Postcolonial Legality: A Postscript from India

By *Upendra Baxi*, Warwick*

I. Some Wayward and 'Politically Incorrect' Prefatory Remarks

'Postcolonial' is an unusually resilient and versatile notion. Operating without an expiry date the 'postcolonial' constitutes an infinite horizon: once colonized, peoples, cultures, societies remain always 'colonial' with the honorific prefix, of course! Put another way, the colonial inheres the postcolony as 'framing' the collective political unconscious and even life-forms / and life-worlds. Thus the 'postcolonial' is not so much a history of miscellaneous and contingent events but conspectus of the violent erasure of 'deep' time encasing the pre-colonial peoples and societies. The stories of the colonial/postcolonial are narrated in terms of spatial categories concerning the making of the 'modern' world; important as this remains, one needs to explore several ways of transformation of the non-European others imageries of time via the hegemonic linear time of Eurocentric narratives of progress.[1] In this way, the time of the 'colonial' remains always that of the 'postcolonial'.

The appellation 'postcolonial' further extends, by some uncommon communicative courtesy, only to the 'darker nations'[2] constituted by the predatory histories of the Enlightened Europe's 'scramble for sovereignty' in Asia and Africa. It does not extend to the United States or the Old British Commonwealth countries (Canada, Australia, and New Zealand). Nor may one readily extend in the same way the epithet to 'Latin American', or further to 'post-socialist societies'. These seem to offer different histories of domination and resistance than conventionally grasped by the notion of the postcolonial which remains a peculiar historic formation, marking the aftermaths of the cessation of European belligerent occupation of the territories, resources, and peoples especially in Asia and Africa. In this way, the 'postcolonial' is a hegemonic term of art, if only because it does not readily extend elsewhere.

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1 See as to this: *Wai Chee Dimock*, Through Other Continents: American Literature across Deep Time, Princeton 2006; *Rosalyn Higgins*, Time and the Law: International Perspectives on an Old Problem, International and Comparative Law Quarterly 46 (1997), pp. 501; *Martti Koskenniemi*, Why History of International Law Today?, Zeitschrift für Rechtsgeschichte 4 (2004), pp. 61–66; *Michael Craven*, Introduction: International Law and Its Histories, in: Craven, Fitzmaurice and Maria (eds.), Time, History and International Law, Leiden 2007, pp. 1–27.

2 *Vijay Prahsad*, *The Darker Nations:* A Biography of The Short-Lived Third World, Delhi 2007.

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Obviously, I may not any further pursue this story – the future labors of a Foucault-style 'genealogy'. Even so, I may not resist at least the temptation of adding the following cryptic remarks. First, if the 'colonial' is a process and product of imperial ambitions and rivalry amongst European nations as such also a project of sustained political violence against the non-European others, the postcolonial may scarcely be otherwise. If the colonial presents itself as an presented as an ethical project of violence (for example: whether in terms of Kantian notion of moral 'tutelage', Hegel's notorious remark that the non-European others had no notion of 'history', or as overall the 'civilizing mission' of Europe), it remains unsurprising that the postcolonial reenacts this project in the space-time of the postcolony. In this register, the counter-violence of insurgent reason may never be regarded as bearing the weight of dignity of the title- and life – of 'Reason'.

Second, the 'postcolonial' occurs outside the achievement of self-determination in Latin America, and South Asia in the times of adoption of the United Nations Charter and the Universal Declaration of Human Rights. Both further remain held within the catastrophic rivalry of the two superpowers. I refer here to the 'Cold War' militarized global governance formations flourishing under the auspices of rival triumphant and bloody slogans seeking on the one side to make the world safe for 'democracy'(global capital dominance) and on the other privileging 'wars of national liberation (state socialisms). The 'postcolonial' thus furnish other as little or no more than the future histories of imperialisms at least as viewed from the subaltern or the worm's eye view of the non-European others.

Third, 'postcolony' now recurs as cruelly and poignantly as before though in a different narrative vein– via global 'wars' on 'terror'; and via hyper-globalizing world economic orderings which characterize different trajectories of myriad forms of 'colonization without colonizers'. In this paradigm shift some new signifying practices/semiotics, genres and grammars more fully emerge; these re-articulate the 'postcolonial' in complex and contradictory by phrase-regimes so well beloved of the United Nations and the European Union) which seek to so fully dissipate as well as remake the state of the 'postcolonial' in such vastly staggering imageries of the developed', 'developing', ''underdeveloped', 'least developed; and now via the hype of even 'emergent' formations such as BISA (Brazil, India, South African) frames of the postcolonial. These narratives of dissipation of the 'colonial' into 'postcolonial' afford little dignity of discourse for the non-European others.

Fourth, and amidst all this, remains eclipsed any real-time understanding of what the colonizers may have learnt /unlearnt from the colonized. I have at least in view here some ways in which the very idea of human rights stands transformed both in the formative practices of resistance to colonization and in the timespaces of the global 'post-colony'.[3]

Prescinding all this, I address here the suffix 'legality' than the prefix 'postcolonial'. That suffix already presupposes that the 'colonial' was a normative enterprise in the first place. Colonial legality is indeed an oxymoron. Compounding this, I here summarily enunciate several 'Baxi-morons'. The histories of 'colonial' juridification testify to Mohandas

[3] See as to this: *Upendra Baxi* , The Future of Human Rights , Oxford / Delhi 2008.

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Gandhi's dictum that the law is nothing but the 'convenience of powerful'. Today, different phrase-regimes dominate – such as fostered by Carl Schmitt revival of the 'states of exception', differentially supplemented by Derridean 'readings' of the relatedness of the practices of 'foundational and reiterative violence'[4]. For the present intendment perhaps it suffices to say that 'postcolonial legality' (to adapt a germinal phrase from Jürgen Habermas) is a 'troubled continent of contested conceptions' of sanitized and insurrectionary thoughtways.

II. Judas at the 'Last Supper'?

The challenge and complexity stand aggravated when the unfamiliar guest – the discourse of constitutionalism and human rights – makes appearance at the dining table.

Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both *rule* and *resistance*.

If resistance constitutes the interruption of the power to govern, we have little choice but to agree with Alian Badiou that 'ruling'/ 'governance' comprise so many forms of '*interruption of interruption';* in this way, the idea of constitutionalism may not be grasped outside that of 'destruction'. Badiou further guides us towards understanding of constitutional governance in terms of the dialectics of destruction schematizing this further in the diction of 'law as 'nonlaw' (forms of destruction of the other 'so that law may live') on the one hand and on the other 'nonlaw as law' (so that 'the other may live').[5] How then may we read this dialectic in the rites of passages between the 'colonial' and the 'postcolonial' constitutional forms?

Descending here to some sundry detail, 'constitutionalism' typically evokes the device of written constitutions; but the texts of the constitution do not always illuminate, much less exhaust, the context of political and social action. Indeed, constitutionalism interrogates the notion of *writtenness* in at least two ways. First, behind every *written* constitution lies an *unwritten* one, which enacts the conventions and usages, the protocols and accouterments of power that resist linguistic codification. Second, the *unwritten* often overrides that which stands elaborately written, such that we have the paradox of "constitutions without constitutionalism" (to adapt a notion of Oketh-Ogando)[6]. The defense/war power of the executive furnishes the paradigm case of the first; the second stands illustrated by periods of constitutional dictatorships. In these, the *acquisition of political power* is legitimated through devices prescribed in the written constitution but the modes of *exercise of power*

4 *Jacques Derrida*, Acts of Literature, London 2002, pp. 228-298.

5 See *Alain Badiou*, Theory of the Subject, London 2009, pp. 169-176.

6 *H.W.O. Oketh-Oganda*, Constitutions without Constitutionalism, in: I.G. Shivji (ed.), State and Constitutionalism: An African Debate on Human Rights, Harare 1991.

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remain relatively autonomous of the corpus of constraints enacted in the text. Third, styles of constitutional interpretation may privilege either the written or reinforce the unwritten constitution; the learned Justices often achieve the latter everywhere when they engage in judicial self-restraint by declining to address basic violations of rights on the grounds so differently named as doctrines of the separation of powers', 'political questions', 'security' of the State, or 'margin of appreciation' towards other organs of governance

The history of evolution of modern constitutionalism is a narrative of growth of asymmetries in the structures of state-formative practices of domination and the formative praxes of resistance.[7]

Principles of constitutionalism were perfected in Europe at the very historic moment when colonialism flourished. In retrospect, the narrative of constitutional development in decolonized societies provides a massive indictment of accomplishments of liberal thought. Colonial/imperial power provides scripts only for governance; by definition, it is a stranger to the idea of fundamental rights of the people. This formation regarded all practices of interrogation of colonial/imperial power as acts of subversion and sedition, even treason. Notions of 'justice' and 'development' in colonial law formations are at best *paternalistic* and at worst *accessories* to imperial domination. Ideas and forms of incipient constitutionalism do occur (at some moments of insurgency against colonial rule) but only as instrumentalities of governance.

Thus, for example, colonial governance may entail separation of powers or decentralization of power. But in neither situation is the centralized unity of colonial state power put even to the mildest risk. Separation of powers between executive and judiciary occurs in colonial governance; but more as a design for efficient rule than as mechanism for any superior protection of peoples` rights against bad or evil governance. Likewise, "federal" division of powers occurs typically as *decentralization*, and not *devolution*, of power.

All this needs to be stated in order to cure the modern superstition which suggests that constitutional forms and ideals constitute a legacy of colonialism. The reality is otherwise. Colonialism and constitutionalism were always strangers. And the very act of enunciating a constitution marks a historic rupture.

Even so, it would remain true at a broad level to say that colonial legal cultures did affect *forms* of constitutions. Thus, the *civil law* and the *common law* traditions render difficult a third choice in the making of postcolonial constitutions. They often structure the apparatuses of governance: this contrast may, for example, be studied fruitfully through the ways in which concentrations of the supreme executive power, especially through the Imperial Presidency in most parts of 'Francophonic' and 'Anglophonic' Africa or in the structuration of the adjudicatory powers. Even more fundamentally, the language of the law established, at least initially, the reach of eclectic *mimesis*. But more profound remain ideological closures on constitutional imagination as stands illustrated by the contexts of the Cold

7 See *Upendra Baxi*, Constitutionalism as a Site of State Formative Practices, Cardozo Law Review 21 (2000), pp. 1183-1210.

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War, which generated the antithetic discourse between the *liberal bourgeois* and *revolutionary socialist* constitutionalism. The differences proved vital for Third World practices of constitution making.

This text is scarcely a site for any more than summary indications of ideological closures worked out in the making/working of many a postcolonial constitutional form /grammar. Broadly, I refer here to two postcolonial constitutional formations/constitutionalisms: the socialist postcolonial form (SPF) and the capitalist postcolonial form (CPF). If SPF celebrates the denial of ownership in the means of production (private property), CPF venerates rights in *private property.* Whereas in CPF political representation in liberal constitutionalism is a function of class domination, in the SPF "state" such representation stands collectivized though the Party always claiming to represent "workers," "peasants," and "masses''. If SPF imagines adjudication as a way of markedly *pedagogic role in the construction of the new socialist human person*; CPF insists on a relatively autonomous liberal self of its citizens (rational choice actors) pursuing their own ends of private interests (freedoms to define their life projects).

In contrast, then whereas SPF emphasizes *fundamental duties of citizens*, CPF foregrounds their *fundamental rights*. Both these forms/grammar are at one in the structuring of *reign of terror* in the very name of 'law'. 'Uncle' Marx (as I fondly name him) demonstrated in *Capital, Volume One* that the idea of *rule of law* remains insensible outside that of *reign of terror*. This at least suggests that the distinctions we may make after all between CPF and SPF remain those of degree, rather than kind. If the gulags were manifest SPF pathologies, CPF forms (the *rule-of-law* societies) preset us with a dispersal of their very own *gulags* – constitutionally and legally unredressable manifestations of micro-fascism of the local State and civil society (e.g. McCarthyism, vicious forms of racism and patriarchy and 'neo-Nazism).Further, the gigantomachy between the two superpowers in the Cold War era contributed, with deep implication for human rights, to the *militarization of the state* in ex-colonial societies. Put summarily, both socialist and capitalist forms of imperial hegemony affected the text and context of constitutionalism in decolonized societies.

III. Postcolonial Constitutionalisms

Despite all this, it would be an error to regard the postcolony as one coherent "public place" determined by any single organizing principle. It remains rather a plurality of spheres, arenas, identities.[8] And partly these stand shaped by the struggles for decolonization, most of which have entailed militant peoples` movements and colonial state repression. Postcolonial constitutions thus inevitably carry their birthmarks.

Even so, these do stand constituted by a foremost organizing principle of *natural rights*: claims to self-determination not warranted by imperial legality. Mohandas Gandhi inaugurated the historic practice of this right in the early decades of this century, as did Nelson

8 *Achille Mbembe*, Provisional Notes on the Postcolony, Africa 62 (1992), pp. 3-37.

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Mandela towards its end (and to further mention the interregnum constituted by Martin Luther King Jr). These *performative* practices of natural rights create a new order of institutional facts confronting the *brute* facts of power and domination.[9]

The practices of the human right to self-determination stood, however, conditioned by the diverse patterns of colonization, as yet been insufficiently theorized. But available accounts suggest a rich diversity. At the one end of the spectrum we have the pattern of complete metropolitan domination as in Mozambique, which was completely dominated by Portuguese laws, Portuguese legal officers and Portuguese legal thinking. All legislation was made in Portugal and then applied to the colony. Indeed, and to offer a vignette:[10]

> "The laws were shipped out to Mozambique like wine or wool. All the judges and prosecutors belonged to Portuguese state service, and all the legal profession consisted almost entirely of Portuguese persons who had gone out to the colony to make their fortunes. No law school existed in Mozambique until the very eve of independence."

At the other end of the spectrum were the colonies like the subcontinent of India in which toleration and at times grudging indifference to civilizational and cultural traditions of the colonized, animated by the exigencies of empire-building, entailed recognition of indigenous legal traditions. The Hindu and the Muslim law as practiced for centuries in India required (so tied were these bodies of law to land, forms of property, religion, and culture) sustained recognition in law, policy, and administration. Colonial mediation, of course, resulted in hybrid formations now known as Anglo-Hindu and Anglo-Muslim law.[11] And protection of "personal" (religious/customary) law systems thereby became typical stratagems of "divide and rule" practices of communalization of governance and politics.

The diverse interests of the colonizing elite in India (the missionaries, the commercial/industrial elite and the administrator/law reform networks) produced strikingly different results. As compared with Mozambique, for example, these networks of elites pulled together (without, of course, threatening their collective interests) not to *ship* their laws but to freight the cargo of *law reform* models!

Colonial India became the arena of Benthamite legislative programs: the metropolitan English legal culture, which remained common-law allergic to the very notion of codification, reveled in pioneering the codification of civil and criminal law in Indla![12] All this generated an increasingly sophisticated Indian legal profession which was to dominate both the nationalist movement (in the figure of Mohandas Gandhi, Rajendra Prasad, Vallabhai

9 *John R. Searle*, The Social Construction of Reality, London 1995.

10 *Albie Sachs* and *Gita H. Welch*, Liberating the Law: Creating Popular Justice in Mozambique, London 1990, pp. 3.

11 *J.D.M. Derrett*, Religion, Law and State in India, London 1968.

12 *Eric Stokes*, The English Utilitarians and India, Oxford 1959; *ibid*., The Peasant and the Raj, Cambridge 1978.

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Patel, C. R. Das, K. M. Munshi, Motilal Nehru, M. A. Zinah, B. R. Ambedkar, to mention a few examples) and the making of the Indian Constitution.[13]

In the middle ranges of the colonial spectrum lies the example of "settler colonialism" in many parts of Africa. For the most part, in what stood named as the "African customary law" the colonial regimes invented various devices of governance, as for example the institution of chieftainship. Of course this invention was a result of complex and contradictory negotiation of interests between colonial administrators and indigenous elites[14] and has functioned as more than a historic residue in the postcolonial African condition.

When we attend to the difference and diversity of formative colonial contexts and struggles for self-determination, we begin to realize, at least for law and constitutionalism, how reifying the term "postcolonial" is. And this should serve to remind us as well that the term itself often functions as a constituent moment of organization of the politics of memory and of forgetting, devices available for political mobilization, and coequally for resistance movements, within and across nations.

IV. Postcolonial law registers *breaks* as well as *continuities*

A salient continuity resides in the simultaneous affirmation and negation of the emancipatory logic of self-determination. The very success of the decolonization project entails a closure: the new nation-state consolidates colonial boundaries, giving rise to the paradox of "nationalism without nation"[15]. The new nation-state appears neocolonial to many groups whose understanding of struggle against colonialism was radically divergent from those who eventually capture state power and apparatus. Postcolonial legality thus stands sited in the dialectics of repression and insurgency. lt continues colonial laws` repressive legacies and even innovates these through the regimes of security legislations. These often equate *suspicion* by the authorities with *proof* of guilt. The jurisdiction of suspicion permits dragnet arrests; indefinite incarceration often beyond pale of even bare judicial scrutiny; custodial torture and tyranny; organized "*disappearances*" of the detainees. The colonial Official Secrets Acts continue to convert conscientious citizens into *spies* by declaring a notified public place the *private* space of the security forces; to enter proscribed places is an act of espionage "worthy" of severe repression.

Despite all this, the postcolonial state lives in fear and trembling. lts Constitution must provide means of its own demise through the power to proclaim a state of emergency. These proclamations seldom relate to the objective of preserving the nascent constitutional emergences from external aggression or armed rebellion. More often, emergency powers have been used in aid of the corrupt sovereign who muzzles even the semblance of political

13 *Granville Austin*, The Indian Constitution: Cornerstone of a Nation, Delhi 1964.

14 *Mahmod Mamdani*, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton 1996.

15 *G. Alyousis*, Nationalism without a Nation, Delhi 1997.

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dissent, through extrajudicial killings – at times even taking the juridical form of capital punishment. Ken Saro Wiwa emblematizes, at the turn of the century, the extraordinary politics of "constitutionalized" cruelty.

V. Discontinuities

All the same, a major discontinuity inheres in the constitutional project, which installs a new order of representation of the national "selfhood." Constitutions are constructed, as moral autobiographies of "new" nations, promising a new future, vigorously disinvesting the colonial past.

Postcolonial constitutions comprise two contradictory genres of texts: texts of *governance* and texts of *justice*. The social justice texts of constitutions (texts permeated with ideologies of human rights and redistribution) are slender compared with the texts of governance. But postcolonial legality is always characterized by constitutionally anchored contradiction between *governance* and *justice* in ways not characteristic of the original American constitution and many "Western" counterparts. In this sense, the post-Soviet or "transitional" constitutionalism derives as much, if not more, from the Third World traditions than from the post-bicentennial French and American ones.

Postcolonial legality provides a register of creativity within the framework of mimesis. Mimesis consists in the reproduction, with a range of variation, of texts of governance; even here the invention of military constitutionalism, notably in Africa, deploys cruelly the latent antiliberal potential of the Western constitutional genre. Creativity abides in the human rights and social justice constitutional texts illuminating contradictions of transition, not just rites of passage.

The thesis that postcolonial constitutions are exemplars of "catachreis" (a concept-metaphor without any "historically adequate referent"[16]) negates in the ex-colonial subject any epistemic capability to form languages of rights and justice. It also ignores the historical specificity of anti-colonial struggles, which innovate new forms of constitutionalism. It would fly in the face of recorded history to suggest that either the "classical" genre of postcolonial constitutionalism (such as in India) or the radically emergent forms (in South Africa, Namibia, or Eritrea) constitute any Form of` "catachreis."

Indeed, some of these latter provide inaugural examples in human history of constitution-making not under the auspices of` an elective oligarchy but through the means of widespread popular participation, deferring to a logic of government by consent in the very *foundational* endeavor: the making of the constitution itself.

The contribution of constitutionally authored postcolonial legality lies in the mutation of a whole variety of norms and doctrines writ large on the "Western" / "Northern" constitutional imagination and praxis. We examine below some aspects of forms of discontinuity.

16 *Gayatri C. Spivak*, Constitutions and Culture Studies, in: J.D. Leonard (ed.), Legal Studies as Cultural Studies: A Reader in (Post) Modern Critical Theory, New York 1995.

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1. Notions of Human rights

Among the most notable transformations is the extension of the "classical" western notions of rights. The Indian Constitution (IC), inaugurally, extends the notion of rights beyond the state to civil society. lt outlaws practices based on the ground of` "untouchability"; forbids and penalizes practices of forced and bonded labor and markets for trafficking in human beings; and provides a first contemporary example of *empowering* state action in aid of human rights against formations of cruelty in civil society.

Not merely this. The lC, in its progressive development, becomes the vehicle of empowerment of the untouchables and indigenous peoples (defined respectively as the "scheduled castes" and "scheduled tribes"). They stand endowed with legislative reservations: under a constitutionally prescribed scheme, a considerable number of` seats are reserved in Parliament and state legislatures.[17] Quotas in education and state employment for these categories as well as for socially and educationally backward classes and other backward classes stand mandated. The extension of quotas in the federal services in the eighties (through the implementation of the Mandal Commission report) marked a major social and political upheaval, including poignant practices of self-immolation by young people. The Supreme Court has validated this provision, at the same time mandating that such quotas should not exceed a 50 percent limit and should exclude those groups of beneficiaries who have already achieved economic and social well-being.

Affirmative action programs abound, both as devices of *governance* and of *justice*. ln Malaysia, the majority of *bhoomiputras* (sons of soil) enjoy benefits denied to the local Chinese and Indian Malaysian citizens. Sri Lanka is in search of acceptable formulas to end a most savage civil war and find a balance of equity between the Sinhalese and Tamils. Similar, and acute, problems bedevil the political economy (of what Horowitz aptly names as) "severely divided societies."[18] Politics of affirmative action enshrined as an aspect of the doctrine of liberal equality, present manifold narratives transcending political labors following the American Supreme Court`s heroic endeavors with since *Brown* v. *Board of Education*.

2. State neutrality

The liberal doctrines about state neutrality stand significantly renovated by the development of postcolonial constitutionalism. Constitutions do embody notions of collective moral good that the state is enjoined to promote. In India, for example, the state may justifiably regulate rights to conscience and to religion on the grounds of public health and order and morality. The answer to the question *which*, *what* or *whose morality* can regulate

17 See *Upendra Baxi*, Justice as Emancipation: 'The Legacy of Babasaheb Ambedkar', in: Upendra Baxi and Bhikhu Parekh (eds.), Crisis and Change in Contemporary India, New Delhi 1995, pp. 122–49; see further *Marc Galanter*, Competing Equalities, Delhi 1984.

18 *Donald Horowitz*, Ethnic Groups in Conflict, Berkeley 1985.

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even the right to *conscience* has been a contested site named as constitutional *secularism*. Many devout Indian Muslims cannot concede that courts or parliament can reform the *Shari'a* in ways beyond what the hermeneutic of Koranic tradition warrants in the name of secular gender equality. Similarly, many a pious Hindu remains perplexed by the constitutional modification allowing untouchables a right to enter and worship in temples. Indian Catholics are no less perturbed by legislative measures which restrict on the ground of morality certain practices of preaching and converting, and by legalization of abortion. All religious communities feel equally distressed by the very notion of a Uniform Civil Code, which remains the constitutional obligation of the Indian State!

When politics stands thus confronted with the might of religious traditions in multi-religious society like India, it takes recourse to aspirational *constitutional enunciations*, typically crystallized in the Directive Principles of State Policy and the Charter of Fundamental Duties of Citizens. Not judicially enforceable, these cast a paramount duty on the legislature and the executive. These provide critical social spaces for politics of identity and difference by introducing dissonance in the life of civil society and the state. The fundamental duty to respect and cherish the ideals of the freedom movement; to respect the "composite culture" of India; to develop a scientific temper, spirit of enquiry, and reform; and to renounce practices derogatory of women – all enable discourses of empowerment. These draw legitimation not from some abstract conception of toleration and dignity but from the source of all legality: the Constitution itself. Of course, the discourse on fundamental duties of citizens is not always people-friendly and has been used to trump basic rights in the constitutional experience of socialist societies and in military constitutional dictatorships in the South.

3. Property relations

From the first generation of Third World Constitutionalism to the third generation[19], a central problem has been one of redefinition of property relations. Given the diversity of patterns of colonization and national resistance movements, postcolonial legality furnishes divergent narratives.

Often enough, the bourgeoisie who triumphed in nationalist movements embodied fundamental rights against expropriation, necessary to any basic transformation of agrarian relations. Wherever federalism prevails, the power to legislate and implement agrarian reforms lies with the state or province rather than with the national government. The com-

[19] This is a notion not commonly used and perhaps also problematic. I wish to indicate by the *first* generation of Third World constitutionalism law-regions decolonized after the Second World War; by the *second* generation I designate forms nascent during the various phases of the Cold War; and by the *third* generation I refer to post-Cold War constitutions. The first, inaugurally, is the epoch of Indian constitutionalism; the second reaches out to "continental socialist" constitutions in the Third World; the third brings to mind post-Cold War forms such as those in Southern Africa, Ethiopia, Eritrea, Uganda. The distinctions, historically crucial, await elucidation from the labors of comparative constitutional scholarship.

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bined impact of the fundamental right to property and the federal principle is to create a juridical maze which mires all prospects of transformation of deeply unequal property relations.

Pitted against this constitutional construction of the *status quo ante* are, of course, the energies of expectations nurtured during anti-colonial struggles. Unlike First World constitutionalism, where universal adult suffrage was extended gradually, over long stretches of historical time, most postcolonial societies were born with instant political enfranchisement. This has led to significant agrarian movements, including movements on behalf, if not at the behest, of the rural poor. Unlike First World constitutionalism, postcolonial constitutionalism provides a register of state formative practices centered upon the issue of redistribution and property relations.

Of course, both *rule* and *resistance*, in this arena, depend on the historic *locus*. Socialist (and even post-socialist) Third World constitutions (Mozambique being an exemplar) differ historically from South Africa or Zimbabwe. The latter stands characterized by an entrenched constitutional provision forbidding agrarian reform measures which may disrupt assurances of entitlement to the White settler[20]; the former has to confront the necessity of reordering land relations and rights leavened by both colonialism and apartheid. In addition, different systems of property relations colonially constructed on customary law remain obdurate (and not just in Africa). In contrast, for example, the Indian experiment and experience in guarded agrarian reforms successfully abolishes the historic *zamindari* system (of revenue exactions by large landowners) but fares very unevenly[21] in terms of protection of tenancy or agrarian land ceiling.

Despite some intense variations in the practices of 'juridification', the following remain broadly salient in any narrative of comparative postcolonial constitutionalism:

- the militancy of subaltern movements for agrarian reforms reinforces the raison d'état. The state is able to justify excessive use of violence, while condoning structural violence: the reign of terror by state agents and mangers is justified as the rule of law (e.g. the state response to the Naxalite movement in India);
- the worst practices of agrestic serfdom continue (e.g. debt bondage; payment of wages in kind, often narcotics, as in Pakistan, to secure a servile workforce; varieties of unfree labor arising from nonpayment of minimum wages and gender-based wage differentiation; unconscionable forms of child labor; trafficking in women);
- by the same token, preservation and promotion of the worst forms of violence against untouchables is practiced by the dominant landowning classes; it knows no restraint, whether in terms of the wise custom or the rule of law governance models

20 *Shadruck Gato*, Humans and Peoples' Rights for the Oppressed: Critical Essays on the Theory and Practice from Sociology of Law Perspectives, Lund 1993.

21 *Upendra Baxi*, Towards a Sociology of Indian Law, Delhi 1985; *Tomasson Jannuzi*, India's Persistent Dilemma: The Political Economy of Agrarian Reform, Boulder 1994.

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(to appreciate the depths of victimage, one has to read the poignant portrayal in Rohintoon Mistry's classic novel *A Fine Balance*[22], grounded in modern India but of deep relevance elsewhere);

- forms of regulatory capture becomes versatile: that is, not just the capture by special interests of the making of legislative policies and law reform but also the *systematic* co-optation of the land revenue, local police and adjudication, learned professions including lawyers, and mass media.

The postcolonial quest for equity in property relations continues, though beset by the inheritance of colonial inequities aggravated by malgovernance practices. Constitutional texts and contexts continue to energize both *rule* and *resistance*. The gains of social movements, wherever considerable, as for example in India, stand now threatened by the might of forces of globalization. The spread of foreign direct investment and multinational capital (while posing a different order of challenges to social activism and human rights movements) also presents a relatively bleak future for agrarian reforms. The voracious appetite of multinationals devours prime agricultural lands, forests, and environment (that provide the necessary infrastructure for their profit and power). Postcolonial constitutional texts could not have anticipated the context of globalization; the task of interpretation has to contend with the fact that constitutions become merely the "local" particular that has to adjust somehow to the "universal" in the global.

V. Judicial Activism

Indeed, judicial activism has steadily emerged as a foremost powerful site, making adjudication (as in India) a people's ally contributing to social movement for re-democratization. Judicial activism in India results in two astonishing feats.

First, the Indian Supreme Court enunciated in the seventies an unusual province and function for judicial review by declaring that the power of Parliament to amend the Constitution was subject to judicial review: it may not extend to alteration of the essential features of the basic structure of the Constitution. What these "essential features" was left for the Justices to enunciate from time to time, but these included the "rule of law," "republican form of government," "federalism," "democracy," "socialism," "secularism," and above all the power of judicial review. The doctrine was not merely enunciated; it was also applied to invalidate several amendments. (In the process, the Court considered the right to property as worthy of deletion.) The result has often been, accurately, described by naming the Indian Supreme Court as a *constituent assembly in permanent session*. And this form of adjudicatory activism has, in turn, traveled to Pakistan, Bangladesh, and Nepal.

Second, the meteoric rise of the social action litigation (SAL, to be distinguished carefully from Public Interest Litigation: PIL) in India represents a process of informalization and democratization of access to appellate courts, including the Supreme Court of India.

22 *Rohinton Mistry*, A Fine Balance, London 1995.

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The inaugural device here is simple: sending letters to justices drawing their attention to violation of the rights of the disadvantaged, dispossessed, and deprived sections of Indian society. The letters are usually based on media horror stories of violations of the rights of the impoverished and vulnerable. Justices usually act upon them, thus inventing an *epistolary jurisdiction*, expanding the standing (the strict rule being that only a person whose rights are affected may approach courts), determining the facts at issue by the device of socio-legal commissions of enquiry and by orders and directions requiring state action.

SAL has thus been deployed to combat: (a) governmental lawlessness and official deviance; (b) compensatory measures of rehabilitation and restitution for cruel, inhumane, and degrading treatment in custodial institutions; (c) environmental degradation; (d) gender inequality and injustice; (e) corruption in high places. In the process, new fundamental rights of the people, not scripted in the Constitution, have been judicially enunciated and enforced (such as: right to work, literacy, education, shelter, environmental integrity, health, education, accountability and transparency in governance.[23]

Not all these enunciations bring about immediate impact, so entrenched are some forms of abuse of public power and concentrations of violence in the civil society. But SAL enables, beyond conventional theories about judicial process and power, through continuing social conversation between human rights and social activists, on the one hand, and wielders of adjudicatory power on the other, practices of *re-democratization* of the Indian polity. No doubt, such judicial activism has often been attacked as *usurpation*. And the charge rings somewhat true when the courts actually begin to *administer*, as when they take over the day-to-day invstigation in cases of corruption in high places or management of custodial institutions like jails, juvenile homes, and remand homes for women. But this is done only when the institutions of governance fail to heed the directives of the Court. SAL has so far survived attacks based on the Northern prescriptive theories about judicial role (ever anxious about the antimajoritarian character of judicial review). These theories, indeed, provide a good example of Spivak`s "catachreis", the prescriptive theories have no "historically adequate referent" for the phenomenon of such judicial activism!

VI. Engendering Constitutionalism

All postcolonial constitutions are characterized by *political gender equality*. Women as citizens have a right to vote and contest at elections, marking a profound transformation in the way the criteria of political legitimation function in actual social life. South Asian constitutionalism has witnessed a steady succession of women heads of state, at a rate unparalleled elsewhere in the world. And this has a major significance for cultural traditions: political Islam, which otherwise enacts patriarchal gender differentiation in all

23 *Sangeeta Ahuja*, People, Law, and Justice: Casebook on Public Interest Litigation, Delhi 1997; *Upendra Baxi*, Liberty and Corruption: The Antulay Case and Beyond, Lucknow 1989; *ibid.*, Judicial Activism: Usurpation or Redemocratization?, Social Action 47 (1997), pp. 341-60; *S.P. Sathe*, Administrative Law in India, Bombay 1996.

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manner of ways, has still enabled women Prime Ministers in Islamabad and Dhaka. Buddhism in Sri Lanka or "Hinduism" in India has not rendered problematic accession to the highest political power by women political leaders. All this symbolizes p*olitical gender equality at work* in South Asian constitutionalism. And, in some ways, this is an achievement in itself when we recall that the two bicentennial constitutions have yet to install a woman as the head of the state.

The issue of engendering politics, of course, goes deeper than women heads of state, unfortunately fated to govern in a robust patriarchal structure of domination. The constitutional agenda for women`s movements in the Third World addresses issues of *feminization* of political party structures and processes. In India, controversy rages on a quota system through which at least one-third of seats is "reserved" wholly for women candidates as a fulfillment of representational equality. India has, at long last, made a wholesome beginning by reserving seats for women in local self-governance, both at the levels *panchayats* (rural self-governance institutions) and in municipal institutions. It is estimated that as many as 300.000 women will thus be empowered to experience the responsibility of grassroots governance. Elsewhere, especially in some Latin American constitutions, attempts have been made to require political parties to provide “blue ribbon" constituencies to women candidates.

All the same, the most agonizing issue confronting postcolonial constitutionalism has been that of achievement of gender equality in civil society, in the family, and the market relations. Forms of constitutionalism have proved woefully inadequate (as in the First World) in coping with sexual aggression in "public" and “private" spaces and in overcoming gender stereotypes. The promise and challenge of postcolonial constitutionalism lies in ways of overcoming the “male in the state."

The Indian example shows that much can be achieved through judicial activism, where a proactive judiciary exposes and nudges a disoriented state executive to constitutional compliance. On the eve of the golden jubilee of Indian Independence, the Indian Supreme Court in *Vishakha v. State of Rajasthan* proclaimed, through a judgment, *legislation* outlawing sexual harassment in all (public and private) workplaces. It further declared that unless Parliament enacts a law consistent with the decision, the *law* declared by the Court shall be binding throughout India. This illustrates the fecund scope which judicial power and process holds for combating patriarchy in the state and civil society.

And yet major issues remain on the agenda of the Third World, engendering militant constitutionalism that combats worse violence against women: the dowry-murder (Menski); child sexual abuse; female genital mutilation practiced in some parts of Africa, despite legislation criminalizing these forms of social behavior; sex-based nutritional discrimination; and sex-trafficking signifying nothing less than a new form of *slavery* for women.[24]

[24] *Human Rights Watch/Asia*, Rape for Profit: Trafficking of Nepali Girls and Women into India’s Brothels*,* 1995*; Upendra Baxi*, From Human Rights to the Right to be a Woman, in: A. Dhanda

https://doi.org/10.5771/0506-7286-2012-2-176 - Generiert durch IP 216.73.216.73, am 16.06.2026, 05:16:59. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

Forms of constitutionalism are everywhere notoriously phallocentric. But Third World constitutionalism makes the traditions of patriarchy deeply problematic. Women`s human rights movements today question formations of power in state and society in ways which would have literally terrified the founding *fathers* of the formative era of First World constitutionalism.

VII. Pathologies of Power

When all is said and done, histories of postcolonial legality provide their distinctive pathologies. The steady emergence of *military constitutionalism* in many parts of Africa and Asia is marked by catastrophic practices of power, particularly against ethnic groups. And it is also marked by *quasi-nationalism* which captures the "nation-state and bring(s) authorized violence down ruthlessly against the people who seem to stand in the way of the nation being united and pure as one body," contributing to the rise of a genocidal state.[25]

"Militarization of ethnicity"[26] accentuates militarization of state and at times of civil society. Under such conjunctures, constitutionalism merely marks the cruel cartography of power and resistance to power. The combined impact of the upsurge of collective popular illegalities and state lawlessness cumulatively complicates ideas about authority, rights, justice, pluralism, and law. Under such conditions of postcoloniality the notions about the rule of law acquire synonymy with *the reign of terror*.

Postcolonial legality has proved itself versatile in its toleration of political corruption. inadequate laws, insufficient investigation, politically debilitated prosecution, labyrinthine adjudication, witness intimidation, anemic law reform – all these combine to produce a legal and political culture rendering public accountability a casualty. Peoples` movements against corruption in public life, when not co-opted with "moral crusades" against rival political parties or factions, are swiftly suppressed. Privileged criminality, of which corruption is an epitome, also bestows postcolonial legality with impermissible pluralism in the administration of criminal justice. Differential justice exists everywhere, but what distinguishes postcolonial law formation is its open espousal of regimes of impunity, perforated by an occasional "truth commission".[27] In many a society, the bulk and generality of postcolonial "citizens" are hapless victims of "governance" beyond the pale of accountability. For them, *the law itself assumes the face of fate*.

The aborted fate of postcolonial law needs to be grasped in terms of a global genealogy. Shaped by the imperatives of the Cold War, the contours of postcolonial legality were

and A. Prashar (eds.), Engendering One Law: Essays in Honor of Professor Lotika Sarkar, Lucknow 1999, pp. 275.

25 *Richard Werbner*, Multiple Identities, Plural Arenas, in: *ibid.* et al. (eds.), Postcolonial Identities in Africa, London 1996.

26 *Donald Horowitz*, Ethnic Groups in Conflict, Berkeley 1985; *Sudhir Chandra*, Enslaved Daughters: Colonialism, Law and Women's Rights, Delhi 1998.

27 *Carlos Santiago Nino*, Radical Evil on Trial, New Haven 1996.

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heavily conditioned by two hegemonic superpowers. Articulatory space for peoples` jural creativity stood confiscated by juristic *dependencia*. Non-Western forms of legal *imaginations* were denied yet again historic time and space for their unfurling, beyond many a worthwhile improvisation (already mentioned earlier). The *material practices of power* (such as global arms traffic; direct military intervention thinly disguised as humanitarian intervention aborted many a departure from the Western/imperial canons of *law-ness*. Just when the reversal of European history indicated possibilities of transcendence, "globalization" translates the Cold War motto "Making the world safe for democracy" into "Making the world safe for foreign investors"! It seeks to transform all Third World States into the clones of Late Capitalism. lf self-determination was the signature of postcolonial legality, the globalization of law calibrates the postcolonial states and law to the carnival of global capital in its myriad forms. International financial capital, lethal multinationals (the Bhopal catastrophe remains an archetype[28] regimes of suprastatal institutions, international and regional, all combine to escalate networks of power constituting the new global ruling class.

A *paradigm shift* is already under way: a transition from the paradigm of *universal human rights* (to the historic enunciation of which the South contributed a very high order of imagination) to the paradigm of *trade-related*, *market-friendly human rights*. Aggregations of global capital and technology make problematic the future of languages of human rights. This emergence of global economic constitutionalism has numerous impacts on the theory and practice of post-colonial dialectic between *rule* and *resistance*.

For example, it makes difficult, and at times impossible:

- performance for *redistributive programs and policies* amidst the labyrinthine complexity of conditionalities of structural adjustment forms of global governance;
- the achievement of even modicum goals of "sustainable development";
- any historically meaningful pursuit of gender equality towards which global capital is notably hostile (e.g. sweatshops, gender-based wage discrimination, sex tourism);
- respect for fledgling rights of indigenous peoples, which now stand sacrificed at the altar of foreign investment (its "land hunger": that is, dispossession of lands considered necessary for siting profitable projects);
- minimal observance for collective human rights of the labor;
- development of social movements not co-opted by the United Nations patterns of international solidarity, at the behest of global capital though not on its *behalf*, in ways that has potential for registering here-and-now human amelioration.

On all accounts the globalization of the law is more conducive to legal imperialism than to autonomous development. The most formidable challenge now nosed to postcolonial law,

28 *Upendra Baxi* and *Amita Dhanda*, Valiant Victims and Lethal Litigation, Bombay 1990.

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in all its complexity and contradiction, is posed by *modest sites* of *resistance to global economic constitutionalism*. It is on this register that the future(s) of postcolonial legality and constitutionalism shall be inscribed.

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