate the violated. All political parties are seemingly unanimous concerning the need to do something about the criminal-politician nexus; yet ‘history-sheets’ (those that openly terrorise the ‘have-nots’) get party tickets, become legislators, and even senior ministers. Perpetrators of horrible communal carnage are rarely brought to book, despite judicial commissions of enquiry that so regularly indict them. Extra-judicial killings and ‘disappearances’, including those of social and human rights activists, remain the norm, not an exception. Genocidal politics and administration continue to enjoy impunity. If this seems too strong a statement, I invite you to consider the most recent expose of the indifferent ways in which the 1984 Sikh genocide in Delhi, and elsewhere, is being ‘pursued’. See, "NHRC Turns a Blind Eye to Sikh Killings", The Asian Age, London Edition, 19 February 2001, p. 1. India has yet to appoint anything like the Truth and Reconciliation commission for the communal carnage that followed in the wake of the Babri Masjid demolition. See, Baxi, Upendra, Inhuman Wrongs and Human Rights (Har Anand, Delhi, 1994); see also Engineer, A.A., Lifting the Veil: Communal Violence and Communal Harmony in Contemporary India (Sangam Books, Hyderabad, 1995) and the references in Baxi, U., supra note 13.

\textsuperscript{17} Supra note 14.

\textsuperscript{18} See, Cover, R., Narrative, Violence and the Law in Minnow Martha et. al (Eds.) The Essays of Robert Cover, p. 155 (Ann Arbor, Michigan, 1995).
assured measure of destruction of radical legal plurality.19 Respecting this crucial insight, I extend somewhat the notion of the ‘jurispathic’ judicial role and function, promise and performance, to routine acts of destruction of people’s democratic rights by the Indian appellate Justices.

There are moments when constitutional lawyers and theorists bring to the fore the issue of interpretive violence. They were, for example, outraged by the appallingly infamous habeas corpus denying Supreme Court decision, during the 1975-76 Emergency. There is by now universal consensus that the Shiv Kans20 decision lacked, to say the very least, even a semblance of constitutional integrity; its interpretive violence remains cruelly transparent. The consensus was catalysed by the expression of public remorse and apology by Brother Chandrachud,21 on his assumption of the office of the Chief Justice of India, about a year after his leadership role in that decision.

Such a unanimity of outrage does not however, for example, characterise the epistemic community’s reception of the catastrophic Bhopal jurisprudence ‘developed’ by the Supreme Court of India nor its recent authorization of the Narmada dam.

In the Bhopal case, the Supreme Court ordered settlement, manifestly denying any kind of hearing to the victim petitioners, and in complete liquidation of its own painstaking and remarkably progressive ‘natural justice’ jurisprudence.22 What is more, when we argued that the settlement orders were invalid (because of an ‘error going to the root of jurisdiction’), the Court converted the review petition itself into sui generis ‘post-decisional’ hearing! Worse still, while acknowledging that it had violated its own jurisprudence, the Court (per Justice Venkatachaliah),23 recalling MacBeth, observed that ‘To do a great right, a little wrong is justified’. The ‘little wrong’ condemns still, sixteen years after the Bhopal catastrophe, more than 200,000 children, women, and men to immeasurable suffering by hideous exposure to 47 tonnes of methyl isocyanate. And the ‘great right’ enables the offending corporation a near-total immunity. Like Shiv Kans, the Bhopal case entailed judicial subversion of the Court’s own jurisprudence and perhaps with more lethal consequence. Unlike Shiv Kans, Indian constitutional lawyers (barring a handful of eminent exceptions) were not outraged by Bhopal.

The constitutionally abrupt termination of the Narmada dam litigation marks a similar order of interpretive violence. All of a sudden, after indulging the

19. The Indian constitutional context makes this notion somewhat problematic when Courts and Justices need to adjudicate group rights, which are then seen to be violative of rights to gender justice or ‘authorize’ religious practices within protected ‘minority’ groups that deny a just freedom to dissidents. I refrain here from illustrating the range of instances where judicial interpretation has been contested as ‘jurispathic’.


23. Later Chief Justice of India, Chair of the National Human Rights Commission, and now Chair of the rather ominous Constitutional Review Commission.


26. In felicitating me on my first assignment as the Vice-Chancellor (of South Gujarat University) Brother Krishna Iyer reminded me of Bernard Shaw’s quip that more eminent a person is, the more he or she has done to be ashamed of!
The difference may not be explained altogether by reference to the neo-colonially installed distinction between civil and political rights on one hand and the social and economic rights on the other. For, developmental violence names the constitutional itinerary of the postcolonial India. It, in all its manifestations, constitutes a condition of impossibility of constitutional justice for large masses of the impoverished citizens. Torture, tyranny, and terror define their life condition, as if the enactment of the Indian Constitution was still a distant promise!

The class-bound explanation does not quite grasp the fact that environmental hazards overrun the class divide, as the panic in Delhi following the Oleum Gas leakage on the first ‘anniversary’ of Bhopal amply demonstrated. Large irrigation projects are known to have consequences that cut across the caste/class divide. Contemporary technoscience, and ‘development’ policy, is fraught with the prospect of creation of ‘communities of danger’ that endanger the rich as well as the impoverished, the high as well as the low caste, the governors as well as the governed. Interestingly, as disbursement of compensation proceeded, people outside the immediately exposed 36 wards in Bhopal also claimed that they had been adversely affected by the catastrophe. When dams like the Tehri located on seismic fault lines burst (one hopes this never happens), it would not merely affect those petitioners in social action litigation that were treated so summarily by Brother Kuldeep Singh but also the entire North India. Kalyansagar Dam in Andhra spread new health hazards following ecological disturbance through heavy impounding and silitation, which did not disturb us. In their reach, the bhadrakali from the atisudras. I will not multiply poignant examples. How does one understand, in this conjuncture, group definitions of special short-term interests that betray the not too long-term interests of the constitutional haves?

Once again we return to the heterogeneity of the constitutional haves. This heterogeneity promotes different idealisations (rationalisations) of conflicting interests among the constitutional ruling classes. Each fraction of these classes presents its specific ‘immediate interests’ as constitutive of the universal constitutional purport. Each fraction has its special and mystifying constructions of justifiable and unjustified epistemic violence. That which is presented as a rational, systematic, planned pursuit of Indian development presents, in social effect, a multitude of contingent and chaotic happenings. It is this welter, this quagmire, of special interests serving immediate outcomes that determines the visibility or otherwise of epistemic violence. Constitutional politics and Indian ‘development’ signify acts of worship at the necessarily amorphous and constantly shifting ‘sites’ of interpretative cruelty.

VII. GENRES OF FOUNDATIONAL VIOLENCE

The ‘foundational violence’ of Indian constitutionalism may be read in very distinctive ways. The Indian Constitution was constructed amidst the Holocaust of the Partition, the imperially constructed form of a ‘civil war’. The sheer scale of mass atrocities, the horrible depth of social technologies of organised violence, the construction of justiciable regimes of impunity and the injustice of just redress for the violated humanity provide the troubled, and traumatic, contexts of the making of the Indian Constitution. The foundational choices made by constitution makers structure a Constitution in which the agony of the partition of India has no trace of ‘remembrance’.

Incredibly enough, the only memory of the catastrophic practices of politics of cruelty occurs in the citizenship provisions of the Indian Constitution that determine who shall count, and why, as Indian citizen in the context of descent and ‘migration’ as of a constitutionally installed date. Even the Preamble disacknowledges the memory of the Partition. The devices of political reinstallation of public memory, like the post apartheid South African Truth and Reconciliation Commission lie beyond (and still escape) the imagination of the founders of the Indian Constitution. India, that is Bharat, stands signified as an ‘immaculate’ conception, with no history, unless by ‘history’ one can possibly mean a ‘union’ of a millenarily distant, and mythically constructed, ancient Bharat somehow united with the postcolonial idea of an entity now called ‘India’. The making of the Constitution, then, is symbolic of the craft of organised political amnesia, a willed history of politics of forgetting.

This deliberative genesis amnesia leads to the formation of a liberal state whose Constitution enshrines a mixed body of principles or applies them differently to different parts of the country or different sections of citizens, .... deemed to possesses hybrid and confused identity and to form what Pufendorf called corpus irregulare monesos simile (an irregular body, like that of a monster). One does not have to share a classical aesthete’s value of ‘symmetry’ and ‘proportion’ to delineate monstrosities of modern constitutions. In fact, one may even say that that Pufendorf’s telling description applies to all modern constitutions, including the much-vaunted bicentennial ones.

The monstrosity is not just a matter of forms of constitutional policy. Rather, it constitutes long-term violent social and political effects. Veena Das poignantly highlights this ensemble of effects when she writes:

[I]f men emerged from colonial subjugation as autonomous citizens of

28. Developmental violence can be manifestly hostile as well as comprise forms of benign indifference. The hostile forms are in evidence when the developmental policy and performance explicitly declare that the impoverished shall have all their rights suspended in pursuit of a specific programme or policy. Benign indifference operates a genocide sector (to borrow Rajeev Dhavan’s term) in which the impoverished stand denied of all forms of constitutional solicitude by the makers of developmental policy.

29. Already the Bar, which so disclaimed the enunciation of the Bhopal case standard of absolute corporate liability of hazardous or ultra-hazardous industry or manufacture, enthusiastically embraced it!


India, they emerged simultaneously as monsters.33

Veena Das refers here to the 'unnamable' aggression against women during the Partition holocaust, which the gifted Constitution makers altogether silenced. The citizen-monster dialectic is thus both foundational as well as reiterative, as the everyday lived experience of masses of Indian women suggests, despite the exaggerated claims to human rights-oriented Indian constitutional governance.

VIII. CONSTITUTIONALISM FOR THE 'HAVE-NOTS'

Even so, one may not overlook altogether the fact, noted earlier, that the Indian Constitution declares a normative war against the foundational violence of the Indian civil society as well as against the catastrophic 'divide-and-rule' practices of the high colonial politics. The war against civil society stands declared in the constitutional outlawry of 'Untouchability' (article 17) and against forms of agristocracy (articles 23, 24 and 35). The war against politics of imperially fostered 'communism' stands inaugurated by telescopes of constitutional secularism (articles 25-30). Constitution here emerges as a form of cultural warfare. The constitutional conceptions of equality already justify patterns of affirmative action (articles 15, 16) in unprecedented 'comparative constitutionalism' ways. The aspiration towards a constitutionally desired egalitarian social order might not be gainsaid. No normative or empirical account of Indian constitutionalism, in its half-century development, remains sensible outside a justificatory schema of radical egalitarian constitutional violence.

Many classes of constitutional 'have's do not relish these forms of constitutional belligerency. Programmes of affirmative action, for example, have always been regarded by the bhadrakal citizen-formations as hostile to their preferred conceptions of 'merit' and 'equality'. The violent protest that greeted the implementation of the Mandal Commission Report (extending quota in education and employment to backward classes) in the nineties provides a poignant recent example. Contemporary regime-institutionalised 'Hindutva' critique of constitutional secularism furnishes a similarly grotesque form of politics of constitutional cruelty. This has already substantially converted the constitutional idea of India into the reality of a regressive Bharat.34

All the same, it must also be acknowledged that the Indian Constitution innovates the distinction (thus anticipating the international human rights law developments) between civil and political rights on one hand and social, economic and cultural rights on the other. The former set of rights (embodied in Part III as Fundamental Rights) are eminently judicially enforceable; the latter (crystallised in Part IV as Directive Principles of State Policy) are not enforceable, though declared fundamental to governance and casting a constitutional obligation of observance and fulfilment through acts of public policy and legislation. Part IV rights include rights to education, health, work, welfare and social security, and protection of the 'weaker sections of society'. These rights are to be realised progressively, save the right to free and compulsory education of young persons under the age of fourteen, a right which required fulfilment within the first decade of the enactment of the Indian Constitution. The Indian model, unfortunately, commended itself to many constitution makers in the South (with the significant exception of post-apartheid South African Constitution).

Part IV of the Constitution has been systematically under-enforced. Even the only time-bound provision concerning education has been flagrantly flouted. Activist adjudication, in the last fifteen years, has however steadily begun to transfer Part IV rights into Part III rights. Thus, right to education has been declared a fundamental right, integral to rights to life and liberty embodied in article 21. So have been the rights to immunity from malnutrition and hunger, health, housing, livelihood, and environmental well-being: Judicial enunciation of 'new' (in the sense of enforceable rights) has comforted constitutional 'haves', who raise questions concerning democratic legitimacy of judicial activism. The discourse of the 'haves' thrives on alienated, imported wisdom concerning the nature, role, and limits of judicial power and process, unaffected by the practices of the politics of cruelty entailed in ongoing violation of social rights of the masses of Indian impoverished. The 'have-nots', in contrast, have no difficulties with justification of judicial activism; they remain concerned with the problem of production of social cooperation among the various branches of government, the only pathway to ensure effectiveness of ameliorative judicial orders.35

IX. IN LIEU OF A 'CONCLUSION'

What has thus far been said itself, I hope, indicates at the very least the need to relate Indian constitutional development to constitutional violence, constitutive of a nomos of incumbent and insurrectionary forms of violence. The practice of constitutional theory in India will be the richer, were it to find ways of narrativising this integral relation.

To make even a stronger claim, I would have to say that for far too long, and with enduringly subversive costs for the future of Indian constitutionalism, this practice of theory has contributed to continual constitutional disenfranchisement of the bulk and generality of Indian citizenry. The present era of headlong and heedless globalisation of Indian politics and economy now deepen and enhances the deprivation of the constitutional 'have-nots'. The violence of economic globalisation36 summons renewal of normative and empirical theory of Indian constitutionalism.


36. By this notion I mean here to refer to three imperatives of economic rationalism, the three Ds—deregulation, disinvestment, and de-rationalisation—whether imposed by international
Civil Society and Liberty, Equality and Justice:
Percolation of Values to the Grassroots: Some Concerns

Chapter III

INTRODUCTION

Many years ago, Julius Stone had raised a question whether the liberal values enshrined in the Constitution of India reflected the volkgeist of the Indian people or whether it reflected the volkgeist of only the Indian elite? Events in early 2002, however, create doubt in our minds whether even the Indian elite continue to share the liberal values enshrined in the Constitution. Do the political parties share those values? Is the middle class committed to those values? Happenings in March 2002 such as the Central Government's total surrender before fundamentalist Hindu organisations on the question of Ayodhya, and the brutal slaughter of Muslims in Gujarat as a reaction to an earlier brutal carnage by Muslim extremists against Hindu pilgrims from Ayodhya at Godhra, point out a total breakdown of civil society and the State.

What was most shocking was the total communalisation and brutalisation of civil society. Such communalisation and brutalisation has not taken shape suddenly but had been growing since last several decades. Three recent events clearly fall in the category of pogroms. In March 2002, the latest of such pogroms in Gujarat, even the State supported the minority carnage by either actively helping the fanatics or by conniving at them. The State Government belonging to the BJP did not hide its partisanship when it offered Rs 2 lakhs as compensation to the Hindu victims of the Godhra carnage and Rs 1 lakh to the Muslim victims of the post-Godhra carnage. The RSS has given an ultimatum to the minorities that unless they earn the goodwill of the majority, their lives would not be safe. How would they earn the goodwill of the majority? They would do so by agreeing to give up the claim on reconstruction of the Babri Masjid on the site on which it stood before its demolition on 6th December 1992; by relinquishing sites of other mosques at Mathura and Kaashi and such other places as might be claimed in future; by agreeing to give up their personal laws and by not speaking against Hindus and joining hands with the political parties which indulged in Hindu bashing. In essence, this means that they must live as second-class citizens. If they agree to do so, then the Hindus would not kill them, rape their women or destroy their property. If they did not agree to any of these things, they should be prepared to face a similar fate as faced by the inhabitants of Gujarat. In other words, the Sangh does not believe in equality before the law or equal protection of law or


2. See infra p. 41.
3. The Times of India, 18th March 2002.

financial institutions or global, regional, or bilateral investment treaty regimes, whose overall impact is to redefine processes of development in ways that primarily protect and promote (1) the interest of the foreign investors and (2) and consumption needs of globalising middle classes in India. The social costs of economic globalisation spread unevenly but fall most heavily upon what the Constitution described as ‘the weaker sections of society’. The perambulatory values and visions of social development articulated in Part IV (the Directive Principles of State Policy) become altogether marginal to the making of macroeconomic policies in ways that amount to their de facto repeal.