

RECONTEXTUALISING THE ‘COLONIAL’: UNVEILING THE INDIAN CONSTITUTION’S COSMOPOLITAN TAPESTRY

Adwaitb PB

Ramjas College, University of Delhi

Today, as I sit down to pen down my thoughts on the lovely article by Mr Rangra, something rings the doorbell of my mind – Terrence Ball (2004) called the discipline of political science a “backward-looking enterprise” – for it is etched to the core of the discipline to glance through the Archean classics in search of solutions to even the most contemporaneous of all problems, for Platonian dialectics and Aristotelian logic being a ‘living past’ – and this, according to him, is not a *vieux jeu* obsession with the bygone past, but a testament to its academic richness, as it is compelling to visualise how the discipline situates itself between the authority derived from the past and its utility for the future.

Rangra (2023), in his text, quoted Mr Nariman, who “invoked Ambedkar’s remarks” by looking back to the constituent assembly debates. His methodology, thus, involves a sign of healthy mutualism with the constitutional debates of the past – the very essence of the discipline of political science that Ball (2004) talked about – travelling back in time to situate Ambedkarite arguments to fill in the jig-saw of the present – which, though served the purpose of his argument, opens a new, unconventional front – of the ‘Indian constitutional culture’, being a backward-looking enterprise, where the original text and the original debates being frequently invoked in its creative reinterpretation to solve a contemporary problem. This is not only limited to Mr Rangra’s article or Mr Nariman’s comment but is omnipresent – from drafting a judgement to arguing for a cause in a media debate, the original text and debates are vigorously referred to.

Constitutionalising Indian Culture

Indian constitutional culture is not a fancy term I used to make this text look more ‘academic’, but it is in sync with the observations of Madhav Khosla (2020), who writes, “The Indian Constitution has not only endured but also consolidated into the Indian psyche, to the extent that it has become a part of the national identity” – he argues how every debate and every problem is now a ‘constitutional issue’, with the debaters on both the sides of the table take recourse to the constitution to buttress their views – however contradictory it may be.

This, which I would like to call ‘constitutionalisation of the Indian way of life’, involves its backward-looking disposition, which Mr. Nariman resorts to, to support his view. Also, Mr. Sengupta, when he hailed the constitution as a text to engage with, only solidified the coveted positioning of the constitutional ethos in the Indian way of life. More importantly, the ending remarks quoted by Rangra

(2023), where a constitutional recourse is taken to support two sets of mutually exclusive arguments – of the Constitution promoting or having no role in putting an excessive burden on the judicial shoulders is again a testament to Khosla's (2020) observation.

Indian Constitution: A Social Touchstone

In the beginning, I drew a reference to Ball (2014), who interpreted the backward-looking disposition of the discipline of political science as its biggest strength. This reminds me of something – Popper once said that “Western thought can be Platonic or anti-Platonic, but cannot be non-Platonic” (as cited in Dai, 2012). Similarly, an Indian, now, can either be pro-Constitution or anti-Constitution (remember, Mr Sengupta himself said that the text is not sacrosanct), but can hardly be oblivious to the constitution. This is the biggest testament to its unique positioning in the Indian society – Indian society, being the interface between the Indian civilisation (representing two thousand years of civilisational ‘continuity’) and the Indian nation (representing the element of ‘change’) – as Khosla (2020) says, the Constitution is now a “touchstone”, which finds a way in even the most mundane of all disputes – as, for instance, I remember my friend invoking Article 19 (1) (a) when he was asked to zip his mouth – and I'm sure, we, in our lives, have at least once invoked the constitutional provisions – mostly 14, 19, and 21 – to win arguments with our peers and loved ones – representing what Redfield would call the devolution of ideas from the great tradition (the mental or moral aspect of Indian society, including values and norms, which, according to Austin, is embodied in the constituent assembly) to the little tradition (the material aspect of Indian society, manifested in the day-to-day lives of the masses).

Riggs and the English Orchestra

When K Hanumanthaiyya lamented that he had to hear the symphony of an English orchestra, whilst he wished for the music of veena of sitar (Constituent Assembly Debates, 1949), he would've never dreamed of how this ‘English orchestra’ would find a substantial position at the very heart of the Indian socio-cultural ethos. If the Constitution of India is as colonial as it is claimed to be, untouched by the very essence of India, we would have been like any other postcolonial country out there – with what Fred Riggs (1960) called “prismatic societies”, where the constitution and written laws are so alien to the masses that it miserably fails to integrate with the social ethos of a country – and as I previously argued, the Constitution of India is now an inseparable element of the Indian culture, closely linked to its very ethos, that the idea of modern India will perish with the annihilation of this text. Yes, it is not sacrosanct, but it is supreme. Yes, it is supreme, yet not infallible, thus, as rightly said by Sengupta, it is something to be engaged with – and more importantly, a force to reckon with (Rangra, 2023).

A Heavily Descriptive Text or a Labyrinth of Normativity?

Sengupta engages with the text by critiquing it on three levels, as succinctly summarised by Rangra (2023) – I will go one by one. One, Sengupta claims that the Constitution is colonial, as it is extraordinarily descriptive and prescriptive, based on the assumption that Indians are inferior to

Europeans. I will counter this argument with two arguments – one at the theoretical level and the other at the practical. One of the potent criticisms of the Constitution of India is its complexity – which, in my opinion, has to be demystified for the masses to understand. Even the most learned judges could not grasp the essence of the constitution – at least that is what the inconsistencies in judicial interpretations tell us.

For instance, for a simple question of whether article 13 of the Constitution is a limitation on the amending powers of the parliament under article 368, the Supreme Court, in *Shankari Prasad vs Union of India* (1951) held that constitutional amendments are immune from Article 13, and was further upheld in *Sajjan Singh vs State of Rajasthan* (1965). However, in *Golak Nath vs State of Punjab* (1967), the Supreme Court outmanoeuvred the previous verdict to state that Article 13 limits the amending power of the parliament. Nevertheless, in *Kesavananda Bharati vs State of Kerala* (1973), the Supreme Court upheld *Shankari Prasad's* (1951) verdict to declare that the Parliament, while exercising article 368, can amend any part of the Indian constitution, including part III, and Article 13 is not a limitation on this power. [However, in the same case, the Basic Structure Doctrine was fashioned, which acts as a limitation on the amending powers of the Parliament.]

Thus, given the ‘extraordinary descriptive nature’ of the Constitution of India, even the puisne judges are unable to capture its essence – so, how is it colonial, as claimed by Sengupta? Even today as novel interpretations of various provisions of the Constitution of India pop up, we cannot help but marvel at the hieroglyphic subtext hiding behind these ‘extraordinarily verbose descriptions’, smiling to the puisne excavators in the dark, waiting to be unearthed and reunited with the Indian psyche.

A Text for Indians or a Text for India?

At the theoretical level, I would argue that Mr Sengupta’s observations of the constitution being a verbose text written for the ‘inferior Indians’ (Rangra, 2023) to read and understand essentially attaches a narrowly local context to this universalist document located at the crossroads of global constitutional landscape. To elaborate upon my assertions, I would love to situate the constitutional developments in India at the heart of the Indian national movement. It is indisputable that the Constitution of India is the result of culmination of all socio-political developments in India since the creation of regional political associations – to be precise, the *Bangbhasha Prakashika Sabha* (patronised by Rammohan Roy) in 1836 and the *Zamindari Association* (1838) – through the creation of INC in 1885, and all socio-political reforms since then – the mass movements, successive reforms, and finally, freedom.

Indian scholars, from the philosophers of the bygone ages to the modern thinkers always placed a premium on ‘cosmopolitanism’. From the upanishadic thoughts of *vasudeva kutumbakam* to Vivekananda’s unity of the Brahman, from Tagore’s cosmopolitan humanism to Gandhian unity of humanity, from Roy celebrating constitutional developments across the world to Narayana Guru preaching ‘one caste, one religion, and one God for humanity’, the Indian freedom struggle (both social and political) has always been cosmopolitan and all-encompassing. Granville Austin (2021) called the Indian Constitution a “social document” – but for me, it is a ‘value document’, something that

encompasses all of humanity – a value document that any global citizen can relate to, and claim that this is my constitution. Pratap Bhanu Mehta and Madhav Khosla (2016) declare the Indian Constitution to be cosmopolitan, not just because of its commitment to the values of liberty, equality, and fraternity, but because of its unique situatedness “in the crossroads of global constitutional law”, and according to them, from its promulgation, the Constitution of India has been a “flagbearer of universalism”.

The Right Interpretation is the Cosmopolitan

A simple example that visualises the cosmopolitanism of the Indian Constitution would be the judicial interpretations of the Supreme Court, which often takes recourse to international jurisprudence to ‘rightly’ interpret the Indian constitutional provisions – for instance, *Munn vs Illinois* to expand the fringes of Article 21 to read ‘life’ as ‘human-like existence’, the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) to fabricate the coveted Vishaka guidelines, and the subtle references to the United Nations Declaration of Human Rights and the International Covenant on Civil and Political Rights while delivering Hadiya judgement (*Shafin Jahan vs. Ashokan KM*) or striking down Section 377 (*Navtej Singh Johar vs. Union of India*). It is an ecstasy to see how the Indian constitutional law deliquesces with international jurisprudence – with both reinforcing each other as inseparable parts of the same whole, descending into a composing oblivious trance, thus proving the arguments of Mehta and Khosla (2016).

On similar lines, Julian Ku and John Yoo (2013) expand upon Anne-Marie Slaughter’s (2005) concept of ‘new sovereignty’ through ‘a transnational network of government officials’ by adding: “... Judges on some national courts increasingly... cite precedents from other countries and international tribunals, stitching together, in countries that respect international law, something like a transnational body of law in discrete areas...” (p. 210).

However, Ku and Yoo (2013) present it as evidence of eroding state sovereignty in the era of globalisation, by antagonising international jurisprudence vis-à-vis domestic constitutional law and legal structure. So, it becomes imperative to question whether the ‘sovereignty’ of the Indian state is under any kind of threat from this ‘transnational body of law’, especially since we’ve seen some instances where the Supreme Court interpreted the Indian Constitution from the light of extra-territorial jurisprudence. As I argued before, backed by the observations of Mehta and Khosla (2016), the proper way to interpret Indian Constitution is by situating it in the crossroads of international constitutional law and jurisprudence – it is not something that compromises with the constitutional value of sovereignty, but when read with Article 51(c) (respect for international law) and the cosmopolitan nature of the text, mirrors the very nature of the Indian society itself – “Whatever is here, may be found elsewhere; what is not, cannot be found anywhere else” Mahabharata (18:56-33) – in simple words, ‘India is the microcosm of the universe’.

In sum, rather than being a text for Indians, the Constitution is a text for India – and India being essentially universalistic, makes the text cosmopolitan. Thus, any claims of the Constitution of India being overly descriptive for ‘mediocre Indians’ to read and understand occludes the very cosmopolitan

nature of this text, as any such claim bases itself upon the presumption that the text is narrowly local, ignoring the universalist elements that flood its spirit.

Nature of the Social Contract: Beyond Pinched Prescriptions

In his monumental essay on Enlightenment, Kant (1784, 2012) says that a contract is inherently void that “binds itself and ordain to put the succeeding [generations] into such a condition... by obligating [them] by oath to a certain unchangeable symbol” – it is, according to him, “a crime against human nature” – and indeed, the Constitution of India is neither that symbol nor that contract that bound the Indians of the 1950s and the successive generations to itself. For instance, consider Ambedkar, who, when asked why the word ‘socialist’ could not make it to the preamble alongside sovereign, democratic, and republic, replied:

“What should be the policy of the state, how the society should be organised in its social and economic side are matters which must be decided by the people themselves according to time and circumstances. It cannot be laid down in the Constitution itself, because that is destroying democracy altogether” (Bhattacharya, 2016).

Khosla and Mehta (2016) say that the Indian national movement has always been self-conscious “to be free, not bound by a particular tradition or a specific social contract”. In simple words, the Indian national movement was all-encompassing and universal – it was not bound by any ideology – it was an all-class movement – the capitalists and the workers, communists and the capitalists, men and women, rich and poor, tribals and urban folk, Hindus and Muslims, peasants and zamindars – all mortgaged their lives to breathe in a free India. This all-encompassing nature of the Indian national movement resulted in laying the universalist foundations of the Indian Constitution.

It is universal not only because of the nature of national movement, but also because of the fact that it was not a product of a revolution, unlike the French constitution, which bound an entire society and its future generations to the values of laicite, French idealism, and homogenous nationalism that now, in the age of globalisation, Paris is struggling to keep pace with multiculturalism (consider Burqa ban); or the American Constitution that prescribed the values of merchant-capitalism to its existing and upcoming generations (that at one point of time, uttering the word ‘communism’ was as good as sedition in the USA) – rather, it is a document that aimed to give birth to a revolution – a revolution that shook the very foundations of medieval feudalism, paving the way for constitutionalisation of Indian way of life, that Ambedkar had dreamt of long ago – the land of Buddha, where the triumvirate of liberty, equality, and fraternity exist in harmony with the cosmopolitan elements of the Indian constitution (Chakrabarti, 1986).

This ‘non-prescriptive’ nature of the Indian Constitution (in opposition to Sengupta’s claim that the Indian Constitution is highly prescriptive), can be seen on multiple fronts, of which I would like to quote one: this is the same constitution that saw two polar phases of the Indian economy – the Nehruvian dirigiste and the new liberalised economy. The same constitution presided over our tumultuous journey from centralised planning to the triumph of market forces; everything was done in

a day, and we did not even have to amend the constitution for that. In other words, the Constitution of India has just spelt out the foundations of the nation – and has given the steering to the parliament without any prescriptions. If we can surf through what economists call the ‘landmark event in post-Independent Indian history’ with the very same constitution, how is it prescriptive?

Like An Accordion Capable of Contextual Stretches and Compressions in Meaning

Unlike the American Constitution, the Constitution of India can be changed by the parliament according to the caprices of time, and over a hundred amendments since its inception simply testifies the same. But it is not that simple. I am not arguing that the flexibility of the Constitution, allowing for interventions through amendments when social realities change, makes it non-prescriptive. I argue that at any point in time, the Indian Constitution is universal, beyond any ideologies, and has never bound future generations to its principles. For instance, consider the definition of ‘state’ under Article 12, which reads:

“...‘The State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States, and all local or other authorities within the territory of India or under the control of the Government of India...”

I would like to stress the expression “other authorities” here, while the traditional expression of ‘state’ is limited to the central, state, and local governments, article 12 is ‘non-prescriptive’ enough so as to accommodate institutions like LIC (Life Insurance Corporation of India), ONGC (Oil and Natural Gas Corporation), and SAIL (Steel Authority of India Limited) in the broader fabric of ‘state’ – not only it accommodates the present institutional structure, fifty years from now if the concept of ‘state’ itself changes in a hypothetical situation where the government delegates the responsibility of governance to civil society organisations and NGOs (Non-Governmental Organisations), or even if a new institution altogether comes up that performs the functions of state, radically altering the present-day nation-state structure, the Indian Constitution, without the need of any amendments, is ready to welcome the new change, however radical it might sound to be.

Today, successive judicial interpretations have come up with more than fifty primary and secondary rights stemming from Article 21 of the Constitution, including the very recent ‘Right to Privacy’, which, in the first place, had no ‘explicit mention’ in the original text. If more than fifty different rights – including those of bodily integrity, death with dignity, travelling abroad, a clean environment, marrying the person of one’s choice, eating the food of one’s choice, livelihood, education, transgender rights, and more – can find a place in the text without tweaking its original provisions, the Constitution of India is, as Ananth Padmanabhan (2016) comments, an “accordion... capable of contextual stretches and compressions in meaning”. It is, within its present structure, capable of accommodating any major changes in the polity, economy, and society. So, how is it ‘prescriptive’? What is it prescribing?

Accusations and Exonerations

Now I come to Sengupta's second and third charges that revolve around the 'un-Indian' or colonial nature of the administrative structure (Rangra, 2023), which, for Tagore, was "untouched by human contact" (Rao, 2021), and for Gandhi, was characterised by a "disconnect with traditional India" (Rao, 2021); and the positioning of colonial policies like preventive detention in Part-III of the Constitution, which reinforces the saying that 'what the Constitution gives with one hand (fundamental rights), it takes away with the other'. Instead of considering these as proof of the colonial nature of the Indian Constitution, I would like to see them as its criticisms, for, as I mentioned before, the Indian Constitution is not a contract that binds the successive generations to its yoke, but a flexible document that can accommodate novel interpretations with or without amendments, in accordance with the prevailing socio-political-economic needs.

Rangra (2023) quoted Mr Nariman saying the "amendments cannot be foreseen" – yes, it cannot be foreseen as it is not a contract that prescribes a particular social order – it can be changed as and when the need arises – so, is it the so-called colonial spirit of the constitution that has kept the bureaucracy 'untouched by human contact' and the draconian laws of preventive detention amidst the Bill of Rights, or is it the lack of willingness to alter it to the needs of the changed Indian social milieu? If Mr Gupta (Rangra, 2023) can exonerate the constitution from the charges of burdening the judiciary and shift the charges to the government's incessant desire for litigation, why is the colonial nature of the constitution being used as a mask to cover the need for legislative reforms and political enlightenment?

We the People of India

Years ago, Laxmi Narayan Sahu claimed that the Indian Constitution has no manifest relationship with the fundamental spirit of India. If so, then who is "We the People" etched in golden letters in the opening lines of the preamble? Is it, as Loknath Mishra would ask, another "slavish surrender to the West" (The Museum of British Colonialism, 2022), as it is another line picked up from the Constitution of the USA? I doubt it. As I argued in this piece, the Constitution of India is not an alien text; it is now an intrinsic part of Indian culture, or its very essence. The constitutionalisation of the Indian way of life, as Khosla (2020) explained, makes us rethink the essence of "We the People".

Critics say that the text is the 'Constitution of the Congress', for Austin (2021) himself said that the constituent assembly was a "one-party assembly in a one-party country", but Rajeev Bhargava (2013) was right in situating his argument in the proper context, where Austin (2021) mentioned *en passe* that "Congress is India, and India is Congress", to be read with Rajni Kothari's (1964) conclusions of Congress being the widest social coalition, which was nothing less than a mini-India, as rightly pointed out by Austin (2021), 'a microcosm in action', where thoughts and aspirations of every visible and invisible Indian had found a place to dwell in the 'conscious, cosmic chaos known as India', and reading all these together, we will start appreciating the observations of the Supreme Court of India while delivering the Kesavananda Bharati judgement (1973) – "we have to accept 'We the People' as 'We the People'" – thereby demolishing any claims of the constitution being a beautifully-engineered colonial construct.

References

Austin, G. (2021). *The Indian Constitution cornerstone of a nation*.

<http://ci.nii.ac.jp/ncid/BA18745503>

Ball, T. (2004). *History and the interpretation of texts*. In SAGE Publications Ltd eBooks (pp. 18–30).

<https://doi.org/10.4135/9781848608139.n2>

Bhargava, R. (2013). *Constitutional democracy and Hindu nationalism*. In Routledge eBooks (pp.

153–175). <https://doi.org/10.4324/9780203085387-11>

Bhattacharya, S. (2018, April 24). *Secularism and the state*. Frontline.

<https://frontline.thehindu.com/politics/secularism-and-the-state/article8123816.ece>

Chakrabarti, R. (1986). The social and political thought of BR Ambedkar. In T. Pantham & K. L.

Deutsch (Eds.), *Political thought in modern India* (pp. 176–191). SAGE Publications Pvt. Limited.

Choudhry, S., Khosla, M., & Mehta, P. B. (2016). *The Oxford Handbook of the Indian Constitution*. In

Oxford University Press eBooks. <https://doi.org/10.1093/law/9780198704898.001.0001>

Colonialism, M. O. B. (2023, August 7). *India at 75: Colonised & Decolonised*. MBC.

<https://museumofbritishcolonialism.org/2022-7-29-india-at-75-colonised-decolonised-6cxyk/>

Columbia Global Freedom of Expression. (2023, November 4). *Navtej Singh Johar v. Union of India -*

Global Freedom of Expression. Global Freedom of Expression.

<https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>

Constituent Assembly Debates On 17 November, 1949. (n.d.). Retrieved February 25, 2024, from

<https://indiankanoon.org/doc/1553297/>

- Dai, C. (2012). *A comparison of the political thoughts of Confucius and Plato*. In Springer eBooks (pp. 181–190). https://doi.org/10.1007/978-3-642-32445-1_12
- Goel, S. (2019, September 25). *Shafin Jahan vs. K.M. Ashokan* & Ors. Law Times Journal. <https://lawtimesjournal.in/shafin-jahan-vs-k-m-ashokan-ors/>
- I. C. Golaknath* & Ors vs *State Of Punjab* & Anrs. on 27 February, 1967. (n.d.). <https://indiankanoon.org/doc/120358/>
- Kant, I., & Wood, A. W. (2012). *An answer to the question: What is enlightenment? (1784)*. In Cambridge University Press eBooks (pp. 11–22). <https://doi.org/10.1017/cbo9780511813306.005>
- Khosla, M. (2020). *India's founding moment: The constitution of a most surprising democracy*. Harvard University Press.
- Kothari, R. (1964). The Congress “System” in India. *Asian Survey*, 4(12), 1161–1173. <https://doi.org/10.2307/2642550>
- Ku, J., & Yoo, J. (n.d.). Globalization and sovereignty. *Berkeley Journal of International Law*, 31(1), 210. <https://doi.org/10.15779/z38t076>
- Kumar, A. (2022, May 13). *Shankari Prasad vs. Union of India Case Summary 1951*. Law Planet - Legal News, Law Updates & Law Exams Preparation. <https://lawplanet.in/shankari-prasad-vs-union-of-india/>
- Padmanabhan, P. (2017). *Rights*. In Oxford University Press eBooks (pp. 581–599). <https://doi.org/10.1093/law/9780198704898.003.0032>
- Rangra, P. (2021). *Is the Constitution of India colonial?* Ramjas Political Review. <https://www.ramjaspolreview.com/post/is-the-constitution-of-india-colonial>

Rao, S. (2021). *Indian Bureaucracy*. *Yojna*, 8.

Riggs, F. W. (1960). Prismatic society and financial administration. *Administrative Science Quarterly*,

5(1), 1. <https://doi.org/10.2307/2390823>

Sajjan Singh vs State Of Rajasthan on 30 October, 1964. (n.d.).

<https://indiankanoon.org/doc/1308308/>

Slaughter, A. (2005). *A new world order*. In Princeton University Press eBooks.

<https://doi.org/10.1515/9781400825998>