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Review Essay: A “Countertenor’s” polyphonic rendition of the Constituent Assembly Debates

By *Pratyush Kumar**

Abstract: The Indian Constituent Assembly Debates is a remarkable deliberative document to create the written constitution of the democratic republic of India based on an open society. By its very nature the text is polyphonic and had multifarious voices with a dominant and uniting trend to create a liberal constitutional state with Indian features suited to Indian conditions. The intention, and rightfully so, was not to bring about a “revolution” in the nature of a Russian, Chinese or even the French variant, soon slipping into dictatorships of either party or bureaucratic elites or charismatic individuals; but was to create a democratic polity based on liberal constitutional values drawing from India’s history and cultural conditions. This rich text running into few thousand pages is being explored in some of its aspects in the present work. Though, the tone and tenor of the present work is not representing the dominant voice of a soprano but that of a countertenor who is castrated to reach the higher octave.

Udit Bhatia (ed.), The Indian Constituent Assembly: Deliberations on Democracy, Routledge, London 2018, 238 pages, GBP 29.59, ISBN 9780367885311.

This edited work by Udit Bhatia is a set of nine articles mostly written by emerging legal scholars from India dealing with democratic deliberation of the Constituent Assembly Debates (CAD) exploring its *discursive* (range of arguments rather than the bargain struck), *political* (interests pursued and strategies adopted for it) or *institutional* (role of different advisory or sub-committees constituted for instance) features while framing the constitution of the largest democracy in human history.¹ The effort is commendable and the hopes for its readership from a wide range of readers including political scientists, philosophers, legal scholars and practitioners positively assured.

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1 *Udit Bhatia*, Introduction, in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 2-4.

The first article is by Arvind Elangovan titled "‘We the People?’ Politics and the conundrum of framing a constitution on the eve of Decolonisation'.² In this article, the author bases his thesis by focusing «on the political debates that occurred at the highest levels of colonial administration and those of the Indian National Congress and the Muslim League leadership on the question of transfer of power and, in particular, the establishment of the Constituent Assembly in the aftermath of the Second World War.»³ In his view the fractured politics of the period vitiated the myth and the founding statement of "We the People" in the preamble. In the process the author has tried to critique the works of Granville Austin, Sarbani Sen, Uday Singh Mehta, Rajeev Bhargava among others who rightfully considered the members of the Constituent Assembly of India (CAI); or at any rate those coming from the Indian National Congress; even most of the non-Congressites were public men of illustrious record like B.N. Rau, B.R. Ambedkar and Syama Prasad Mookerjee; as representing the "popular sovereignty" of the people (Sarbani Sen), with "a conscious rejection of separation of power and politics" (Uday Singh Mehta) because of precisely their political struggles based on democratic political processes in the likeness of English liberal democracy to set up a parliamentary republic (Granville Austin). In doing so, the author has fetishized the concept of "people" by drawing from Dipesh Chakrabarty, who in turn draws from Foucault's idea of "Domination", by emphasizing that there was a tension between liberalism and democracy and because of colonial domination and its legacy in the post-colonial period, and drawing additionally from Hobbes' idea of a liberal order being based on the distinction between instituted and acquired sovereignty, both of which were absent in India due to lack of guarantee of rights and therefore India could not have a liberal order. It is indeed a spectacular construct of an ideologue based on rhetorical flourishes but patently removed from facts. Fact is that the Indian freedom struggle as led and articulated by its leaders committed to liberal constitutionalism who then constituted the constituent assembly was part of the "popular sovereignty" of Indians on the threshold of citizenship (despite all hype and hoopla both the Socialist Party and the Communist Party could muster a very small percentage of popular vote of 'Indian citizens' and seats in parliament and state legislatures) validated the liberal democratic constitutional republic through the instrument of the Constitution of India. Therefore, contrary to what Chakrabarty or Elangovan through him formulates, the Indian Constitution and constitutionalism (the political processes both in the colonial period and the post colonial), does represent the moment of fusion of liberalism and democracy, or in a Hobbesian sense, of order and freedom. The guaranteed rights of individuals are the constitutional promise of the remarkable document called the Constitution created by the Constituent Assembly.

2 Arvind Elangovan, "‘We the People?’ Politics and the conundrum of framing a constitution on the eve of decolonization", in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 10-37.

3 *Ibid* at p. 11.

The very premise of the author of how “the late colonial context not being amenable to a liberal republic based on the notion of “We the People” is faulty. The constitution makers (most of whom were associated with the Indian National Congress as a common platform) had years of service to their fellow Indians, many of whom had sacrificed their lives and careers for it, and they were not just trained in the democratic constitutional processes but were active practitioners of the same in making not just the constitution drafting process a stellar success but its implementation a matter of pride for liberal constitutional republics since 26th January, 1950 when the Constitution of India was finally promulgated. The author’s insistence on “the divisive nature of politics” rests primarily on giving too much credit to Muslim League (ML) as the sole representative of Muslims and its vicious politics of raking up medieval notions of Islamic superiority and its retention of political dominance over India through a return to Mughal rule as the British had achieved paramouncy from the Mughals (not just, but for the Muslim League, yes). The Muslim League was not even interested in any kind of dialogue, leave alone any kind of compromise and settlement from the outset. It was not on the same page and there could not have been a dialogue as the Indian National Congress and other leaders of the Indian freedom movement were interested in creating a democratic, liberal, constitutional republic on the one hand and the Muslim League wanting to create an Islamic Republic governed by Islamic Law on the other. Venkat Dhulipala writes in his celebrated work, “Creating a New Medina” (this work has been curiously overlooked by the author who rested mostly on a debunked work of Ayesha Jalal⁴), «As regards the ML’s Islamic credentials, these were first attested to by the redoubtable Maulana Ashraf Ali Thanawi who from 1937 onwards made it clear that this was the sole representative organization of the Indian Muslims as against the Congress whose membership, he insisted, was *haraam* (forbidden). Subsequently, after the 1940 Lahore Resolution, local ML functionaries repeatedly emphasized that Pakistan would be established as an Islamic state. [...] soon after the 1940 Lahore session the U.P. ML leadership constituted a committee comprised of its representatives as well as the ulama for the purpose of crafting an Islamic constitution for Pakistan. [...] Syed Sulaiman Nadwi (*alim* belonging to the *Nadwatul Ulama* of Lucknow) was invited by the Pakistan government in 1949 to head the ‘body of experts’ to help the Pakistan Constituent Assembly frame an Islamic Constitution for the nation, and this report became the basis for recommendations that he submitted.»⁵ Both for Pakistan movement and for Islamic obscurantism, it was not Muslim-majority provinces of Punjab or Sindh which today constitute Pakistan played a role, but it were the political and religious elites from United Provinces (Uttar Pradesh

4 Ayesha Jalal in her famous and controversial work “The Sole Spokesman” has presented Mr. Jinnah as a “holy cow” who did not know till the very end of what would constitute Pakistan and what would be its polity like, unlike glaring evidence to the contrary both prior to India’s independence and partition and after the creation of the Islamic Republic of Pakistan. For more, see: *Ayesha Jalal, The Sole Spokesman*, Cambridge 1985.

5 *Venkat Dhulipala, Creating a New Medina: State Power, Islam, and the Quest for Pakistan in Late Colonial North India*, New Delhi 2015, p. 20.

today) who played the most prominent role, as accepted by Mr. Mohammad Ali Jinnah, the leader of ML said, «UP was 'the heart of Muslim India', whose Muslims were politically the most advanced in the country in contrast to Punjab, a 'hopeless' and most 'official ridden province' dominated by the Unionists.»⁶

The Muslim League did not represent even the majority of Muslims in the reserved Muslim electorates until 1946; and in the Muslim majority states of Punjab, the government was run by the Punjab Unionist Party, in Sindh and North West Frontier Province the Indian National Congress had won the majority; Balochistan was autonomous and Bengal had a Krishak Praja Party government. In Uttar Pradesh (United Province, which was a Muslim minority province) the Muslim League won an absolute majority in all the elections (in the Muslim reserved seats) after the Government of India Act 1935. Unlike previous works which overlooked how the creation of Pakistan as the new Medina of an Islamic State led by the Muslim League took roots in Uttar Pradesh, Dhulipala has done justice to this fact. It might also be because the centre of Mughal polity was in Uttar Pradesh, major centres of Islamic learning was in Uttar Pradesh and a number of Islamic elites both religious and political (with a number of landlords) came from Uttar Pradesh. Jawaharlal Nehru said in an interview on 14 July 1945, «The League inevitably represents not only the particular claims of a group, but represents them in a medieval context».⁷ On another occasion, he said, «Mr. Jinnah's fear of the Hindu majority in a centralized national government is based on his medieval trend of thought».⁸ He went on to add, «League is at present the most powerful organisation amongst them but it has no constructive approach or objectives and its leaders have openly said they base their appeal on hatred.»⁹

Therefore, the author's contention that the CAI was not rooted in historical developments¹⁰ is misplaced because unlike CAI (with most of its members being drawn from Indian National Congress), the Muslim League was a colonially orchestrated, medievalist, obscurantist and a sectarian organization without any mass support till the eve of independence. Its fortunes changed when Muslim League led by Jinnah (unlike the Congress) openly supported the British War efforts without seeking any clarity on the nature of India's involvement in the war, or without seeking any pre-conditions of democratic self-government for Indians during or after the war; Jinnah led Muslim League was already committed to the idea of a separate nation for Muslims since at least 1937 and passed the resolution for

6 *Ibid* at pp. 31-32.

7 *Arvind Elangovan*, Norms and Politics: Sir Benegal Narsing Rau in the Making of the Indian Constitution, 1935-50, New Delhi 2019, p. 81.

Elangovan has further developed his ideas in this book which came after the article in the present volume. For a detailed review article on the book, see: *Pratyush Kumar*, Book Review Article on "Norms and Politics: Sir Benegal Narsing Rau in the Making of the Indian Constitution, 1935-50", *Studies in Humanities and Social Sciences* 26 (1) (2019) (printed Jan., 2021), pp. 209-231.

8 *Elangovan*, note 8, p. 81.

9 *Ibid* at p. 82.

10 *Elangovan*, note 3, p. 13.

Pakistan in 1940 (peculiar name for a nation; Pak – sthan literally meaning land of the pure, and by implication meaning how Hindus are impure and Muslims cannot live with them in a liberal democracy with universal suffrage; little realizing that even the suffix ‘sthan’ or place has Sanskrit or Hindu origins).¹¹

It is also striking to note how the author misses the point of the Wavell plan at the Simla Conference, with Jinnah insisting on an equal membership of Hindus and Muslims (in his view Congress and Muslim League) apart from representation to other minorities and all Muslim members to be only from the Muslim League (thus dictating other parties, including Congress, but also the Unionist Party – not mentioned by the author – into what members they could send to the central and provincial legislatures). Pandering to this bullying tactics based on a zero-sum game led by Jinnah and his Muslim League is not sufficiently looked into by the author. He does not criticize this form of sectarian politics at all and giving this sectarian organization an equal footing with that of Congress comes across as rather peculiar. The Indian National Congress was a national non-partisan party with no mention of religion framed in its Constitution (framed by none other than Mahatma Gandhi in 1920), apart from having inclusive policies, programmes, election issues, plan of action, leadership, or the different resolutions passed by the Congress Working Committees like the one on Fundamental Rights in 1930 which found pride of place in our constitution and today form part of the inalienable basic structure of the constitution guaranteeing individual rights and freedom. It is rather baffling how the author misses this point. It is also interesting how the colonial regime which followed rank racism against ‘coloured’ and ‘black’ people, was steeped in anti-Semitism, discriminated against the Romani people, persecuted the Irish and the Catholics, were so much concerned for ‘minority rights’ in India by promoting and pandering to the bullying tactics and unrealistic demands of a sectarian and racist organization like the Muslim League. Actually, India could have a stellar constitution and a functioning democracy because Muslim League did not join the Constituent Assembly. If the Muslim League had joined the Assembly, it would have stalled the constitution writing process, and India could also be in a mess like the Islamic Republic of Pakistan, with many constitutions, bouts of military dictatorship, apart from being the fountainhead of global Islamic terrorism. It is sad but a difficult fact (truth), that partition was unavoidable in the circumstances where Muslim League had turned into a Frankenstein monster with colonial patronage and it is rather India’s good fortune that they were not part of Constituent Assembly which framed India’s constitution.

Much in keeping with the tone and tenor of the first article, with its emphasis on “conflict” and not “consensus”, basing itself of the ideological divide of “elite” and “mass”,

11 This history is very well recorded by Professor Bimal Prasad in his trilogy *Pathway to India's Partition*. For a brief overview, and more specifically to the issues raised in this article, his introduction to the third volume is immediately relevant. See: *Bimal Prasad, Pathway to India's Partition Vol. III: The March to Pakistan 1937-1947*, New Delhi 2009, pp. 9-53.

the second essay in the volume is written by Sandipto Dasgupta titled, "Conflict, Not Consensus: Towards a political economy of the making of the Indian Constitution".¹²

The author has written correctly on how «Gandhi had over a couple of decades transformed Congress from a party of petitioning urban elites to a genuinely mass organization. His central contribution to the nationalist movement was to engender a discourse that succeeded in recruiting the peasant masses of India to the cause of the nationalist movement under the umbrella of Congress». ¹³ There is an inner tension and a contradiction, when in the immediately previous section, he writes about the decline of Congress in the 1970s basing his emphasis on the lack of elite-mass alliance in the postcolonial moment, but tracing it back to the anti-colonial movement due to the inability of Congress «to establish an expansive hegemony through the anti-colonial movement in the sense of generating an organic "common sense" regarding the nature of the new political and social order based on the active consent and participation of the masses». ¹⁴ He becomes clearer on his critique of Constituent Assembly and Gandhi's leadership, through Sudipta Kaviraj, of how «he (Gandhi) ultimately failed to form through the movement a "structural base" for the "foundation of an independent Indian state"» ¹⁵ and the Indian elite, could not «create a new language of politics that could represent the view of the masses regarding what is "just, fair, and possible"». ¹⁶ One of the reasons for the lack of such a "structural base" according to the author is the non-inclusion of the Communist Party of India in the Assembly. ¹⁷ India's struggle for independence spearheaded by Gandhi through the platform of Congress had no intentions, and rightfully so, to create some kind of communist dictatorship. Besides, the Communist Party (barring few individuals), unlike the democratic - Congress Socialist Party and its sterling leaders, had played a negative role in the Indian freedom movement, thus not enjoying support of either the elite or masses both in pre-colonial and most of post-colonial India so far. It had opposed the Quit India Movement (along with Muslim League and the Hindu Mahasabha), a mass movement against colonial rule wherever it spread (Bihar, Eastern UP, Satara, and so on) despite all leading Congress and Congress Socialist leaders in jail, and supported the British in the Second World War as "people's war" (sudden change and diametrically opposite view after USSR was dragged into it, thus being guided by Moscow rather than having its own views) besides supporting India's partition on communal lines, are just few of its long list of negative deeds. Therefore, both Sudipta Kaviraj and by implication the current author, are incorrect in their estimation of

12 Sandipto Dasgupta, Conflict, Not Consensus: Towards a political economy of the making of the Indian Constitution (Chapter 2), in: Udit Bhatia (ed.), The Indian Constituent Assembly: Deliberations on Democracy, London, New York 2018, pp. 38-57.

13 *Ibid* at p. 43.

14 *Ibid* at p. 42.

15 *Ibid* at p. 44.

16 *Ibid*.

17 *Ibid* at p. 46.

the structural base not leading to “just”, “fair” and “possible” to which they have pointed. What he is correct at is, however, at Gandhi’s and by extension CAI’s, in tempering the “tyranny of the masses” (which is almost always violent and destructive and tramples over individual rights) where he states, «he (Gandhi) was scrupulous in avoiding “end oriented” mobilizations based on class or caste that could sow internal divisions and conflict within the national movement. However, the contingent condition for the alliance, and by extension Gandhi’s centrality as the “hinge”, was the struggle against the colonial regime».¹⁸ It was the Gandhian political process which led to the formation of the “structural base” in the form of CAI (constituting the “elites” representing industrial capitalist class, landowning class and the managerial bureaucratic interests in the author’s estimation) which framed India’s constitution on liberal, democratic, republican, “Indian secular” foundations to create equal citizenship for the protection of individual rights (and some collective rights) based on constitutional solidarity. The author’s point is unclear and imprecise (which part of Europe and what exact social-good provisions is he looking at is unclear, besides is he really comparing a newly independent India with a “comparable” country?) when he writes, «it (Constitution) did not – in the manner of its mid-twentieth century contemporaries in Europe – provide constitutional guarantees regarding certain social goods to its citizens».¹⁹

The third article titled “Pride and Prejudice in Austin’s Cornerstone: Passions in the Constituent Assembly of India” by Vatsal Naresh deals with the role of hot and cold passions (and their different variables) in the attitude of members of CAI and its impact on the exact framing of some of the provisions of the Constitution.²⁰ Drawing primarily from Jon Elster (who in turn follows French moralists) and Andras Sajó, he writes, «[...] Elster (2013) suggests that *reason*, *interest* and *passion* are the main motivations in assemblies. He defines reason as “the rational pursuit of long-term ends”. [...] Interest is understood “as the pursuit of advantage at a scale smaller than that of the relevant collectivity as a whole, and further subdivided into personal interest, group interest, and institutional interest”. [...] Passion comprises emotions and prejudices: like fear, anger, enthusiasm, contempt and pridefulness».²¹

The author has «explored four relevant aspects of passion: (a) characteristic features; (b) types of affect; (c) the mechanisms through which they influence action and (d) the cultural construction of collectively felt passions in deliberative assemblies».²² For characteristic features of emotions, he writes, «(1) emotions have cognitive or perceptual antecedents. In other words, it is possible to identify the conditions in which certain

18 *Ibid* at p. 43.

19 *Ibid* at pp. 53-54.

20 *Vatsal Naresh*, *Pride and Prejudice in Austin’s Cornerstone: Passions in the Constituent Assembly of India* (Chapter 3), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 58-82.

21 *Ibid* at p. 59.

22 *Ibid* at p. 60.

emotions are evoked. For example, anger is triggered by the negative action of another towards oneself. (2) Emotions shape action and belief. For instance, the action tendency most often associated with fear is "fight or flight". [...] anger against another may cause future actions by him or her to be seen as negative, thereby generating greater anger. In this way, emotion affects beliefs, beliefs about beliefs, beliefs about action and action itself».²³ For the intensity and duration of effect, he focuses on hot and cold passions because, «Passions affect cognition, and therefore action, for varying periods of time. *Hot passions* get their name from the adrenaline release that actually causes one to feel more energetic when under their influence. They are accompanied by a high level of arousal and activity, tend to have a short half-life and dissipate soon. They may also trigger action tendencies immediately – wherein the actor moves from emotion to action without forming new beliefs. *Cold passions* trigger less intense arousal, and tend to linger, affecting beliefs at several stages, without compelling the actor to react in any characteristic manner at each stage».²⁴

Motivated reasoning (beliefs generated as a result of emotions), urgency (desire to act swiftly, regardless of a consideration for the returns) and empathy gap (inability to imagine how one would think or act if she were in the other state) are the three mechanisms the author has identified through which emotions influence action.²⁵ On "collectively held passions in assemblies", the author relies on Sajo, «"culture sets situational rules of emotional display, and the proper behavior at the display is culturally scripted" in that "where the display outrage regarding slavery was culturally improper, antislavery sentiments were unlikely to develop". [...] (drawing from Elster's forthcoming work on hot and cold passions) Enthusiasm, for example, was crucial in shaping the 1789 French Assembly's decision to disband the state's feudal structure in one night. When that same French Assembly surrendered to the demands of the crowd, they did so out of hot, visceral fear. Sajo (2011), on the other hand, contends that it was cold fear which inspired the American framers to enshrine safeguards against absolute political authority, as well as staunch protections of civil liberties».²⁶

Within this conceptual framework, the author has argued that the CAI was governed by cold rather than hot passions, as result of time delays due to extensive deliberations in the CAI through different advisory committees and sub-committees and the drafting committee and separated responsibilities between the interim government and the assembly despite sharing some common members. For example, due to partition on communal grounds, cold passions helped determine a complete non-acceptance of reservation based on communal grounds (as reminiscent of communal electorates introduced by Morley Minto reforms in 1909 constitutionalising the demands for partition subsequently). The author has quoted

23 *Ibid* at p. 61.

24 *Ibid*.

25 *Ibid* at pp. 62-63.

26 *Ibid* at pp. 63-64.

relevant passages in the debates of Nehru, Vijayalakshmi Pandit, Tandon, Ray, Pant and Patel to drive home the point, «Each passion assessed here is linked to national unity in a nuanced way, and was likely shaped over time. Cold fear stems from the belief that the fragile nation-state is in existential danger; cold anger connotes the anti-colonial ire directed at the British for their injustices against Indians; and contempt applied to the proposal and the people that were holding India back from achieving the progress it had been denied under colonial yoke».27 On “transformational constitutionalism and pridefulness”, the author writes, «The call to suspend suspicion of the state was novel: it was hitherto considered an essential tenet of liberal constitutionalism. Pridefulness is also evident from the debates on the Assembly’s legitimacy and competence.»28, which was vindicated by B.R. Ambedkar, «The Constituent Assembly in making a Constitution has *no partisan motive*. Beyond securing a good and workable constitution it has no axe to grind. In considering the Articles of the Constitution *it has no eye on getting through a particular measure*.»29

The fourth essay in the volume is “The Antecedents of Social Rights in India” by Neera Chandhoke.³⁰ While listing out Vasak’s historical categorization of rights as «political and civil rights belong to the first generation of human rights, social and economic rights fit into the second generation, and solidarity rights that range from the right to a sound environment to culture can be termed as third generation of rights»³¹, she rightfully points how «rights cannot be thought of as sequential; they are overlapping and cumulative.»³² She correctly points out how, as a response to Indian political leadership’s opposition to the Simon Commission in 1927 with no Indian membership and the Secretary of State Lord Birkenhead’s challenge to Indians to produce a constitution acceptable to all was aptly met by the Motilal Nehru Constitutional Draft of 1928.³³

The Nehru Committee was appointed on May 19, 1928 by Dr. M.A. Ansari (Chairman of All-Parties Conference) led by Pandit Motilal Nehru which submitted its report in August 1928.³⁴ It was a nine-member committee with the other members being Sir Tej Bahadur Sapru, Sir Ali Imam, Shri Pradhan, Shri Shuaib Quereshi, Shri Subhas Chandra Bose, Shri Madhao Shrihari Aney, Shri M. R. Jayakar, Shri N.M. Joshi and Sardar Mangal Singh.³⁵ In today’s terminology and verbiage, each one of them would be labeled as “élites”

27 *Ibid* at p. 71.

28 *Ibid* at p. 74.

29 *Ibid*.

30 Neera Chandhoke, The Antecedents of Social Rights in India (Chapter 4), in: Udit Bhatia (ed.), The Indian Constituent Assembly: Deliberations on Democracy, London, New York 2018, pp. 83-102.

31 *Ibid* at p. 83.

32 *Ibid*.

33 *Ibid* at p. 85.

34 *Ibid* at pp. 85-86.

35 *Ibid* at p. 101.

with the only exception of Subhas Chandra Bose as having distinctly left ideology despite his “elite” moorings and background. Everyone else in the committee which produced the Nehru report was a moderate and incremental constitutionalist rather than some radical revolutionary trying to upturn the world. Therefore, even though one largely sides with the author when she is lamenting on why the CAI divided the set of rights into fundamental rights (justiciable) and the Directive Principles of State Policy (DPSP; non-justiciable), reducing many of the social and economic rights to “secondary status”, her justification on ideological grounds where in the second half of her essay she branches off into rhetorical ideology is extraneous to the constitutional process and rights formulation (or at least extraneous to the political-constitutional process leading to the formulation of Nehru Report which is her main point of reference). She bases it on how on the eve of independence, it were the demands of popular student, labour and peasant unrest (her correct estimation of the protests not forming a united movement or a unified set of demands) which all pointed for a craving for social and economic rights (justice is her preferred usage; though ‘right’ or ‘rights’ is not necessarily justice, demanding a more careful use of terms) did not find its imprint in the ultimate rights formulation framed in the provisions of the constitution by the CAI.

The author offers correct juristic reasons for such a segregation of rights «following the well-worn argument in circles of political philosophy and legal jurisprudence that political and civil rights are fundamental because they are justiciable. And they are justiciable because they place negative obligations on agents that are in a position to affect these rights. For example the right of a citizen not to be tortured is a negative right insofar the state is obliged not to subject the citizen to cruel or inhuman treatment.»³⁶ She is also correct in her historical-political estimation, «In sum, two features of the Congress system stand out as politically significant. One, struggles initiated by the leadership, were controlled and contained by the coalition of influential interests within the party. Two, the Congress leadership was supremely uncomfortable, if not completely dismissive, about popular struggles led by non-Congress organizations.»³⁷ Though the author misses the point (or even fails to mention) on how the “mainstream” Congress leadership was either uncomfortable or had a lukewarm response to even Congress-affiliated organizations like the Congress Socialist Party or the Kisan Sabha and its leaders like Dr. Abdul Bari, Basawon Singh and Swami Sahajanand Saraswati (he broke from Mahatma Gandhi in 1934 and led the Kisan Sabha in its own course)³⁸, among a host of others. Though both she, and by implication Ravinder Kumar (whom she is quoting) are incorrect in the periodization of “hegemony of propertied classes”, «By the 1930s upper and middle class interests had crystallized

36 *Ibid* at p. 90.

37 *Ibid* at p. 98.

38 *Walter Hauser* (Trans. and ed.) / *Kailash Chandra Jha*, *Culture, Vernacular Politics, and the Peasants: India, 1889-1950* (An edited translation of Swami Sahajanand Saraswati’s *Mera Jivan Sangharsh – My Life Struggle*), New Delhi 2015, pp. 413-417.

within the movement in a “manner which ensured that the lowly class, urban and rural, participated in nationalist agitations only under the hegemony of the propertied classes.”³⁹ Congress top leadership had always constituted that of moderate constitutionalists, and even in its moments of expansion of its support base amongst the masses of people, like with the efforts of “extremists” like Lal-Bal-Pal (Lala Lajpat Rai – Bal Gangadhar Tilak – Bipin Chandra Pal) or Gandhi’s mass movements from 1920s onwards, the top leadership were constitutionalists wedded to the democratic political processes which are always incremental and graduated rather than some radical revolution of France (1789) or Bolshevik revolution of Russia or the Communist Revolution of China which all slipped into dictatorships of either charismatic individuals, or bureaucratic elites or party elites. Such was neither the intention nor the programme of India’s top Congress leadership and they were wise in doing so, which despite numerous challenges, has kept India’s democratic structures functioning so far. In the author’s accepted usage, the leadership of Congress was always held by the “propertied classes” of landlords and professionals or the “intellectual elites” even when they were ideological (Vilfredo Pareto, Gaetano Mosca)⁴⁰, but it does not by itself make it intrinsically wrong or unacceptable so long as it is a democratic and peaceful process and takes into account the interests of everyone in a deliberative process which actually was done by the CAI.

What the author could have done is how in political theory terms all or most of the rights mentioned in DPSP could be subsumed in the fundamental justiciable rights (Part III of the Constitution of India) for “fundamental rights effectiveness”⁴¹ (Peter Häberle) which would have given conceptual weight to jurists (like right to life and liberty – Art. 21 – cannot be had without public health, the lack of which, we have seen disastrous consequences in the ongoing pandemic – COVID 19 challenge – and public education to have a healthy, effective and educated workforce – a point highlighted by Amartya Sen quite often, – to increase our economy, which would then increase our social security base to have better fundamental rights effectiveness) and policy guidelines to legislators and administrators rather than ideological rhetoric and lamenting by the rivers of Babylon which might be

- 39 *Neera Chandhoke*, The Antecedents of Social Rights in India (Chapter 4), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 97-98.
- 40 For more, see: *Vilfredo Pareto*, *The Rise and Fall of Elites: Application of Theoretical Sociology*, New Brunswick, NJ 2017; *Gaetano Mosca*, *The Ruling Class (Elementi di Scienza Politica)*, New York 1939. This circulation and perpetuation of elites as coded in law tuned to achieve different ends (equality) has been explored recently by *Katharina Pistor*, *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton 2019.
- 41 *Peter Häberle*, *Fundamental Rights in the Welfare State*. Second Co-report of Professor Dr. Peter Häberle, Marburg on Lahn (originally published in 1972 as: “Grundrechte im Leistungsstaat”, translated from German by Dr. Thomas Rittler (Attorney at Law)), in: Markus Kotzur (ed.), *Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters*, Baden Baden 2018, pp. 17-128.

done with good intentions and nobility of a poetic heart but essentially and effectively to no constitutional-political avail.

The fifth essay in the volume is by Gautam Bhatia titled, "The Conservative Constitution: Freedom of Speech and the Constituent Assembly Debates".⁴² He begins by saying, «The framing of India's Constitution is popularly considered to be a transformative moment [...] The crowning glory of the constitution-making process, which reflects this transformation, is Part III: the fundamental rights chapter. Guaranteeing core civil and political rights such as the right to freedom of speech and expression, life and personal liberty, and equality before law, Part III of the Constitution appears to place the autonomous, self-determining individual at the heart of the Constitutional order. Nonetheless, the rights guaranteed by Part III are not absolute. They are subject, in many cases, to "reasonable restrictions".»⁴³ The author correctly identifies "popular sovereignty" and "non-discrimination" as the nature of transformation that the Constitution had brought about in Justice Vivian Bose's understanding of it in *Virendra Singh v. State of Uttar Pradesh* [(1955) 1 SCR 415] guaranteeing right to property, invalidating the state's claim of expropriation under "Act of State" Doctrine.⁴⁴ While the Punjab High Court in *Tara Singh Gopi Chand v. State* [(1951) Crim. L.J. 449] held sedition – i.e. spreading "disaffection" against the state – to be violative of the freedom of speech and expression guaranteed under the constitution; the Supreme Court of India overturned it in *Kedar Nath Singh v. State of Bihar* [(1962) Supl. (2) S.C.R. 769] where it upheld the constitutionality of sedition «every state, whatever its form of Government, has to be armed with the power to punish those who, by their conduct, jeopardize the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public order." Thus, the rationale of transformative nature of the constitution which the author draws from the right to freedom of property he applies it to right to freedom of speech and expression, with perhaps a preference for allowing for sedition or seditious speech because it has been dispensed in its country of origin (England) but continues in India from colonial to post-colonial times reflecting not just the conservative nature of the judgements of Indian courts but the conservative nature and intention of the framers of the Indian constitution itself through the CAI. Then he puts a third category of upholding constitutionality of obscenity laws by the Supreme Court of India in *Ranjit Udeshi v. State of Maharashtra* [(1965) 1 SCR 65] and film censorship under Cinematograph Act, 1952 in *K.A. Abbas v. Union of India* [(1971) 2 SCR 446].

He correctly identifies, «These three examples are part of a broader, almost uniform, trend. In the sixty-five years of its existence, the Supreme Court has struck down exactly

42 *Gautam Bhatia*, The Conservative Constitution: Freedom of Speech and the Constituent Assembly Debates (Chapter 5), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 103-129.

43 *Ibid* at p. 103.

44 *Ibid* at p. 104.

one speech-restricting colonial legislation, while upholding pre-censorship of the press, the blasphemy law, the sedition law, the obscenity law and the executive's power to prohibit assemblies and ban books». ⁴⁵

Like the Supreme Court is incorrect in following the same line of reasoning to uniformly stifle the transformative intention as well as understanding of the framers in all the above mentioned instances, the author is also misplaced in his judgment of categorizing and clubbing them altogether (from property rights to obscenity laws and the like). They all require individual treatment and assessment under Indian contemporary conditions with our own reasonings and drawing from other legal systems on our own terms and methods of interpretation. Like the reasoning for defending the legitimacy of a democratic constitutional state (India in our case) is very much the accepted constitutional doctrine, so is the idea of colonial difference, where the colonized subject is either a savage or a child requiring tutelage by a colonial master, is abhorrent to post-colonial India. Therefore, in terms of cultural constitutionalism, obscenity laws are laughable for a civilization which wrote the first extant sex-manual (*Kamasutra*) in the world and perhaps invented the first sex toys and did not shy from depicting sexual love in all its forms on its temples and worship the *phallus-coitus* as a sign of natural divinity and perpetuity of the human race; where questioning the absolute itself (equally applicable for believers, non-believers and agnosts) is valid as part of critical reasoning drawing from the *Nasadiya Sukta* of the *Rig Veda* itself, thus warranting nothing as blasphemous in the Indian tradition; with even the *Rakshashas* (those representing evil) having freedom to express their point of view themselves in *Bharata's Natyashastra* demands removal of pre-censorship of the press and under no circumstances should a book be banned. Therefore, Hicklin test can be replaced by *Kamasutra test* for obscenity; *Nasadiya Sukta* test can be applied for blasphemy, pre-censorship of press and for books; and *Natyashastra test* can be applied for freedom of press and books.

What certainly requires a much more careful and deeper examination is the sedition law (and assemblies) which might have implications on other rights but not always (depending on the circumstances of the case) especially when they are accompanied or invariably expected to accompany overt actions of violence or adversely affecting the "public order". According to the author, if on the one hand, the makers of Indian constitution might have betrayed "conservative" tendencies and arguments regarding free speech "considering the circumstances", he on the other, displays ideological positions with his excessive reliance on the lone communist member of CAI Somnath Lahiri's arguments. Let us try and analyse the circumstances as identified by some of the proponents of such restrictions of free speech as quoted by the author, but much too briefly, without offering details, or going into the details as he did for Lahiri, «In his response to Lahiri, for instance, Prof. N.G. Ranga argued that the reason for restrictions was to ensure that "people who believe in liberalism at one end and communism at the other will not be enabled to take advantage of these rights to pave the way for totalitarianism." Indeed, in responding to Lahiri's suggestion that

45 *Ibid* at p. 105.

the word "security" be replaced with the narrower "defence", Patel effectively accused him of acting in bad faith, with the intention of hamstringing the government in its attempts to counter internal chaos. Shri Hanumanthaiya noted that "we are faced, within our own society, with elements who want to take advantage of those rights in order to do violence to men, society and laws."⁴⁶

India *suffered/was suffering partition* based on medievalist-religious-obscurantist (Nehru's preferred adjectives) political views of the Muslim League in order to create an Islamic (sectarian) republic with hundreds of thousands dying due to communal riots and one of the most tragic forced migrations of millions in recent history⁴⁷ (with Sir Cyril Radcliffe, with characteristic arbitrariness, marking the border between India and a future Pakistan in less than six weeks⁴⁸). One of the characteristic byproducts of colonial modernity has been a cycle of communal riots throughout the sub-continent,⁴⁹ given much impetus by aligning the Non-Cooperation Movement with the Khilafatists (curious demand of revival of Islamic Caliphate in Turkey by Indian feudal-religious Islamic "elites" when Turks themselves disbanded it under the leadership of Atatürk) and "genocide" and forced conversions of Hindus in India's Malabar coast (passed off as some kind of "leftist revolution" against Hindu landlords when it was nothing but a forerunner of Islamic Terrorism), with its impact felt across the sub-continent. The communists played a dubious role in Indian independence

46 *Ibid* at pp. 116-117.

47 Arun Thiruvengadam writes, "The immediate effect of the Indian Independence Act 1947 was to make the Constituent Assembly also the Dominion Parliament. Members of the Assembly were simultaneously converted into parliamentarians and they spent half of their time dealing with day-to-day matters of government. Being seized of immediate problems inevitably affected their long-term constitutional vision, especially on crucial issues such as the powers that the executive and the Parliament should have to restrict the rights of citizens. Awareness of the broader context at the time will help us situate their decisions better. [...] The subcontinent had been roiled by communal riots since August 1946. After starting in the eastern city of Calcutta, the riots had spread westwards through the State of Bihar, and to the capital in Delhi. By 1 November 1946 the death toll across India had reached 5,000. Once partition was effected in August 1947 the subcontinent bore witness to 'the greatest mass migration in history': between 10 and 15 million people emigrated in response to the physical dismembering that led to the creation of the new State of Pakistan out of parts of the eastern and western perimeters of British India. [...] erstwhile estimates of the killings put the deaths at 1 million, while more recent historians believe that the death toll reached 2 million." Cf. *Arun Thiruvengadam, The Constitution of India: A Contextual Analysis*, Oxford 2017, pp. 29-30. Bimal Prasad writes, "These unprecedented migrations and killings created a very difficult situation for the new governments and while they did their very best, suffering persons failed to get timely or adequate relief. The long-term impact of such unfortunate incidents on such a vast scale in shaping the attitudes of the peoples of the emerging nations towards one another was not at all favourable to the establishment of friendly relations between them. That was in any case difficult in view of the bitterness created on both sides of the divide in the wake of the rise and growth of the Pakistan movement and the strong opposition to it by the Hindus and Sikhs." Cf. *Prasad*, note 12, p. 559.

48 *Leonard Mosley, The Last Days of the British Raj*, London 1961, pp. 193-200.

49 *Ashis Nandy, An Anti-secularist Manifesto*, India International Centre Quarterly 22 (1) (1995), pp. 35-64.

movement, on the one hand, and creating sporadic unrests on the other (in doing this, they must be distinguished from the socialists and the Congress Socialist Party whose leaders played a remarkable role in India's freedom struggle as also in improving the lot of labour, peasant and students in the country, both pre-and-post independence)⁵⁰, creating a genuine concern with the members of CAI who wanted to create a liberal constitutional republic and not some form of communist dictatorship or such a "weakling of a state" like the Weimar Republic (even though the author discounts this possibility without telling why) which would soon slip into some form of authoritarianism. Besides, one has to understand that the western world, and quite specifically the United States, was worried about communist dictatorships spreading through the world when it decided *Gitlow v. New York*⁵¹ [286 US 652 (1925)] (Stalin was comfortably saddled in USSR then, though by the time *Gitlow* was decided in 1925, it did not betray the paranoia of the McCarthy era, immortalized by Charles Chaplin in his film "*A King in New York*") when there was no major communist movement or membership in the United States. Whereas, India got partitioned by Islamic separatists in 1947 (making religion a constant prickly factor) and had a Communist party and leadership which got its commands from either Moscow or

- 50 The leaders like Narendra Deva, Abdul Bari, Basawon Singh, Achut Patwardhan, Yusuf Meherally, Rambriksh Benipuri, Yogendra Shukla and many others who were socialists (many of whom were associated with the Hindustan Socialist Republican Army) and associated with the Congress Socialist Party had often suffered years of incarceration, British brutality, in their struggle for India's independence. Both Congress and later Congress-combined with communist historians just ignored their contribution.
- 51 "Benjamin Gitlow was a member of the 'Left Wing Section' of the Socialist Party of the United States. [...] The Manifesto called for the establishment of 'revolutionary socialism' through military means such as mass industrial revolts and mass political strikes, ending with the overthrow of the parliamentary state, and the establishment of the proletarian dictatorship. Gitlow was tried and convicted under New York's Criminal Anarchy Law, which penalized advocating the overthrow of organized government through force, violence or other unlawful means. The conviction was upheld on appeal. Before the Supreme Court, Gitlow's lawyers argued that the Manifesto's publication had not resulted in any public disorder, and nor had it been shown that there was any significant likelihood of public disorder. The criminal anarchy statute had been unconstitutionally applied by the lower courts, because they had failed to limit it to factual situations where there was some likelihood of unlawful consequences to speech, and instead penalized mere 'utterance....of doctrine'. [] The Supreme Court disagreed. It distinguished between an abstract or academic discussion about unlawfully overthrowing the government, and 'advocacy of action for accomplishment of that purpose'. It then cited the paragraph that Ambedkar quoted in his speech – that the freedom of expression did not mean an 'unrestricted and unbridled license' to every use of language. The disturbance of public welfare and public peace, and the corruption of public morals, were all legitimate goals which the state could invoke to curtail speech. In particular, that court noted that 'utterances endangering the foundations of organized government' could be punished for the 'imperative' reason that 'these imperil its own existence as a constitutional state...the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.'" Cf. *Gautam Bhatta*, *The Conservative Constitution: Freedom of Speech and the Constituent Assembly Debates* (Chapter 5), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, p. 108.

Beijing (unlike the Communist Party of Italy which grew organically, had local leadership which was also wedded to Italian issues and concerns, both in conceptual-theoretical terms as well as in matters of practical politics) and the ongoing civil war in Burma (which has been extremely politically unstable with bouts of military dictatorships until today) and China (with one party dictatorship).⁵² Additionally; the violent left-leaning terrorists, quite paradoxically called Maoists (also called Naxalites, sometimes even glamorized) do not just make speeches for overthrowing the democratic-constitutional state of India; but kill Indian citizens every now and then; set up kangaroo-courts and award death to perceived state sympathizers or informers; blow up schools, health centres, roads and other infrastructure of the poorer parts of a poor country with hard-won public infrastructure plagued by resource-seepage, cost-overruns and corruption (who are then fetishized in European and American campuses brandishing their Kalashnikovs and other sophisticated weaponry bring about “violence and destruction”, “revolution” in the other words in a dirty-filthy third world – their former colony). The Red Army Faction or *Baader-Meinhof* Group in Germany or Red Brigades or *Brigate Rosse* in Italy (not comparable in scale, impact, length of time and violence of the Naxal terrorists), had to be banned and forcefully suppressed as they intended to overthrow the democratic constitutional state. It is quite curious how the author overlooks these glaring facts, which do encourage the state and its institutions, including the judiciary to put restraints on free speech based on “political creed” or “religious” persuasions which have an ongoing impact of violence and killings which are constantly bleeding India of its citizens and resources. A third factor is how United States despite six decades removed from civil war gave *Gitlow* as a judgment – on the other hand, it is actually the balance and equipoise of our constitution makers who, despite all constraints, formulated widespread justiciable rights under Part III and DPSP under Part IV of the Constitution of India. On this, the founding Chairperson of CAI, generally acknowledged as a moderate constitutionalist, Dr. Sachchidanand Sinha, had once written how the Congress should not have accepted partition even at the cost of Civil War like for the US to evolve into a united, liberal, constitutional democracy! All these require consideration before giving a concrete answer or a well-considered position on sedition law (Sec. 124-A of the Indian Penal Code, 1860) accompanied with Sec 153-A (which makes it an offence to promote enmity between different groups, on grounds of religion, race, place of birth, residence and language), Press Act 1931 (section 4), different public safety acts, criminal procedure, and perhaps even UAPA.

The next article (sixth) in the volume by Arudra Burra titled “Freedom of Speech in the Early Constitution: A Study of the Constitution (First Amendment) Bill”⁵³ addresses

- 52 Gautam Bhatia cites Seth Govind Das’ concern for the ongoing civil war in Burma and China. See: *Gautam Bhatia*, note 52, p. 119.
- 53 *Arudra Burra*, Freedom of Speech in the Early Constitution: A Study of the Constitution (First Amendment) Bill (Chapter 5), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 130-162.

some of the concerns raised by the reviewer in the previous paragraph, when he writes, «“No civil libertarian has ever denied that the state may sometimes curb speech in the interests of public order. The Supreme Court’s interpretation of Art 19 (2) would not allow such restrictions unless the law in question was directed at undermining the foundations of the state. This would exclude a large range of cases in which restriction would surely be appropriate.”⁵⁴ [...] “I think it is fair to say that this galaxy of stars (all the major members of CAI) would have made sure to have included a public order exception in the original Constitution had the issue come up.”⁵⁵ [...] “To understand the parliamentary debates around the First Amendment we need to understand more clearly what background political factors might have been driving some of the alliances and responses whose expression is evident in the debates, keeping in mind the political turbulence of the times. Doing so need not lead to a reductive argument from political interest to ideology; after all, the causal link might just as well go the other way. What is required is some theoretical way of integrating the political history of these debates with the text of the debates themselves.”⁵⁶»

Article 19 (2) originally read, «Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State».⁵⁷

*«The amending clause in the Bill as originally introduced in Parliament read as follows (words in boldface indicate the major changes sought to be made): 3. Amendment of Article 19 and validation of certain laws. – (1) In article 19 of the Constitution – (a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed to have been originally enacted in the following form, namely: - “(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, **in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, contempt of court, defamation or incitement to an offence.**”»⁵⁸*

This draft bill was amended by the Select Committee, which made the most crucial intervention in the form of adding “reasonable” before “restrictions” (which gave the Supreme

54 *Ibid* at p. 153.

55 *Ibid* at p. 154.

56 *Ibid* at p. 156.

57 *Ibid* at pp. 130-131.

58 *Ibid* at p. 132.

Court of India a leeway in terms of intervention through interpretation), and the amended bill read, «3. Amendment of article 19 and validation of certain laws.-(1) In article 19 of the Constitution,- (a) for clause (2), the following clause shall be substituted, and the said clause shall be deemed to always have been enacted in the following form, namely:---“(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, including, in particular, any existing or other law relating to, contempt of court, defamation or incitement to an offence.”»⁵⁹

Given the then “prevailing circumstances”, and even “continuing challenges to the overthrow of the constitutional order” itself being faced by the Indian republic today, as far as the Constitution (First Amendment) «sought to introduce three new exceptions in 19(2), covering public order, incitement to an offence and friendly relations with foreign states; it also sought to remove the qualifiers relating to undermining the security of the state or tending to its overthrow»⁶⁰, Burra is, therefore, correct in stating, «arguments from colonial continuity are limited because they can be used to defend substantive positions both for and against the same claim.»⁶¹

The concerns of how the Provisional Parliament (the author is correct in not interchanging it with Dominion Parliament, as held by Austin, because India ceased to be a dominion and indeed became a republic after the adoption of the constitution; one can even argue that the CAI could be called Provisional Parliament soon after the India Independence Act came into force on 15 Aug, 1947 itself⁶²) was enacting the first amendment opposed by few members on grounds that elections were due soon, and with universal suffrage, the newly constituted first parliament should take up the amendment.⁶³ The amendment was passed with an overwhelming majority and opposition to it was «blunted to some extent because of the introduction of the term “reasonable”. The motion passed on 31 May with a margin of 246 to 14»⁶⁴ and the «Bill as a whole was passed with a majority of 228 to 20. Although

59 *Ibid* at p. 147. Article 19(2) as finally amended and incorporated in the Indian Constitution is, «(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India (Instituted by the Constitution 16th Amendment Act, 1963, S. 2)] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.» cf. MAHENDRA PAL SINGH (ed.), V.N. Shukla's Constitution of India, Lucknow: Eastern Book Company, 2017 (13th edn., 2021 supp.), p. 128.

60 *Burra*, note 54, p. 132.

61 *Ibid* at p. 155.

62 *Ibid* at pp. 135, 158 (fn. 13).

63 *Ibid* at pp. 139-147.

64 *Ibid* at p. 151.

Rajendra Prasad had his doubts about the advisability of assenting to it, it became law on 18 June, as Act 37 of 1951.»⁶⁵ The author is also correct in his reading «Fears about executive overreach and misuse were appropriate when Parliament was enacting laws which gave specific powers to the executive: but the First Amendment Bill did not give the executive any new powers, and no such law was then being contemplated.»⁶⁶

The seventh article logically follows the sixth titled, “Between Inequality and Identity: The Indian Constituent Assembly Debates and religious difference, 1946-50” by Shabnum Tejani.⁶⁷ In her article, she has ferreted out the details of the evolving idea of “secularism” in the CAD, and the building of a modern constitutional state with equal citizenship eventually delinking of “minorities” from “backward” or “depressed classes” (as disadvantaged castes of Hindus were then referred) to bring about social reforms within Hindus “intra se” (for which it was “singled” out) and to develop equal citizenship among different communities “inter se”. Despite all constitutional safeguards regarding “minorities” in its time (1946-1950) (quite spectacular as compared to any of the constitutional democracies) and in contemporary times, she finds them inadequate and perhaps pines for “communal reservation”.

Communal electorates (Muslim representatives would be selected by Muslim electorates), were introduced by Morley Minto reforms in 1909. This colonial policy played up on the religious differences and the harmony of an unequal solidarity which existed during rule by different Islamic dynasties before the coming of the British, was gradually loosened, the wedge was widened and the divide was constitutionally stoked and normalised.⁶⁸ Muslim League’s politics and policy latched on to this constitutional anomaly which eventually became a Frankenstein monster and led to India’s partition and continuously strained relations between two countries (Democratic Republic of India and Islamic Republic of Pakistan) and the two communities of Hindus and Muslims. The wily British wanted to create the same divide inter-se among Hindus with caste conflicts and potentiality of civil war by creating the same kind of separate electorates for the oppressed classes of Hindus, referred to as Harijans by Mahatma Gandhi and Dalit Hindus (getting constitutional protection and reservation as Scheduled Castes and Scheduled Tribes) in the contemporary discourse.⁶⁹ The British policy becomes suspect because its own handling of Catholic and Irish minorities, treatment of Jewish and Romani minority, widespread racism against

65 *Ibid* at p. 153.

66 *Ibid* at pp. 146-147.

67 *Shabnum Tejani*, Between Inequality and Identity: The Indian Constituent Assembly Debates and religious difference, 1946-50 (Chapter 7), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 163-180.

68 See *Bimal Prasad*, *Pathway to India’s Partition Vol. II: A Nation within a Nation 1877-1937*, New Delhi 2000.

69 For more, see: *Narayan Desai*, *My Life is My Message*, Vol. III Satyapath (1930-1940) (Translated from the original Gujarati by Tridip Suhrud; Foreword by His Holiness the Dalai Lama), New Delhi 2018.

“coloured” and “black” people (with laws enacted as late as 1970s but with continued “systemic racism” until today) really called into their benign motives for “minority rights” by creating, nurturing and pandering to a fascistically sectarian party of Muslim League. Muslim League’s politics and India’s partition foreclosed the possibility of communal electorates; minority rights adequately and extensively safeguarded under the constitution (Arts. 25 to 30; plus the provisions regarding Anglo-Indian minority – Arts. 366(2), 331, 333, 334, 336, 337, 338) sans communal electorates. India’s partition to carve out a theological state out of it, paradoxically called Pak-sthan – land of the pure – severed violently from the land of the “impure and idolatrous Hindus” (in the view of Islamic “elites” who created Pakistan), calls into question Tejani’s conclusion, «a consideration of the CA debates shows that religious minorities argued against their own marginalization, albeit unsuccessfully, which they saw as political, social and educational. Perhaps, then, it was the failure to address the marginality and exclusion on the part of religious communities that was written into the constitution, rather than the failure to privatise religion, that has laid the ground for subsequent claims for equality to be articulated in the language of community»⁷⁰; though she is correct in her estimation «that “religion” was always a problem requiring a solution.»⁷¹ The secular solution to the religious problem seems to have outlived its utility. If the constitutional state of India has to remain not just for itself, but for the equality of citizenship living in a democratic republic which it espouses through its constitution, then communal reservation as a matter of state policy can *never be*.

The eighth article is by Kalyani Ramnath titled, “We the People”: Seamless webs and social revolution in India’s Constituent Assembly Debates’.⁷² She has given an overview of “We the People” as productive lives, as antecedents, as incidents, as exclusion to create the “seamless web” of social revolution in the CAD. She has used “we the people” as an effective and efficient constitutional construction to bridge the gap between Part III (fundamental rights) and Part IV (DPSP), to provide a template for the functioning of the modern republic, which was then taken up by the Supreme Court in later judgments, for example in the environmental law jurisprudence. “We the people” becomes the location of intersectionality of fundamental rights and directive principles governing the functioning of the state including judicial pronouncements.

The ninth and the last article in the volume is by Manjeet Ramgotra titled, “India’s Republican Moment”.⁷³ The author sees India’s Republican Moment through Nehruvian

70 *Shabnum Tejani*, Between Inequality and Identity: The Indian Constituent Assembly Debates and religious difference, 1946-50 (Chapter 7), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, p. 178.

71 *Ibid.*

72 *Kalyani Ramnath*, “We the People”: Seamless webs and social revolution in India’s Constituent Assembly Debates’ (Chapter 8), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 181-195.

73 *Manjeet Ramgotra*, India’s Republican Moment (Chapter 9), in: Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, London, New York 2018, pp. 196-221.

republican vision, «The principles underpinning Nehru’s call for a republic were threefold. First, it opposed both monarchical and imperial rule. Second, it established the principle of popular sovereignty whereby “all power and authority...are derived from the people” and third, it would create a state that would participate with other equal states in the international order. To Nehru, “a free India can be nothing but a republic”».74 The threefold ideas of Nehruvian republicanism got enshrined in the Indian constitution, «the Objectives Resolution which stated that the constitution be framed for a sovereign Indian republic was formally passed on 22 January 1947; and the Indian Constitution adopted on 26 November 1948 declared: “We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic...adopt, enact and give to ourselves this constitution”».75 Nehru also saw republicanism as a means to achieve national unity and remove the sway of colonially protected princely states holding hostage their respective populations to bring about equal Indian citizenship with universal suffrage having an elected President as its first citizen. Nehruvian republicanism rested on constituting a Constituent Assembly76 with its transformative potential including social and economic rights and peace in the world among republican states, thus extending the Kantian frontiers from beyond Europe and covering the whole world.77

Despite the difficulty in situating Nehru in any philosophical school, the author identifies five components of Nehruvian republicanism78: (1) Political Republicanism conceptualizing the republic as an independent entity opposed to external domination or imperialism; (2) Social Republicanism, drawing from the ideas of French Revolution, where republics would oppose arbitrary and absolute power, and popular sovereignty would rest with the people based on universal suffrage; (3) Unity based on equal citizenship and secularism and opposed to communalism, social and gender inequality; (4) Territorially integral republic – independent from any external power; (5) Non-aggressive and non-expansive republics ought to pursue cooperative relations and create an international community and institutions to further the ends of peace and security. The author by exploring Nehru’s writings, speeches and works like *Glimpses of World History* and *Discovery of India* has put the great statesman’s republican ideas in context drawing from best of both Indian and

74 *Ibid* at p. 196.

75 *Ibid*.

76 *Ibid* at p. 198.

77 *Ibid* at p. 216. The German Constitutionalist Peter Häberle gives this idea a concrete shape in constitutional theory for furthering peace. See: *Peter Häberle*, Die „Kultur des Friedens“ – Thema der universalen Verfassungslehre, Berlin 2017. His ideas in constitutional theory and cultural constitutionalism leading to world peace have been taken forward globally in a recent work (among many which have come earlier), *Markus Kotzur / Bernhard Ehrenzeller* (eds.), *Verfassung – Gemeinwohl – Frieden* (Nachgedacht aus Anlass des 85. Geburtstages von Peter Häberle), Baden Baden 2020.

78 *Ramgotra*, note 74, pp. 199-200.

Euro-American intellectual tradition to create the democratic constitutional state of Indian Republic.