

Towards a Postcolonial Theory of Constitutional Patriotism for the Marginalized: The Case of the Indian Constitution and Kashmir

By *Paul Dießelberg** and *Sidra Yousaf***

Abstract: Constitutional patriotism is a concept that developed as a political theory in the German postwar period, in which instead of the nation and the formal mentioning of a common ethnic identity, the state in the form of a plural and liberal constitution, with the universal promise of equality and human dignity becomes the benchmark for societal identification. Although it has been loosely applied to Western civilizations throughout the past decades, constitutional patriotism especially experiences a renaissance in postcolonial societies today, where pluralist constitutional values often clash with majoritarian political realities. By making the argument that constitutional patriotism has a unique postcolonial value to it, an observation that both the Indian Constitution itself and recent developments in majority-Muslim Kashmir have made more visible than ever, this paper attempts to resume an old discussion around this arguably solely Western lens of constitutional analysis and presents it in a new light and context by proposing a general theory of constitutional patriotism for the marginalized, as applicable to postcolonial states. As such, this article attempts to situate constitutional patriotism within a postcolonial political theory tradition and illustrates that it can create value to people of various states beyond the West. While highlighting the uniqueness of the Indian Constitution for integration and its pluralist and liberal foundation, this analysis tries to show that the Indian Constitution is a particularly fitting example for constitutional patriotism, not just because of specific public cases, but especially due to its inherent provision dogmatics for minorities and marginalized groups, and makes an effort to put constitutional patriotism in its practical place by demonstrating its activist dimension through a particular focus on Kashmir.

Keywords: Constitutional Patriotism; Postcolonialism; Minority Rights; Muslims in India; Legal Theory

* Paul Dießelberg is a law and philosophy student and a student research assistant at the Chair of Public Law, European Union Law, and Philosophy of Law at the Ludwig-Maximilians University of Munich, Germany. Email: paul.diesselberg@jura.uni-muenchen.de.

** Sidra Yousaf is an MPhil student in Modern South Asian Studies at the University of Oxford, Balliol College, England. Email: sidra.yousaf@balliol.ox.ac.uk.

A. Introduction

Constitutions depict social realities, tell stories and reflect on people and culture. They are the embodiment of a state reality, matured by a national history, admonishing and guiding politics and the broader public. At least, this is the heroic narrative of Western societies when it comes to this supposedly unifying document. The American archetype of the democratic constitution or the German success story of the *Grundgesetz*—we know their stories and debates. Words like *Verfassungspatriotismus*¹ characterized the search for identity in the postwar period up to Barack Obama, who made it one of his main ideologies.² Inspired by Karl Jaspers,³ Dolf Steinberger's concept, which gained notoriety with further development by Jürgen Habermas,⁴ was intended to create a dynamic identity structure as an alternative alongside the nation based on the 'working' fundamental ideals of the German 'constitution'.⁵ Constitutional patriotism became the cautious, and not uncontroverial identity rescue of a post-WWII-generation, even beyond Germany.⁶

One might think that constitutional patriotism has since disappeared from the social and political stages as globalization has progressed, but in reality, the concept repeatedly experienced a renaissance when political projects of nationalism have encountered multicultural societies and, in fact, correspondingly diverse constitutions.

„National identity, National integrity, and constitutional patriotism [..].”⁷

These are not the words of a politician, lawyer or citizen of one of the supposedly proud Western constitutional states, probably misunderstood and thrown together in combination. No, they are the words of the Indian Supreme Court in the *SN Chouksey v Union of India* decision from 2016, which describes—among other things—why it would be proper to stand up during the national anthem.⁸ While, according to Habermas, constitutional patriotism has always had a certain lived dynamic and a willed activism inherent in it,⁹ in the Indian example, it is more likely to be found on the opposite side, as expressed in the

1 The term appeared for the first time in a newspaper commentary by *Dolf Sternberger*, *Verfassungspatriotismus*, *Frankfurter Allgemeine Zeitung* (1979), p. 3.

2 *Ulrich Haltern*, *Obamas politischer Körper*, Berlin 2009, pp. 67-75.

3 Sternberger referred in several of his writings to the inspiration he has drawn from *Karl Jaspers*, *Die Schuldfrage*, Heidelberg 1946.

4 Habermas laid out the foundation of his version of constitutional patriotism in *Jürgen Habermas*, *Eine Art Schadensabwicklung*, *Die ZEIT* (1986).

5 *Jan-Werner Müller*, *Constitutional Patriotism*, Princeton 2007, pp. 15-45.

6 Jan-Werner Müller pointed to its theoretical value beyond Germany and even the EU already *Ibid.*, pp. 56-58, 141-147.

7 (2017) 1 SCC 421 para 9.3.

8 For a thorough analysis of the decision, see *Gautam Bhatia*, *The Illegality of the Supreme Court's National Anthem Order*, <https://indconlawphil.wordpress.com/2016/11/30/the-illegality-of-the-supreme-courts-national-anthem-order/> (last accessed on 8 February 2024).

9 *Habermas*, note 4, p. 163.

words of Bhim Army chief Chandra Shekhar Azad in the context of the 2020 Jama Masjid Delhi protests against the new Citizenship Amendment Act (CAA), when constitution booklets were held in the air everywhere on the streets as a means of protest:

*“The Preamble is the moolbhav [core idea] of the Constitution. It speaks of equality for all, of secularism. The CAA is trying to destroy it. How can the government keep out one religion from the citizenship act? It is important to read the Preamble so that everyone knows what it says. And if the prime minister has forgotten the Preamble, he needs to be reminded of it.”*¹⁰

Both quotes, in their opposition, tell the story of the Indian nation-state and a large part of society standing against each other and of a postcolonial constitutional state that holds largely unrecognized identity potential in line with the supposedly purely Western concept of constitutional patriotism as not just a feeling, but as a possible tool against a social reality of discrimination and marginalization in the “largest democracy”¹¹ of our world.

By making the argument that constitutional patriotism has a wider pool of applications and in that specifically a unique postcolonial value to it, this article attempts to resume an old discussion around this lens of constitutional analysis and presents it in a new light and context. While several scholars in the fields of law,¹² anthropology¹³ and philosophy¹⁴ as well as journalists¹⁵ and judges¹⁶ have pointed out the uniqueness of the Indian Constitution for integration and its pluralist and liberal foundation, and thereby loosely applied the concept of constitutional patriotism to specific scenarios of Indian political life, we go beyond this point and propose a general postcolonial theory of constitutional patriotism for the marginalized. Other than Jahnvi Sindhu and Vikram Aditya Narayan,¹⁷ who use

- 10 *Charmy Harikrishnan*, Anti-CAA Protests: People Hold up Constitution as the Only Document that Matters, *The Economic Times* (2020), <https://economictimes.indiatimes.com/news/politics-and-nation/anti-caa-protests-people-hold-up-constitution-as-the-only-document-that-matters/articleshow/73618451.cms?from=mdr> (last accessed on 8 February 2024).
- 11 See, for example, the commentary by *Lydia Polgreen*, The World’s Biggest Democracy Is Jettisoning Freedom and Tolerance, *New York Times* (2023), <https://www.nytimes.com/2023/02/08/opinion/india-modi-bbc-democracy.html> (last accessed on 8 February 2024).
- 12 Most recently *Jahnvi Sindhu / Vikram Aditya Narayan*, Constitutional Patriotism in India: Appreciating the People as Constitutional Actors, in: Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne (eds.), *Constitutional Resilience in South Asia*, Oxford 2023.
- 13 *Thomas Blom Hansen*, Democracy Against the Law, in: Angana P. Chatterji / Thomas Blom Hansen / Christophe Jaffrelot (eds.), *Majoritarian State*, New York 2019, p. 21.
- 14 *Chakravarthi Ram-Prasad*, Pluralism and Liberalism: Reading the Indian Constitution as a Philosophical Document for Constitutional Patriotism, *Critical Review of International Social and Political Philosophy* 16 (2013).
- 15 Most notably *Raghu Kesavan*, When Bullets Are Aimed at the Constitution, Who’s the Patriot and Who’s the Traitor?, *The Wire* (2020), <https://thewire.in/politics/anti-caa-protests-constitutional-patriotism> (last accessed on 8 February 2024).
- 16 Most recently *Fali S. Nariman*, You Must Know Your Constitution, New Delhi 2023.
- 17 *Sindhu / Narayan*, note 12.

similar cases to focus on the application of the concept as a tool for constitutional resilience to appreciate the people as constitutional actors in times of constitutional decay, we specifically argue for (1) situating constitutional patriotism within a postcolonial political theory tradition that can create value to people of various states beyond the West; (2) the Indian Constitution being a particularly fitting example for constitutional patriotism, not just because of specific public cases, but especially due to its inherent provision dogmatics for minorities and marginalized groups; and (3) for putting constitutional patriotism in its practical place by demonstrating its activist dimension through a particular focus on Kashmir. This approach was already laid out in our contribution to the *Verfassungsblog*-symposium “Casting Light on Kashmir” in December 2022,¹⁸ which this article expands in a longer and more elaborated version.

Our analysis is structured as follows: Sections B and C introduce the general narrative of this article and sketch out central terms of its underlying theory. Section D then sheds light on the Indian Constitution and its identity potential, while section E introduces the case section of this article and, with that, its political and public discourse, highlighting the abrogation of Article 370 (I.) and the CAA (II.) and applying the constitutional patriotism theory. In section F, we present further issues of constitutional law and its identity potential in India, namely the “terror trials” and *triple talaq*, which is followed by sections G and H that go back to the theoretical level and discuss critique and defence of this approach. Before section J concludes the article with a postcolonial meta-view, in section I, we take constitutional patriotism beyond India and argue for general applicability of the concept for marginalized groups in various postcolonial constitutional states. Throughout our analysis, both a geographical emphasis on Kashmir and a theoretical focus on postcolonial perspectives will remain prevalent.

B. The Nation-State-Dichotomy and the Indian Reality

In August 2019, within three months of Narendra Modi’s overwhelming mandate to serve a second term as prime minister, the Indian government abolished Article 370 of the Constitution, thereby removing the special administrative status of Muslim-majority Jammu & Kashmir.¹⁹ In December of that year, a new law—the Citizenship Amendment Act,²⁰ along with the National Register of Citizens, which would require every Indian to prove

18 Sidra Yousaf / Paul Dießelberg, Constitutional Patriotism for the Marginalized. The Case of the Indian Constitution and Kashmir, *Verfassungsblog* (2022) <https://verfassungsblog.de/constitutional-patriotism-for-the-marginalized/> (last accessed on 8 February 2024).

19 Indian Ministry of Home Affairs, Parliament Approves Resolution to Repeal Article 370; Paves Way to Truly Integrate J&K with Indian Union, <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192505> (last accessed on 8 February 2024).

20 Indian Ministry of Law and Justice, The Citizenship (Amendment) Act 2019, <https://egazette.nic.in/WriteReadData/2019/214646.pdf> (last accessed on 8 February 2024).

citizenship—theoretically²¹ allowed expedited naturalization of Hindus, Christians, and Sikhs from India's neighbouring Islamic countries. With that, religious discrimination has also legally been rooted at the heart of the Indian state, which for centuries defined itself through its constitutionally enshrined multi-religious society with pluralist constitutional values.²² The law sparked street protests across the country by a broad coalition that included India's low castes, civil society activists and students, specifically Muslims. Significantly, they made the Indian Constitution their icon: large groups recited the Preamble in clips that were widely shared on the internet and the face of social reformer B.R. Ambedkar was seen again and again on constitution booklets, which were held up as almost sacred.²³ A constitutional identification—even if unconscious—quickly developed to stand at the centre as a source of hope and as an activist motivation in the debate.

And this makes sense: The concepts of nation, state and society tend to be used synonymously in our—predominantly Western—understanding of political life and organization.²⁴ However, in order to understand the conflictual entanglements of political, social, and arguably legal constellations, we need to distinguish between them.²⁵ The state is an entity consisting of the physical and partly imagined infrastructure of a country that administratively organizes a political community. Through its borders, laws (fundamentally the constitution) and various levels of government, it is the basic prerequisite of peaceful and efficient social life among a large number of people within a sufficiently sized piece of land. The nation, on the other hand, is the constructed emotional community of people, usually developed after a long period of time and thus bound together by one common language or religion, history and culture. The often loosely used term 'nation-state' takes the latter perspective and connects the emotional corpus of the nation with the administrative existence of the state; it follows the idea that every nation has the right to self-determination and thus to its own state, forcing a homogenous community onto the state that facilitates the room for it. This is the point of departure for Modi's project of Hindutva to transform what is actually an administrative, legally hortatory state into an instrument of the Hindu nation.²⁶ At its simplest, it is an attempt to make the wishes of the majority the interest of the country without regard to the legal and constitutional order. Now, it could be argued that the majority interest of the 'country' is just that, but anyone who has studied India's

- 21 Although the governing BJP continues to adhere to this plan, both the CAA and the National Register of Citizen have been constitutionally questioned by the judiciary, which kept the case and thus the implementation of the law pending up until now.
- 22 *Shruti Kapila*, India's Constitution Isn't Saving it from Narendra Modi's Assault on Rights, Prospect Magazine (2020), <https://www.prospectmagazine.co.uk/culture/40159/indias-constitution-isnt-saving-it-from-narendra-modis-assault-on-rights> (last accessed on 8 February 2024).
- 23 *Harikrishnan*, note 10.
- 24 Similarly pointed out in the Indian context by *Kesavan*, note 15.
- 25 *Jürgen Habermas*, *Die Einbeziehung des Anderen*, Frankfurt 1996, pp. 239-242.
- 26 On this, see *Hilal Ahmed*, *New India, Hindutva Constitutionalism, and Muslim Political Attitudes*, *Studies in Indian Politics* 10 (2022).

languages, religions, regions and cultures knows that it is not quite that simple. A glance at the Indian Constitution is enough to illustrate this. Article 29(1) states that “the citizens residing in India hav[e] a distinct culture, language, or script, [and] have the right to preserve their culture, language and script”. The nation is thus constructed solely by politics for a supposed, but much more complex, majority, while the state represents the constitution, and society neither corresponds to the reality of politics nor gets the full potential of constitutional ideas unfolded in its own ranks. So, especially for the many marginalized minorities in the Indian example, there develops a significant difference between the claim of the constitution/state, and the reality of politics. And this triangular difference creates, especially for marginalized groups, a potential for an identity, indeed a patriotism, that lies more with the state, thus with the constitution, and less with politics, therefore the national project.

C. Constitutional Patriotism and the Beyond

The above sketched-out dichotomy, of course, goes against the Indian Supreme Court’s understanding of this exact *constitutional* patriotism, since it—especially in its original conceptualization by Dolf Sternberger and Jürgen Habermas—sets itself apart from anything ‘national’. In the German postwar period, the nation was seen as “a political community shaped by common descent, or at least by a common language, culture, and history”²⁷, similar to the Nazi project before and during the Second World War. Instead of the nation, the state in the form of the newly drafted German constitution—the Basic Law—with the universal promise of equality and human dignity and no mention of a common ethnic identity in the sense of a historical narrative became the benchmark for identification.²⁸ This understanding of socio-political structure and identity thus avoids, on the one hand, the consistently much-contested debate on the ‘what’ and ‘if’ of nationalism and, at the same time, does not create any exclusionary narratives around the state or the nation, but rather serves as a defence against them.

To this end, the people as addressees of the law or of the legitimate exercise of state power must understand themselves indirectly as authors of the law of the creation of justice and thus be able to comprehend the values of a constitution as their own—they owe a certain loyalty to the basic idea of the constitution.²⁹ In the case of social or political conflicts, this idea of loyalty thus offers the common basis of a constitutional-patriotic consensus as a normative language for settling such disputes.³⁰ This conflict, which is limited by the constitution, ultimately gives rise to a living constitutional culture balanced

27 Habermas, note 25, p. 240.

28 Dieter Grimm, *Identität und Wandel*, *Leviathan* 37 (2009), p. 614.

29 Frank I. Michelman, *Morality, Identity and “Constitutional Patriotism”*, *Ratio Juris* 14 (2001), pp. 255-257.

30 James Tully, *The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy*, *Modern Law Review* 65 (2002), p. 207; Jürgen Habermas, *Zwischen Naturalismus und Religion*, Frankfurt 2009, pp. 263-264.

between universal norms or values, on the one hand, and the specific experiences of social collectives, on the other. Constitutional patriotism then mediates those social conflicts and attempts to exert a productive political influence on them in the light of universalist constitutional principles.³¹ The constitution wants to force citizens into a good dispute. Thus, constitutional culture and constitutional patriotism are to be understood as a social project of movement and not as a sole personal object of identification. To the question of what the product of constitutional patriotism then would be, Habermas answered: “legally mediated solidarity among strangers [...]”³². Especially in a state (or a group of people within that state) with a civic, instead of an ethnic understanding of citizenship, the constitution becomes the objectified self-expression of the sovereign people and with that—as Paul Kahn puts it—“the most important point of reification of the group”³³, to which the citizens constantly have to rediscover how their world looks like in this present “culture of law’s rule”³⁴. Constitutional patriotism, then, offers and promises an additional kind of political affiliation and identity, enables citizens to see themselves as a political defense community and to exercise productive criticism, thus serving as a source of legal-political trust and contributing to the stability of a civic community.

This idea could now generally be applied to diverse states, where liberal constitutional realities clash with political marginalization of diverse religious and ethnic groups. Constitutional patriotism could therefore be extended in theory to societies beyond the West, as Jan-Werner Müller already carefully suggested in 2007,³⁵ but did not further develop. This goes in line with Habermas’ early understanding of constitutional patriotism as a “lived-out concept” (and not as a mere academic or “originalist” idea that stands still in time, perpetuating the state of a historic document and the society of the time) and as an appropriate response to multiculturalism, when he wrote about the “explosive potential of multiculturalism” and asked for “a functional equivalent for the fusion of the nation of citizens with the ethnic nation”.³⁶ The fact that constitutional patriotism can indeed have practical benefits, but at the same time also leaves room for exploitation by nationalist tendencies, becomes particularly clear in the example of India’s dealings with the Muslim-majority region of Jammu & Kashmir.

Particularly, this application would stand as sympathetic to the efforts of anticolonial movements in South Asia and the wider world, who not only demanded liberation in

31 *Tim Wihl*, Die Unbestimmtheit der Verfassung, *Verfassungsblog* (2019), <https://verfassungsblog.de/die-unbestimmtheit-der-verfassung-verfassungspatriotismus-mit-juergen-habermas-nach-70-jahren/> (last accessed on 8 February 2024).

32 *Jürgen Habermas*, *Faktizität und Geltung*, Frankfurt 1992, pp. 643-644.

33 *Paul W. Kahn*, *Comparative Constitutionalism in a New Key*, *Michigan Law Review* 101 (2003), pp. 2699-2700.

34 *Paul W. Kahn*, *The Cultural Study of Law*, Chicago 1999, p. 30.

35 *Müller*, note 5, pp. 56-58; 141-147.

36 *Habermas*, note 25, p. 138.

the ‘now’, but also saw the necessity of fighting sword with sword, law with law.³⁷ Constitutional patriotism might not just present an additional identity for the people, but could equally adopt the language of policy (section F) and show its effect as a safeguarding mechanism for the people against the ‘nation’.

Contemporary postcolonial theorists, such as Dipesh Chakrabarty and Partha Chatterjee, largely agree that Western categories are of limited use in analyzing postcolonial societies and their politics.³⁸ The goal rather remains to “provincialize Europe”, recognizing that Europe’s unique brand of nation and nationalism cannot be used as a prime model for the rest of the world to follow.³⁹ Constitutional patriotism, however, became a Western category only by chance (if one would not take the concept of a constitution and its potential liberty into the Western equation) exactly against the nation model by pointing to individual and small-group liberties instead of common history and descent. With the founding of the Indian Constitution, this shift from enforced homogenization, as usually required by the concept of the nation-state and as practiced during the colonial period, to promises of plurality took place in India after the British left. With that, as will be shown in the coming section, constitutional patriotism—at least in theory—was first born in India, although it unfolded its practical value and real-life significance many years later in the Indian society, after having been confronted with complex political realities (section E).

D. The ‘State Reality’: The Constitutional Vision of Pluralism

The history or—to use the terminology of this approach—*potential* of an Indian constitutional identity begins with its already historically created uniqueness. Unlike quite a few post-WWII European states that had to prepare for life after authoritarian regimes, mid-century India had no real alternative to dealing with a civilization that had for millennia been deeply pluralistic.⁴⁰ As early as 1946, Jawaharlal Nehru wrote in “The Discovery of India” that the idea of India, even without a state, had been characterized by secularism and liberality since time immemorial.⁴¹ This history of pluralism was not one of competing essentialism, but rather of an astonishing diversity of sometimes conflicting identities that

37 In line with *Frantz Fanon*, *Les Damnés de la Terre*, Paris 1963, pp. 39-103 and his theory of violence/approach to fight colonial violence.

38 See here specifically *Adom Getachew / Karuna Mantena*, *Anticolonialism and the Decolonization of Political Theory*, *Critical Times* 4 (2021), p. 26 who refer to the influential works of *Partha Chatterjee*, *The Nation and its Fragment*, Princeton 1993 and *Dipesh Chakrabarty*, *Provincializing Europe*, Princeton 2000.

39 *Chakrabarty*, note 38, pp. 6-8.

40 *Ram-Prasad*, note 14, p. 680 in reference to *J. Duncan M. Derrett*, *Religion, Law and the State in India*, Delhi 1968.

41 *Jawaharlal Nehru*, *The Discovery of India*, Calcutta 1946.

needed to be mediated between liberalism and pluralism.⁴² Thus, most of the eminent intellectuals of the time that united (or divided) India for the first time within new borders ensured that the Indian Constitution, drafted between 1946 and 1950, followed these pluralist community goals. They formulated a parliamentary, federal democracy with universal suffrage, enshrined basic civil rights and duties, and uniquely allowed for the protection of minorities and “affirmative action” (Article 15) for disadvantaged groups. As its own normative political theory,⁴³ the Indian Constitution should be seen as an attempt at a developing nation-state, where the term ‘nation’ was intended to express for the first time the reality of multi-layered collective identities based on religion, ethnicity, language and social history, rather than essentialism. While from today’s perspective, the combination of plurality and liberalism was something which comparative constitutional law academia first attributed to the constitutions of Canada and South Africa,⁴⁴ it is actually the Indian Constituent Assembly that should be noted as the forgotten pioneer of these principles in legal terms.

The core of the Indian Constitution’s moral thinking lies in its repeated concern for vulnerable minorities in the fundamental rights: Article 14 regulates equality before the law, Article 19 freedom of speech, assembly and movement, and Article 21 protection of life and personal liberty. In almost contrasting complement to this stand group rights such as Article 19(5), which is intended to allow individual liberty rights specifically for the Scheduled Tribes (socioeconomically disadvantaged groups legally identified in Article 342). Preceding most of the Western constitutional states considered great today by common legal scholarship, the Indian Constitution enshrined the right to equality (Article 14), which prohibits discrimination on the basis of religion, race, caste, sex, or place of birth, while Article 15(3) and (4), in turn, grant the state the group-right to make special provisions for the benefit of children, women, and Scheduled Tribes and Castes.⁴⁵

In the interplay of various fundamental rights, the citizen thus emerges not primarily as an individual but as an individual with a specific identity formed by several groups, which becomes particularly worthy of protection when it appears to be in danger, while basic liberal and individual safeguards remain constant in the background. The concept of state neutrality functions accordingly, especially in conjunction with the notion of secularity.⁴⁶ In Article 25(1), the Constitution recognizes personal freedom of choice and practice of any religion, but Article 25(2b) allows the state to intervene for the sake of social welfare if Hindu institutions remain closed to certain social classes. Moreover, Article 29 prohibits

42 Interestingly, in *Jan-Werner Müller*, A General Theory of Constitutional Patriotism, ICON 6 (2008), p. 72, Müller makes a similar observation as a task of Constitutional Patriotism, although unrelated to India.

43 As is also pointed out by *Ram-Prasad*, note 14, p. 680.

44 As it is often framed in the ‘multiculturalism’ and comparative constitutional law debate, for example by *Ran Hirschl*, *Constitutional Theocracy*, Cambridge MA 2010, pp. 162-205.

45 *Ram-Prasad*, note 14, p. 682.

46 *Ibid.*, p. 683.

minority discrimination in state-sponsored teaching, while Article 30 even hints at the constitutional establishment of educational institutions by minorities in an almost nudging manner. The Indian Constitution thus manages, at least on paper, the feat of combining a liberal and individualistic aspiration with a collective social reality and accomplishes this through powers given to the state to secure minority and differentiated equality rights in various collective spaces.

Although today's Hindutva ideology might lead one to believe so, there is, in fact, no mention of social, religious or cultural, for example Hindu, notions of majority groups in the constitution.⁴⁷ In the logic of the Indian Constitution, the majority simply becomes the population not covered by positive special provisions, the 'non-minority'. Thus, the constitution supports the unusual argument that majority interests are already taken into account by the existence of generally liberal provisions, because these provisions privilege those who are already so equipped (and, by virtue of presumed political majorities, democratically represented) to benefit—demographically, economically, and socially—from freedom.

Already here, a narrative could be interpreted from the constitution, which speaks solely to minorities and marginalized groups and seeks identification precisely from those people, even actively offering governmental regulation elements in the constitutional text. Thus, when a constitution promotes a vision of public life that builds on individual freedoms but at the same time invites a multiplicity of collective affiliations, it becomes precisely a potential for minorities to adhere to this particular document. This surplus in identity seems to overcome the Western dogma that pluralism and liberalism are always in tension in a society,⁴⁸ an achievement making loyalty to one's own collective suddenly translatable as loyalty to the constitution as well. This creates the impression of constitutional patriotism already being inherent in the Indian Constitution, in the 'state' instead of 'nation' narrative.

These liberal values and laws, which also give the primary breeding ground for an Indian constitutional patriotism to develop or—as argued—hint to an inherence of the concept in them, should not, however, be accepted *a priori* as a natural symbiosis to the pluralism that has existed in India also before the colonial period. One key reason for this is the BJP government's colonizing of a liberal rights discourse in actual consistency with Hindu nationalist ideology, which can, for example, be exemplified through the issue of secularism.⁴⁹ While the traditional understanding of secularism rests on the neutral separation between state and religion, many anti-colonial theorists, like Talal Asad, have

47 Ibid., pp. 684–685.

48 As such, Ernest Barker – adopting a rather colonial narrative – actually saw the Indian Constitution as an extension of, rather than a departure from the West, *Ernest Barker*, *Principles of Social and Political Theory*, Oxford 1952, p. VI.

49 *Ratna Kapur*, 'Belief' in the Rule of Law and the Hindu Nation and the Rule of Law, in: Jhaveri / Khaitan / Samararatne (eds.), note 12, p. 369.

argued how the term ‘secular’ is problematic when applied to a postcolonial setting.⁵⁰ In postcolonial India, secularism did not entail the strict separation between state and religion but, on the contrary, involved an active role by the state in ensuring equal treatment of the different religions of the country, with a specific, even constitutional focus on minorities.⁵¹ However, framing the whole constitutional platform and its discourse as liberal and thus hinting towards India’s neutral and secular legacy is a misconception and becomes a basis for political exploitation that, in the name of liberal values goes away from the constitutional *telos* to equalize, not displace or forget the rights and visibility of different religions within the state.

Paradoxically, it is the general liberal tone of the constitution that allows for confusion and loopholes exploited by the BJP government. One example is Article 14 that grants the right to equality and equal treatment before the law and is followed by an exception in Article 15(3) that entails a special protection to be given to various marginalized groups, like Scheduled Castes and Tribes, women, and children. Muslims and generally religious groups are not mentioned in this rule protecting the marginalized⁵² but are granted religious freedom as a group under Articles 25 and 26, which in practice assert the protection of said minorities. Eventually, what we see is a tension between minority rights and those rights one has as a marginalized member of society, as well as between personal rights and group rights—a complex dynamic that emerged in the name of liberalism, which has recently been exploited by Hindu nationalists to further intensify tensions with the Muslim community, as the case of *triple talaq*⁵³ (further discussed in section F II) shows.⁵⁴ In this entanglement, constitutional patriotism allows for the law to reach back into politics and its discourses in an effort to reclaim ‘the legal’ for the people.

E. The ‘Nation Reality’: Politics and the Public Sphere in the Example of Kashmir

However accommodating the Indian Constitution for minorities may be, the political and civic reality, especially in recent years, looks different. Modi’s and the BJP’s Hindutva ideology seem to have started a fight against various minorities, often even in the supposed name of liberal values, and thus in two ways against the constitution, which has been

50 *Talal Asad*, *Formations of the Secular: Christianity, Islam and Modernity*, Stanford 2003, pp. 22-66.

51 *Kapur*, note 49, p. 355.

52 However, there exists an increasing push for religious groups to be dogmatically included, see, for example, *Shireen Azam*, *Scheduled Caste Status for Dalit Muslims and Christians*, *Economic & Political Weekly* 58 (2023), pp. 14-19.

53 *Shayara Bano vs Union Of India And Ors* ((2017) 9 SCC 1).

54 *Flavia Agnes*, *Aggressive Hindu Nationalism: Contextualising the Triple Talaq Controversy*, in: *Jhaveri / Khaitan / Samararatne* (eds.), note 12, pp. 339-340.

subject to a creeping process of change itself.⁵⁵ In the agenda of the politically instrumentalized majority, often in the realm of religious majoritarianism, the largest minority will likely be the first target of exclusion, and in the Indian context, this is the group of Muslims.⁵⁶ If, in addition, long-standing (geo)political conflicts are mixed with national ideological projects,⁵⁷ the conflict rarely knows a moral limit—and even less a constitutional one: The Jammu & Kashmir region is the only Indian administrative zone that has a Muslim majority and thus one of the few (now) Union-Territories and states that do not match the nationwide Hindu majority.⁵⁸ Since the country's founding, both Kashmir and Muslim minorities throughout India have been the focus of national attacks against people, cultural and religious institutions and—most recently—constitutionally secured rights.⁵⁹

The 'differential potential' of the constitution, described in section D, thus became apparent to this group of people at an early stage. The constitution was turned into a political argument, and space was created for constitutional patriotism. Even if the connection between the constitution, identity-belonging and activism has repeatedly been criticized as "thin",⁶⁰ it emerged from an independence struggle of influential political and social leaders like Mahatma Gandhi, Ambedkar, Nehru and Vallabhbhai Patel and does not represent Modi, the BJP or Hindutva.⁶¹ Such language of struggle and protest was spoken by Muslims in Kashmir in particular, yet all over the country, especially in the cases of the revocation of Article 370 of the Constitution and the Citizenship Amendment Act, where adherence to the primordial narrative and intent of the Indian Constitution became a movement against Hindutva ideology.

- 55 This has been argued by many constitutional scholars in the past years, notably by *Manoj Mate*, *Constitutional Erosion and the Challenge to Secular Democracy in India*, in: Mark A. Graber / Sanford Levinson / Mark Tushnet (eds.), *Constitutional Democracy in Crisis?*, New York 2018; carefully analytical *Tarunabh Khaitan*, *Killing a Constitution with a Thousand Cuts*, *Law & Ethics of Human Rights* 14 (2020).
- 56 *Mridu Rai*, *Kashmiris in the Hindu Rashtra*, in: Jhaveri / Khaitan / Samararatne (eds.), note 12, pp. 267-269.
- 57 *Christian Wagner / Angela Stanzel*, *Redrawing the Maps in Kashmir*, *SWP Comment* 52 (2020), pp. 1-5.
- 58 According to the last official census of 2011, Jammu & Kashmir and Lakshadweep are the only Union-Territories and Mizoram, Nagaland, Meghalaya, Arunachal Pradesh, Manipur and Punjab the only states with a Hindu minority.
- 59 *Yasmeen Jahan*, *Intersectionality of Marginalization and Inequality: A Case Study of Muslims in India*, *Journal of Political Science & Public Affairs* 4 (2016), p. 3.
- 60 In the German discussion around constitutional patriotism already *Hans-Peter Schwarz*, *Das Ende der Identitätsneurose*, in: Udo Wengst (ed.), *Historiker betrachten Deutschland*, Bonn 1992, p. 154; generally discussed by *Ciaran Cronin*, *Democracy and Collective Identity: In Defence of Constitutional Patriotism*, *European Journal of Philosophy* 11 (2003), p. 4.
- 61 *Kesavan*, note 15.

I. Hindu Majoritarianism in the Case of Jammu & Kashmir

As of August 5, 2019, the Parliament of India voted in favour of revoking the special status of J&K, granted under Article 370 of the Indian Constitution.⁶² This was followed by cutting off of all communication lines in the Kashmir Valley for five months.⁶³ As shown, the Indian Constitution includes special provision dogmatics for minorities as an important protective measure against the majority.⁶⁴ Thus, who is defined as a minority and majority matters a great deal and is something Hindu nationalists have attempted to exploit with regard to J&K and the Muslim majority living there. In June 2022, the spiritual leader and BJP-ally Devkinandan Thakur filed a petition together with the attorney and leader of the BJP Delhi, Ashwini Upadhyay, seeking the general recognition of minority status for Hindus living in states like J&K, on the basis that such a non-identification of minority status at state-level for Hindus contributed to the negligence of their basic rights guaranteed under Articles 29 (Protection of Interests of Minorities) and 30 (Right of Minorities to Establish and Administer Educational Institutions) of the Constitution.⁶⁵ On August 8th, the Supreme Court announced that Thakur had “no case”, and thereby, his petition failed and was not granted.⁶⁶ India’s highest court expressed that Thakur’s and Upadhyay’s case could only be considered by the court on a case-by-case basis and not with a general declaration of Hindus as a minority. While Hindu nationalists have indeed attempted to use the constitution for their own majoritarian agenda, and there remains a possibility of such petitions to be brought to the Supreme Court in the future, this recent decision by the court also brings forth some of the strengths of constitutional patriotism. As a conceptual idea and analytical lens, when applied to the case of Kashmiri Muslims in India, it shows that the Constitution indeed stands as a strong foundation upon which they can demand their rights as a minority—both on a pure textual as well as practical basis.

Moreover, the sense of betrayal of India’s constitutional promises by the BJP government is expressed not only by people of marginalized communities but also in the broader civil society. Pratap Bhanu Mehta, for example, pointed out the dangers that this approach

62 Indian Ministry of Home Affairs, note 19.

63 *Niha Masih / Shams Irfan / Joanna Slater*, India’s Internet Shutdown in Kashmir Is the Longest Ever in a Democracy, Washington Post (2019), https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html (last accessed on 8 February 2024).

64 *Martha C. Nussbaum*, *The Clash Within: Democracy, Religious Violence, and India’s Future*, Cambridge Massachusetts 2007, pp. 128-130.

65 Organiser Web Desk, Hindus Can Claim Minority Status under Articles 29 & 30?, Organiser (2022), <https://organiser.org/2022/07/19/89525/bharat/hindus-can-claim-minority-status-under-articles-2930-sc-seeks-examples-of-states-denying-minority-status-to-hindus/> (last accessed on 8 February 2024).

66 *Gopalakrishnan Ananthkrishnan*, Hindu Minority Status: SC Slammed Govt in May for Changing Stand, Now Says no Case, clubs please, Indian Express (2022), <https://indianexpress.com/article/india/hindu-minority-status-sc-slammed-govt-in-may-for-changing-stand-now-says-no-case-club-s-pleas-8079023/> (last accessed on 8 February 2024).

signals not only for the Muslim community in Kashmir but also for the rest of society at large, which closely links constitutional values to its engagement in the political and social space of the country.⁶⁷ Rather than Kashmir standing in danger of being “Indianized” by the BJP, the rest of India, in fact, could develop a “Kashmirisation”, hinting to a newly, in society prevalent “story of the Indian democracy written in blood and betrayal”, as has been the case for Kashmir for the past two generations:

“Kashmir is not just about Kashmir [...] it is one more node in a pattern hurtling the Indian state towards denouement where all of us feel unsafe. Not just Kashmiris, not just minorities, but anyone standing up for constitutional liberty.”⁶⁸

Although it is difficult to prove with such developments that constitutional patriotism had a positive effect on a specific societal movement against marginalization, it is exactly this impact where the concept has its practical and activist potential. Similarly, as minorities (and not majorities or state religions) have been made the narrative of constitutional rights within the Indian Constitution from its founding, presenting this storyline to the public and thus bringing the legal language back into politics, constitutional patriotism is able to turn around a public discourse and present, at least for an event-specific moment, an alternative identity. This did not just stand true in relation to the revocation of Article 370, but also unfolded value beyond it.

II. The CAA and the Destabilization of Muslim Citizenship

While constitutional protections are seen as obstacles to the goal of Hindu nationalist groups in transforming India into a Hindu *Rashtra*, the BJP has also actively used the universally appealing liberal values of the Constitution as an opportunity to further their own agenda of Hindu majoritarianism.⁶⁹ The concept of equality has been important for the basis of Hindutva’s attack on the Muslim minority’s rights, highlighted through its agenda for women. A case of specific relevance to this point pertains to that of *triple talaq* (further discussed in section F II), which, beyond its actual policy, has been seen as an encouragement of the demonization of the Muslim man.⁷⁰ This becomes especially visible in the case of J&K. While it is true that J&K has been a site of continued insurgent activity, it is a situation which the BJP has exploited as an opportunity to further the view of the

67 Pratap Bhanu Mehta, *The Story of Indian Democracy Written in Blood and Betrayal*, Indian Express (2019), <https://indianexpress.com/article/opinion/columns/jammu-kashmir-article-370-scrapped-special-status-amit-shah-narendra-modi-bjp-5880797/> (last accessed on 8 February 2024).

68 Ibid.

69 Rai, note 56, pp. 267-269.

70 Kapur, note 49, p. 360.

“aggressive” Muslim population.⁷¹ For example, the BJP J&K president Ravinder Raina stated in 2020: “Just wait and watch. Abdullahs, Muftis, Azads, and others shall have to chant Jai Shri Ram [(Victory to Lord Ram)]”, while simultaneously referring to Muslims as terrorists.⁷² In September 2019, Bipin Rawat, chief of the Indian army, justified a violent clampdown that lasted for several months as an effort to curb terrorism.⁷³

Similarly, the fragile situation in J&K has been used as a reason for why the citizenship of Indian Muslims would—from a Hindu nationalist point of view—need to be destabilized through restriction and, ideally, annihilation. Nothing exemplifies this better than the continued push for the CAA, referred to in section B, which faced strong resistance protests throughout society, with a steady reference to the Indian Constitution as a point of identification.⁷⁴ At their peak of intensity, in February 2020, the protests became particularly violent and resulted in the death of 53 people in Delhi.⁷⁵ This came after police brutality against students at Jamia University and Aligarh Muslim University in December 2019, and later against Muslim protesters in Uttar Pradesh that killed 23 people in January 2020.⁷⁶ In response, activists filed petitions before the Supreme Court seeking action against the police, which were quickly refused by the court.⁷⁷ A positive example of protest in the constitutional patriotism tradition then became the Delhi “Shaheen Bagh sit-in” from December 2019 all the way until March 2020, when especially Muslim women, together with thousands of supporting people from all over the country, peacefully sat for several days in protest against the constitutional erosion caused by the government.⁷⁸ The protest naturally

71 As analyzed by *Idrisa Pandit*, *India Is Escalating Kashmir Conflict by Painting it as Terrorism*, <https://www.opendemocracy.net/en/openindia/india-escalating-kashmir-conflict-painting-it-terrorism/> (last accessed on 8 February 2024).

72 *Ishfaq-ul-Hassan*, Farooq, Mehbooba Shall Have to Chant ‘Jai Shri Ram’, ‘Bharat Mata Ki Jai’: BJP J&K Chief Ravinder Raina, *The Kashmir Monitor* (2020), <https://www.thekashmirmonitor.net/farooq-mehbooba-shall-have-to-chant-jai-shri-ram-bharat-mata-ki-jai-bjp-jk-chief-ravinder-raina/> (last accessed on 8 February 2024).

73 *Pandit*, note 71.

74 A thorough analysis of the CAA and the societal reactions can be found in *Kiran Vinod Bhatia / Radhika Gajjala*, *Examining Anti-CAA Protests at Shaheen Bagh*, *International Journal of Communication* 14 (2020).

75 Scroll.in, *What Do We Know about the Communal Violence that Left 53 Dead in Delhi in February 2020?*, <https://scroll.in/article/955251/explainer-what-do-we-know-about-the-communal-violence-that-left-47-dead-in-delhi-in-february-2020> (last accessed on 8 February 2024).

76 *The Wire*, *AMU Fact Finding Report Accuses UP Police of Violence, Islamophobia*, <https://thewire.in/government/amu-caa-protests-up-police> (last accessed on 06 December 2023); *Abdul Alim Jafri*, *Who Were 23 People Killed in UP during Anti-CAA-NRC Protests?*, <https://www.newsclick.in/who-were-23-people-killed-during-anti-caa-nrc-protests> (last accessed on 8 February 2024).

77 *Hindustan Times*, *Let Rioting Stop, Says Chief Justice on Crackdown on Jamia, AMU Protesters*, <https://www.hindustantimes.com/india-news/on-police-action-on-citizenship-act-protesters-supreme-court-says-will-take-up-only-after-violence-stops/story-dFOjoQHbrbEA2tW8cyQv1I.html> (last accessed on 8 February 2024).

78 See *Bhatia / Gajjala*, note 74.

developed into a microcosm of India's diversity as it not just welcomed but also naturally attracted people from all backgrounds, cultures and religions who started to deliberately discuss with various political leaders and intellectuals about the bill, the values of secularism and unity and India's history.⁷⁹ A dialogue developed as the spirit of the protest and constitutional patriotism did not just become a tool against constitutional erosion brought by the CAA, but a unifying power even beyond the affected groups in society. This further intensified the protests of Muslim activists and NGOs throughout the year, and political parties filed petitions against the CAA claiming that the act goes against India's historically secular character as enshrined in its constitutional Preamble and citizenship laws. The south Indian state of Kerala became the first to challenge the CAA through a lawsuit on similar grounds, stating that such an amendment is discriminatory towards Muslims and goes against both India's constitutional principle of secularism and the values of equality (Article 14) and freedom of religion (Articles 25-28).⁸⁰ Such resistance against the BJP's Hindu nationalist and majoritarian policies from different segments of society brings forth a central aspect of constitutional patriotism through which marginalized minorities like Muslims are equipped with a language of rights that can be used to challenge majority decisions, by appealing to a patriotic idea of remaining loyal to the continuously fought for values of the constitution.⁸¹

F. Anticolonial and Postcolonial Legacies: Constitutional Patriotism as a Language of Rights and Resistance

I. *Law and Terror*

In his recently published book "Terror Trials: Life and Law in Delhi's Courts", Mayur Suresh investigates how legal procedures and what he terms as "legal technicalities" enable terror-accused individuals to navigate the courtroom and make it habitable.⁸² One such legal technicality is the adoption and use of legal language by those terror-accused to fight their own case. Through an ethnographic study on various terror-accused in Kashmir, his research shows how being familiar with the legal language and the law—and the constitution by its extension—becomes an avenue for human voice and expression for the demand of rights.⁸³ What follows is the realization that citizens are not mere consumers of law but also active agents in the legal process, hinting towards Robert M. Cover's idea of *nomos*, where the "law becomes not merely a system of rules to be observed, but a world

79 *Sindhu / Narayan*, note 12, p. 452.

80 *Sanya Mansoor*, *An Indian State's Decision to Challenge the Country's Controversial Citizenship Law Signals a Growing Divide*, *Time* (2020), <https://time.com/5765954/kerala-citizenship-law-supreme-court/> (last accessed on 8 February 2024).

81 *Müller*, note 5, pp. 50-52.

82 *Mayur Suresh*, *Terror Trials: Life and Law in Delhi's Courts*, New York 2023.

83 *Ibid.*, p. 72.

in which we live” and how we want the future to be like.⁸⁴ Thus, the law, and in our case the constitution, develops as central for envisioning the society that should exist in the *now* but also in the future. Just as language is constantly changing depending on the times and contexts in which it is used, so are the identities that are invoked when using a certain legal language or referring to a specific legal document, like the constitution. Followingly, the more frequently and consistently one engages with the law, including the procedures and contents of the constitutions, the more familiar one becomes with the constitution and identifies with it.⁸⁵ Constitutional patriotism in practice as such then develops as central to ensuring that one’s rights are upheld and respected in the present and in the future.

A fitting metaphor for this seems to be Franz Kafka’s “The Trial”, in which the protagonist Josef K. is arrested but cannot seem to figure out what he is accused of. After getting meddled into different bureaucratic traps, which can be seen as a parody of the complex legal system, he seems to be connected to things that make him appear guilty, and he is eventually executed.⁸⁶ This stands symbolic for reflecting the experiences of marginalized communities, like Muslims and Kashmiris, who, in responding to the charges against them, find the law, especially in the shape of the constitution—and in its extension constitutional patriotism—to be that one thing they can hold onto in the process of further majoritarian-induced marginalization. For example, in the second chapter of Suresh’s book, we encounter the Kashmiri man Qayoom, who has been accused of planning to conduct bombings in Delhi. Eventually, he and his co-accused, by adopting the legal language of the anti-terror courts and studying their rights as enshrined in the law, were acquitted and, in turn, ordered charges against the police for constructing evidence against them.⁸⁷

The law under which Muslims and left-wing activists, in particular, have been charged with ‘terrorist acts’ is the Unlawful Activities Prevention Act (UAPA) (also known as the “Anti-Terrorism Act”), which, with its most recent amendment in 2019, expanded the scope of the term ‘terrorist’ to include individuals, whereas it previously only applied to designated organizations.⁸⁸ The roots of the act can be traced back to colonial times when it was introduced in 1908 with the aim of putting pressure on anti-colonial activists and survived even after Partition during the Nehru government to silence those who spoke

84 Robert M. Cover, *The Supreme Court. 1982 Term. Foreword: Nomos and Narrative*, *Harvard Law Review* 97 (1983), p. 5.

85 Suresh, note 82, pp. 73-74.

86 Similarly analyzed by Benjamin Winterhalter, *Franz Kafka’s The Trial—It’s Funny Because It’s True*, <https://daily.jstor.org/franz-kafkas-the-trial-its-funny-because-its-true/> (last accessed on 8 February 2024).

87 Suresh, note 82, pp. 75-76.

88 Amritanshu Pushkar, *Examining the Constitutional Validity of The Unlawful Activities (Prevention) Amendment Act, 2019*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974648, p. 6; Bilal Kuchay, *With 2% Convictions, India’s Terror Law More a ‘Political Weapon’*, <https://www.aljazeera.com/news/2021/7/2/india-terror-law-uapa-muslims-activists> (last accessed on 8 February 2024).

out against the government and its policies.⁸⁹ According to data from India's Ministry of Home Affairs, there has been a 72 percent increase in the number of arrests in 2019 made under the UAPA compared to 2015. Government data also shows that only around two percent of those arrested under the UAPA had been convicted, often because of lack of evidence.⁹⁰ In 2019, the Indian government banned the separatist and militant organization Kashmiri Liberation Front (JKLF) under UAPA, and shortly after arrested its leader Yassin Malik, who in 2022 was found guilty and sentenced to lifetime-imprisonment upon charges based on the anti-terror law. While repression against Kashmiris continues and has increased significantly since 2019 with routine harassment, arbitrary arrests and restrictions on freedom of expression,⁹¹ what is most interesting in the case of Yassin Malik are the statements he has made, linking his reasons for certain actions to those of anticolonial and postcolonial freedom activists. For example, in a speech given after his conviction, he stated that "if seeking azadi [freedom] is a crime, then I am ready to accept this crime and its consequences". He also expressed to the courts that after giving up weapons in 1994, he had "followed the principles of Mahatma Gandhi [and] non-violent politics in Kashmir".⁹² This presents an interesting connection to anticolonial freedom activists and the colonized (which Malik associated himself and the rest of Kashmiris with), which arguably makes the Indian state and particularly the Hindu-majoritarian BJP government colonizers and arbitrary enforcers of the law.

The similarity with the colonial and post-colonial state and government's use of the UAPA hints not only to the colonial continuities of repression that have been taken over by the Hindu-majoritarian government of today but also highlights the value of constitutional patriotism (and broadly the law and legal language) as a mode of constitutional activism, which while it has changed as put in praxis by earlier anticolonial and postcolonial freedom fighters, shows continuity in its use by marginalized communities in India finding their voice through constitutional patriotism to demand their rights.

II. *The Triple Talaq Issue*

The Indian Constitution makes sure that fundamental rights are secured beyond the reach of simple majority vote, resulting essentially in its functioning as a protective instrument of the minority against the "tyranny of the majority".⁹³ When, in 2017, the practice of

89 *Pushkar*, note 88, p. 2.

90 *Kuchay*, note 88; to this discussion, see *Shylashri Shankar*, *Judicial Restraint in an Era of Terrorism*, *Socio-Legal Review* 11 (2022).

91 Human Rights Watch, *India: Repression Persists in Jammu and Kashmir*, <https://www.hrw.org/news/2022/08/02/india-repression-persists-jammu-and-kashmir> (last accessed on 8 February 2024).

92 *Andrew Clarence / Simon Fraser*, *Top Kashmiri Separatist Given Life in Indian Jail*, *BBC* (2022), <https://www.bbc.com/news/world-asia-india-61575778> (last accessed on 8 February 2024).

93 *Nussbaum*, note 64, pp. 128-130.

triple talaq was declared unconstitutional in the *Shahyara Bano* case,⁹⁴ several members of the Muslim community, particularly men, expressed disagreement with the decision and argued that it goes counter to those minority values of the constitution.⁹⁵ *Triple talaq* is a practice through which Muslim men may divorce their wives by saying the word *talaq* (meaning freeing or undoing the knot) three times. Although the practice was declared unconstitutional in 2017, it continued in certain communities.⁹⁶ This is why the parliament passed the Muslim Women (Protection of Rights of Marriage) Bill which formally criminalized the practice of *triple talaq* in 2019 with potential imprisonment sentences of up to three years.⁹⁷ The enactment of this bill received a lot of criticism from parts of the Muslim community, which filed petitions mostly contending that such a bill violates the special rights that Muslims as a religious minority have under the Indian Constitution. For example, Asaduddin Owaisi from the All India Majlis-e-Ittehadul Muslimeen party stated that the bill is “one part of many attacks on Muslim identity and citizenship since 2014. [...] With a firm belief in the Constitution, we’ve withstood oppression, injustices & denial of rights”⁹⁸ and “challenge [the bill’s] constitutionality in our fight to save India’s constitutional values of pluralism & diversity”⁹⁹. Furthermore, the Muslim organization Samastha-Kerala-Jamaithul-Ulema filed a petition against the bill arguing that it violates Articles 14, 15 and 21 of the Indian Constitution.¹⁰⁰ These statements and actions suggest that strong trust and emphasis is put towards the constitution as the ultimate safeguarding instrument in securing their fundamental rights and identity as a Muslim minority.

On the other hand, it is precisely the constitutionally enshrined principle of equality which has been important for the basis of the Hindutva’s attack on minority rights, and shows how the BJP is attempting to use secularism to its own advantage by seeking to rearticulate relations between politics and religion in India, while publicly strengthening its

94 *Shayara Bano vs Union Of India And Ors* ((2017) 9 SCC 1).

95 See *Shannon Leiniger*, The Muslim Women Bill of 2019: Triple Talaq and the Foreshadowing of the Future for the Muslim Community in India, <https://www.pennstatelawreview.org/the-forum/the-muslim-women-bill-of-2019-triple-talaq-and-the-foreshadowing-of-the-future-for-the-muslim-community-in-india/> (last accessed on 6 December 2023) and analytically *Tanja Herklotz*, Walking a Tightrope: Balancing Law, Religion and Gender Equality in the Aftermath of the Indian Supreme Court’s Triple Talaq Ban, *Journal for Law and Islam* 9 (2017).

96 *Leiniger*, note 95.

97 *Amy Woodyatt / Sugam Pokharel*, Indian Parliament Criminalizes Muslim Practice of Instant Divorce, CNN (2019), <https://edition.cnn.com/2019/07/31/india/triple-talaq-criminalized-india-in-tl-scli/index.html> (last accessed on 8 February 2024).

98 *Asaduddin Owaisi*, <https://twitter.com/asadowaisi/status/1156209135270055937?s=20> (last accessed on 8 February 2024).

99 *Asaduddin Owaisi*, <https://twitter.com/asadowaisi/status/1156209138390536192?s=20> (last accessed on 8 February 2024).

100 *Japnam Bindra*, Criminalization of Triple Talaq Challenged in Supreme Court and Delhi High Court, <https://www.livemint.com/news/india/criminalization-of-triple-talaq-challenged-in-suprem-e-court-and-delhi-high-court-1564811764793.html> (last accessed on 8 February 2024).

liberal credentials.¹⁰¹ The created narrative of the ‘aggressive’ Muslim man that Muslim women need protection from expresses not only a saviour mentality to protect women but also demonstrates the BJP’s view of the identity of India as tied to being a Hindu nation, in which minorities like Muslims are outsiders and ‘backwards’.¹⁰² A similar framing can be said to have been applied in the case of J&K, seeing as Kashmir is often framed as an area with terrorist activity, mostly at the hands of the Muslim ‘other’.¹⁰³ Such a securitization of Kashmir arguably gives the BJP government more of a ‘reason’ and legitimacy among the larger population for extra-ordinary means like curfews and state-of-emergencies (suspension of the constitution), stricter application of acts like the UAPA, anti-Muslim campaigning in the form of so-called love-jihad, cow-vigilantism and, more recently, bans against cow slaughter which has led to the loss of trade and livelihood for many communities in the country, and in its most extreme measure until now, the abrogation of Article 370 to “contain” the “difficult” Muslim state of Kashmir.¹⁰⁴

It is, however, precisely when understanding the situation of such a marginalized community against the backdrop of the mentioned policies that constitutional patriotism presents itself as a necessary tool for gaining hope, identity and energy to counter the ‘nation’ and its structural systems. Learning the legal language as a means for identification and argumentation in such a fight against systematic top-down religious majoritarianism not only provides the marginalized communities with this language of rights but also a tangible point of identity reference, which aids in turning hope into actual manifested constitutional activism. Discovering the origins of the special provision dogmatics for minorities in the Indian Constitution, then, only proves this narrative since it shows that even this kind of activism was always ‘offered’ and safeguarded by its very structure, or at least constitutionally legitimized.

G. Constitutional Patriotism: Critique and Defense

One critique that suggests itself against the application of constitutional patriotism upon societies like India needs to be addressed. This is the argument that as a Western-originated concept, constitutional patriotism cannot and was never meant to be applied to a postcolonial society without perpetuating a colonial project of universally superimposing Western socio-political experiences to the wider world. The nature of constitutional patriotism, however, does not prohibit to give attention to experiences beyond the Western ones. In fact, constitutional patriotism involves a reflexive process and critical stance towards one’s own history and the identities that have come about as a result of such a past, where identities are not fixed but are constantly changing and being altered by different

101 *Kapur*, note 49, p. 356.

102 *Ibid.*, p. 362.

103 *Rai*, note 56.

104 *Agnes*, note 53, pp. 341-342.

social and political groups.¹⁰⁵ This reflexiveness of constitutional patriotism, as well as the Habermasian understanding of it as a dialogical process, renders the concept highly adaptable to specific contexts and spaces. Thus, it leaves room for the existence of central ‘universal’ values in constitutions across borders, belief systems and world regions while also respecting the struggles through which a specific constitution came to be.

As expressed by Raghu Kesavan, “there is no German Ambedkar, nor is there a British Gandhi”.¹⁰⁶ Hence, this goes on to counter a second criticism against constitutional patriotism, which is that it only forms a rather “thin” form of attachment to the “too abstract” rights and values enshrined in the country’s constitution, and thus the doubt that a felt attachment to the (here) Indian Constitution among minorities would be able to create a real sense and feeling of positive collectivity.¹⁰⁷ However, with paying attention to the specific struggles through which the Indian Constitution emerged in the aftermath of a long colonial period under the British, it becomes clear that there is nothing “thin” about the (emotional) connection people feel towards activists like Gandhi and Ambedkar. And just as such, one of the most potent aspects of the Kashmiri struggle in India has been the Kashmiris’ rather non-violent protest effort through civil disobedience, which—one could argue—has historical precedence in Gandhi’s and others’ anticolonial and non-violent struggle against the British, while all the while proclaiming their rights, later enshrined in the Indian Constitution. Hindu nationalists, on the other hand (and in a somewhat similar manner to the British), feel threatened by such resistance and try to shut it down with brute force and policy, as shown with the analyzed cases. Thus, constitutional patriotism extends itself into the practical realm in the Indian case, as it becomes clear that political activism is something deeply enshrined in the historical struggle of India embodied through the Indian Constitution.

H. The Problem with Time, History and Change: Further Limitations of Constitutional Patriotism

Even according to Habermas’ basic conception of constitutional patriotism, constitutions should live, patriotism should remain dynamic, and the idea would be a matter of trust into the basic concept and cycle of a (for better or worse) continuously changing democratic system anyways.¹⁰⁸ But what if the whole constitutional system changes? Where is the nourishing soil and the hopeful narrative behind constitutional patriotism then? As enigmatic as specifically the Indian Constitution may sound in its original intentions, it is also susceptible to natural change, manipulation and abuse. The factor of time was already

105 Similarly argued by *Sindhu / Narayan*, note 12, p. 440.

106 *Kesavan*, note 15.

107 *Müller*, note 5, pp. 62-77 and *Cronin*, note 57 discuss and defend this critique thoroughly, although in a different vein.

108 That is at least the reading of Habermas by *Müller*, note 5, pp. 29-32, most likely referring to *Habermas*, note 4, p. 163.

inherent in the Indian Constitution from the beginning. The grand claim of the enormously growing Indian democracy had to assert itself again and again in the Constitution with newly added rights. The Constitutional Assembly already had this expectation in the late 1940s and created a legal document with enormous flexibility and, for example, legal norms such as Article 368, which is the basis for over 100 constitutional amendments today, achieved by mostly simple parliamentary majorities, while the Constitution already stands as the longest in the world with over 150,000 words.¹⁰⁹

Steady changes through parliamentary majorities not only opened a path for an increasingly politicized constitution but also placed the courts, especially the Indian Supreme Court, at the center of the national debate. This, in turn, attracts both opposition and minority groups to increasingly demand their rights in front of the judiciary, but also nationalist movements—especially the BJP—to take their political agenda to court.¹¹⁰ The sphere of law becomes overdynamized in the constant conflict of majority and minority interests, sometimes disproportionate quota regulations are created and discretionary legal margins are deliberately left broad, letting the constitution's actual identity-creating foundation recede more and more into the background. The narrative of the constitution can then be used or inverted through appropriate changes as a heroic argument of a nation-state in the Hindu sense, and constitutional patriotism might become a useless fighting term of both minority and majority. For example, how can Kashmiri Muslims continue to hold to the value of secularism when the CAA has been enacted and Article 370 has been revoked? Martha Nussbaum ventures here the apt comparison with the Indian national flag, which continues to bear at its center the wheel of law, which, according to the Buddhist ruler Ashoka, stands for religious tolerance.¹¹¹ The flag favored by the Hindu right, however, is the saffron-colored banner of the eighteenth-century Maharashtrian hero Shivaji, who led a briefly successful rebellion against Muslim rule—a hateful symbol that itself sets up a narrative of majority versus minority. All of this points to a trend of reverse constitutional patriotism that we are seeing not only in countries like the USA,¹¹² but that even the Indian Supreme Court has employed in the *SN Chouksey v Union of India* national anthem case cited earlier.

Moreover, some colonial legal leftovers continue to directly weaken an activist sense of belonging to the Constitution, looking, for example, at the still-existing Sedition Law, which Patel and Nehru deliberately incorporated into the Constitution to defeat expected civil disobedience from the outset.¹¹³ The liberal-activist origins of the constitution as

109 Such a critique can be found in *Madhav Khosla, India's Founding Moment. The Constitution of a Most Surprising Democracy*, Cambridge MA 2020, pp. 27, 157-158.

110 As section E I has pointed out with the Hindu minority petition filed by Devkinandan Thakur.

111 *Martha C. Nussbaum, Toward a Globally Sensitive Patriotism*, *Daedalus* 137 (2008), pp. 89-90.

112 See, for example, *Randall Curren, Patriotism, Populism, and Reactionary Politics since 9.11*, in: Mitja Sardoč (ed.), *Handbook of Patriotism*, Cham 2020, p. 743.

113 *Nivedita Saksena / Siddhartha Srivastava, An Analysis of the Modern Offence of Sedition*, *NUJS Law Review* 7 (2014), pp. 131-132.

a socially leading principle, which grew out of the protest movements of Gandhi and Ambedkar, thus remain questionable, precisely because many of these values have not made it into India's social reality to this day.

I. Beyond India

The identity case of India and its constitution indeed seems unique, both in theory and in practice. One central argument of our article, however, has been that constitutional patriotism has the potential to unfold value in postcolonial societies when the state reality, ergo the formal constitution and its rights that in many cases experienced a pluralist renaissance after colonial rule, clash with the nation-values, specifically nationalist politics and its exclusions at the time. The larger the differential from this equation becomes, the more marginalization of various groups in society likely appears, but also the more those groups can point to the constitution as a tool for identification and participation in protests. In India, we argued, this potential already exists in the constitution by design. But it does not take long to find similar characteristics of constitutional patriotism beyond India and the West. Although Wikipedia only lists for "Constitutional Patriotism" the relevance of the concept to Germany, Spain, Switzerland, the USA, the UK, and the European Union, India's neighboring countries provide interesting examples.

In Pakistan, the Constitution plays an increasingly important role in society, although the country has deliberately adopted the 'nation'-approach, basing the claim to national identity on the religion of Islam.¹¹⁴ Article 5 of the Pakistani Constitution demands the "loyalty to state and obedience to Constitution and law" as the "basic duty of every citizen" and during the 50-year anniversary celebrations of the 1973 Constitution in April 2023, the Pakistani Parliament passed a resolution to include the constitution in all education curricula.¹¹⁵ The 10th of April was declared as the National Constitution Day. This comes at a time of political unrest in the country,¹¹⁶ when especially the Constitution appeared once again as a symbol of protests, for example, in the context of the women marches¹¹⁷ and the so-called oppositional "Freedom March"¹¹⁸. Uniquely in Pakistan, the judiciary became part of the constitutional patriotism equation in recent years, by taking

114 *Ijaz Khan*, Pakistan: Nation-State, State-Nation or Multinational State?, *European Yearbook of Minority Issues Online* 8 (2011), p. 388.

115 National Assembly of Pakistan, Golden Jubilee Celebrations of the Constitution of Pakistan 1973 to Begin on April 10, https://na.gov.pk/en/pressrelease_detail.php?id=5462 (last accessed on 8 February 2024).

116 A thorough analysis can be found in Dawn, A Judicial Meltdown, <https://www.dawn.com/news/1746622> (last accessed on 03 January 2024).

117 *Somaiyah Hafeez*, Pakistan's Aurat March 2023: Another Year, Similar Challenges, *The Diplomat* (2023), <https://thediplomat.com/2023/03/pakistans-aurat-march-2023-another-year-similar-challenges/> (last accessed on 8 February 2024).

118 *Baqir Sajjad*, Pakistan at a Dangerous Crossroads, <https://www.wilsoncenter.org/blog-post/pakistan-dangerous-crossroads> (last accessed on 8 February 2024).

up the constitutional interests of the people more often than the ones of the government or the legislative through exercising their *suo moto* power/authority.¹¹⁹ And even the remote Pakistani area of Balochistan, often described as geographically, ethnically and administratively marginalized, recently became the face of protests and scholarly voices that demand more constitutional guarantees for the inclusion of the region and described this as “constitutional therapy” for the identity of the people of Balochistan, thus pointing to a constitutional patriotism as identity recognition in center-periphery-tensions.¹²⁰ While the Pakistani Constitution slowly gains popularity among progressive parts of society, certain ‘nation’-elements of the document increasingly play into the hands of nationalist political groups that try to make the constitutional patriotism narrative their own. The Tehreek-e-Labbaik Pakistan (TLP) party made it its goal in recent years to portray the Constitution as the guiding document for a Pakistani identity while specifically relying on the connection of the constitution’s Islamic character to the blasphemy laws in the Penal Code as well as the Second Amendment to the Constitution, which declares Ahmadis as non-Muslims. Through this narrative, the TLP legitimized a certain vigilantism for the effective prosecution of ‘blasphemers’ and exclusion of Ahmadis from society.¹²¹

Although constitutional patriotism has been seen critically by certain postcolonial scholars claiming that all state-originated institutions, and with those constitutions, were imposed on countries during colonial rule to serve foreign and not the people’s domestic interests and thus will never create identification within society,¹²² there is a noticeable change in the literature arguing for a rediscovery of the concept in light of new constitutional movements. As has been one argument in this article, revolutionary changes of a country’s structure, especially after colonial rule, open up the potential for reconsidering the pluralist nature of the society in constitutional laws as a long-term guiding factor for politics and identification for various groups of society. This has recently been argued with

- 119 To the influence of the judiciary on Pakistani society and politics, see *Yasser Kureshi*, *Seeking Supremacy. The Pursuit of Judicial Power in Pakistan*, Cambridge 2022; for the recent political activity concerning *suo motu*, *Ifthikhar A. Khan*, *Returned Bill Passed by Joint Sitting of Parliament*, <https://www.dawn.com/news/1747063/returned-bill-passed-by-joint-sitting-of-parliament> (last accessed on 8 February 2024).
- 120 ANI, *On Pakistan’s Constitution Day, Baloch Organization Runs Freedom Campaign*, <https://www.aninews.in/news/world/asia/on-pakistans-constitution-day-baloch-organization-runs-freedom-campaign20220323205220/> (last accessed on 06.12.2023). A similar constitutional identity relationship can be seen to develop in Khyber Pakhtunkhwa, closer to Kashmir, *Wali Aslam / Alex Neads*, *Renegotiating Societal-Military Relations in Pakistan: The Case of the Pashtun Tahafuz Movement, Democratization* 28 (2021), pp. 273-274.
- 121 See *Abdul Basit*, *Barelvi Political Activism and Religious Mobilization in Pakistan*, *Politics, Religion & Ideology* 21 (2020) for an in-depth analysis of the TLP.
- 122 *Christopher Isike / Olusola Olasupo*, *Rethinking the State in Africa*, *African Renaissance Studies* 18 (2023), p. 52.

regards to Nigeria¹²³, Lebanon¹²⁴ or Brazil¹²⁵ and famously been a topic of post-Apartheid South Africa,¹²⁶ when Nelson Mandela proclaimed upon the adoption of the new South African Constitution in 1996: “Now it is universally acknowledged that unity and reconciliation are written in the hearts of millions of South Africans. [...] They are the glowing fire of our New Patriotism”.¹²⁷ It is not without reason that India’s post-colonial Constitution has often been compared to South Africa’s as jointly progressive and central to the people,¹²⁸ even though both countries have repeatedly faced nationalist-exclusionary realities since then.

J. Conclusion: Towards a Postcolonial Vision of Constitutional Patriotism as Activism

Constitutional patriotism has been met with much criticism and, to be fair, making the case that such a Western concept, which focuses on pluralistic values and the constitution as a concept of identity, is of value to marginalized people in postcolonial societies, might perpetuate the colonial narrative of the West as the “Gentle Civilizer of Nations”¹²⁹, now even with political theory for identity-purposes, and thus opens the stage for even more. All such criticism, however, fails to recognize the aspiration of constitutional patriotism from the very outset. It is not a matter of creating a new identity that naively is culturally, politically and religiously detached. One cannot offer a parallel identity or create a new kind of narrative of historical experience to an Indian minority, or to a Muslim living in Kashmir, who may even aspire to political independence him/herself, if their own identity is so respected in theory but destroyed in practice. Rather, it is about moments when the said difference between the nation and often political reality, on the one hand, and the state as well as social reality, on the other, leaves open a potential; a potential for peaceful activist remembrance of a great idea of state that consisted of compromises between

123 Ibid.

124 See *Maurus Reinkowski*, Constitutional Patriotism in Lebanon, *New Perspectives on Turkey* 16 (1997).

125 See *Gustavo Rabay Guerra / Henrique Marcos / Antônio Italo Hardman*, From Wuhan to 'Planalto Central': Federalism, Constitutional Patriotism and the 'Supremo' in the Face of Covid-19, *Revista Jurídica* 61 (2020).

126 See *Robert Obiyo*, Constitutional Patriotism: The Convergence of Democratic Challenges and Progress in South Africa, *Ubuntu* 5 (2016).

127 Office of the President, Address by President Nelson Mandela on Adoption of New Constitution, http://www.mandela.gov.za/mandela_speeches/1996/960508_constitution.htm (last accessed on 8 February 2024).

128 For example, *Abhijit Singh*, Comparative Study of Rule of Law between South Africa and India, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4384329 (last accessed on 8 February 2024); critical *Vijayashri Sripati*, Constitutionalism in India and South Africa, *Tulane Journal of International and Comparative Law* 16 (2007).

129 Using the term of *Martti Koskenniemi*, *The Gentle Civilizer of Nations*, Cambridge 2001, who, however, applied it differently and to the context and history of international law.

liberalism and pluralism, democracy and new beginnings. Legal directive principles were intended to express these compromises and steer India in a direction that was naturally unifying but also collectively preserving. At some point, majority politics overtook the project of a pluralistic constitution, and the origins faded into oblivion.

Even if its ideals are in danger in India, a constitution still remains constant and creates spaces of protest, remembrance and admonition. Plus, democracy is fluid and can challenge majorities at any time. A postcolonial theory of constitutional patriotism for the marginalized must start here, not as a permanent identity solution, not as a political system in its own right, but as a context-adaptive source of argument and practice for political change that makes marginalized groups of people not just the central actor of constitutional debate, but teaches them how to use their own (and not the colonial) language of the law for their own good—privately as motivation and identification, and publicly for protest and discourse. With that, it stands as a pre-form in the tradition of theories like popular constitutionalism¹³⁰ or—to point to the later and more closely related term of Bruce Ackerman—revolutionary constitutionalism¹³¹. Although our understanding of constitutional patriotism does not attempt to lay the authority over the interpretation of the constitution into the hands of the people, it rather requires them to take the role of pointing out the historical contexts, the reality, relevance and even existence of certain inherent narratives and cultural contexts in the first place, even prior to protested-for reform.¹³² And that not just to judicial supremacy, as in Larry Kramer’s influential theory, but to the system and society as a whole. Instead of institutionalizing the authority of the people to decide over complex constitutional questions, people remain in a constant activist fight *for* (the proper public value and political respect of) the constitution itself, which only enabled the constitution’s existence after colonialism with its values in the first place. This is exactly what makes constitutional patriotism post- and anticolonial. Discursively and in Habermas’ original understanding of constitutional patriotism,¹³³ the law needs to be constantly fought with the law, just as Frantz Fanon pleaded to fight colonial violence with violence.¹³⁴

Of course, this can only be achieved through educational efforts, in which the constitution must be brought more into the focus of social debate. And in India, there are even constitutional starting points for this, if one looks at Article 30 and the right to create and manage educational institutions by and for minorities.

130 *Larry D. Kramer*, Popular Constitutionalism, circa 2004, *California Law Review* 92 (2004).

131 *Bruce A. Ackerman*, *Revolutionary Constitutions*, Cambridge, Massachusetts 2019, pp. 54-76; critical *Arun K. Thiruvengadam*, Evaluating Bruce Ackerman’s “Pathways to Constitutionalism” and India as an Exemplar of “Revolutionary Constitutionalism on a Human Scale”, *ICON* 17 (2019).

132 See for the cultural study of law approach, *Kahn*, note 32 and *Ulrich Haltern*, *Europarecht und das Politische*, Tübingen 2005, pp. 10-24.

133 *Habermas*, note 4, p. 163.

134 *Fanon*, note 37, pp. 39-103.

Kashmir and the activist motivation to be drawn from the CAA and the revoked Article 370 are only initial examples of this. And even if India's constitutional situation is certainly unique and not many postcolonial states have similar – as we argued – ‘state-nation-society differentials’, this case should have at least shown and given hope that constitutional patriotism can develop potential beyond the West.



© Paul Dießelberg, Sidra Yousaf