

Introduction

Decolonization and Constitution

If the world is to be lived in, it must be founded.

—Mircea Eliade, *The Profane and the Sacred*

Why is the originality so readily granted us in literature, so mistrustfully denied us in our difficult attempts at social change?

—Gabriel Garcia Marquez, Nobel Lecture, 1982

Standing on this sword's edge of the present between the mighty past and the mightier future, I tremble a little and feel overwhelmed by this task.

—Jawaharlal Nehru, Constitutional Assembly Debates,
13 December 1946

After the image comes the institution. Images of freedom, in their splendid multiplicity, had been articulated and organized since the beginning of the century. By mid-century, despite the best attempts of imperial regimes, they became impossible to ignore. So, the end of the Second World War began a two-decade-long process whereby nearly half of the world's population liberated itself from formal colonial domination. Now came the time to realize the free futures that had thus far only been imagined: to constitute the postcolony. Speaking at one of the early meetings of the Indian Constituent Assembly on the eve of the country's formal independence, Jawaharlal Nehru said, 'Words are magic things often enough but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion.'¹

The moment of postcolonial transition called for translating the suppressed aspirations of the long anticolonial decades into concrete,

tangible, words – words that would construct the institutional architecture of the liberated postcolony: the constitution, which, Nehru said, ‘feebly seeks to tell the world of what we have thought or dreamt of for so long, and what we now hope to achieve in the near future’.² The language of India’s first prime minister, mixing the soaring with the halting, captured the dynamic of hopes and anxieties, dreams and disquiets that marked the postcolonial institutional moment.

We are a long way from those dreams, and even the disquiets are now set to a different register. While a much-discussed term again, decolonization today is thought of mainly as a discursive and epistemic project.³ The discursive has always been a crucial ground on which anticolonial resistance was mobilized. However, in the middle of the twentieth century, the word ‘decolonization’ signified wide-ranging political and economic projects that went far beyond the discursive to touch the institutional and the material. First used by colonial administrators managing the simultaneous dissolution of formal European empires, the dry juridical nomenclature was given political life through its association with more dramatic phrases like ‘liberation struggle’, ‘self-determination’, and ‘independence’.⁴ To decolonize, in this politicized sense, meant organizing institutions of power against their existing colonial arrangements. That project had two parts which unfolded over the short twentieth century:⁵ to unmake the colonized present and to make the postcolonial future.⁶ Like the Third Estate from which it took its name, the Third World sought to dismantle the colonial *ancien régime* and constitute a new world on its ruins.⁷ The second – arguably more challenging and fraught – part of that project has faded from our collective political memories, partly due to it seeming anachronistic in our re-globalized times, partly due to the failures of those projects to realize their promises of emancipation. Yet they remain, like sedimentary striations on rocks, as institutional traces of the ambitious horizons of what was decolonization.⁸ Hope and anxiety accompanied their beginning. They will eventually give way to improvisations and exhaustions. That project, in both those keys, is the subject of this book.

The site of our exploration is the making of the Indian constitution. Independent India’s constitution was drafted by the Constituent Assembly, over three and a half years, by its 299 members.⁹ It was convened under the authority of the British Crown, but subsequently did its work autonomously, without any influence or intervention.¹⁰ The result was extensive deliberations, debates, and reports, resulting in the world’s longest national constitution

comprising 146,000 odd words.¹¹ In their technical verbiage and cavilling on legalese running over nine large volumes, these deliberations are not welcoming. But they remain an extraordinary archive for historians of political thought. Conducted over the tumultuous years of transition, they registered the conflicts outside the assembly and the alliances within. They demonstrate the concrete challenges of decolonization in discussions ranging from international organizations to the regional variations in land tenancy. These were, in other words, the most comprehensive and thorough textual records of the project of constructing a new order on the ruins of empire. Such records are not unique to India. The decades of decolonization were the most prolific era of constitution making.¹² Yet constitutional theory and histories of decolonization have rarely crossed paths. The debates in the Constituent Assembly have not added much to our understanding of decolonization, and vice versa, the tumultuous rhythms of decolonization did not register in our analytical readings of the debates or of the constitution itself. One was found in the archives, the other in judicial interpretations.¹³

The first wager of this book is that the Constituent Assembly debates contribute to a political theory of decolonization; and conversely, an analysis of the specific socio-historical conjuncture of decolonization helps us construct a theory of the postcolonial constitution. In other words, constitutions can tell us something about decolonization, and decolonization can tell us something about constitutions. Each of those argumentative threads can sustain (perhaps even demand) their individual narrative arch. That is, their own book: the former being a book for theorists and historians of decolonization, the latter a book for constitutional theorists and comparative political scientists. The second wager of this book is that these two argumentative threads can (and even need to) be explored together, within the same narrative arch. The braiding of the threads that this book attempts is not only a formal choice, it is also an argument in itself. It becomes evident from reading the debates that even the thick walls of the assembly could not keep apart the normative and the historical, the juridical and the political. The conditions of postcolonial transition did not allow even the presumption of such a separation. Hence, the constitution makers self-consciously tried (with varying degrees of success) to bring them together: to domesticate the unruly demands of transition and animate the disciplined formalism of constitutionalism. Separating out these two strands (while a service to the cause of brevity) would have led to the loss of the specificities of that moment. Therefore, I try (with similarly varying degrees of success) to mirror the braided form of their deliberations through

my braided narrative. The central argument of the book emerges from these dual themes that demand this narrative form: read as an archive, the records of the constitution-making process tell us that the postcolonial transition was an attempt to legalize the revolution.

To Legalize the Revolution

In 1947, Indians won their freedom from two centuries of colonial rule through one of the largest mass movements in history. The effect was felt across the British Empire, which was dependent on the army, labour, and capital that India provided.¹⁴ In international fora, India assumed a role as the leading spokesperson for anti-imperial causes.¹⁵ India's independence proved to be one of the most significant events in the decades-long unfolding of decolonization. Yet hardly anyone belonging to the Indian National Congress (the party that led the anticolonial struggle; hereafter, Congress), or the scholars and scribes who wrote about the movement, used the word 'revolution' to describe what they did or saw. The word that has come to stand in for an epochal shift in the life of a polity is conspicuous in its absence from the historical consciousness of Indians. Perhaps the most paradigmatic case of twentieth-century decolonization left behind no 'memory' or 'spirit' of the revolution.

However, the members of the Constituent Assembly, meeting in the magnificent legislative hall built by the colonial government, frequently spoke of revolutions. Revolutions are rarely far from anyone's mind when constitutions are made. The term appeared several times in the deliberations of the Constitutional Convention in Philadelphia, which gave us the most influential of all modern constitutions. There it appeared in a particular temporal guise. The reference was – in James Madison's phrase – to the 'late revolution':¹⁶ an event of the past, which has brought about the conditions for the making of the new constitution, and the principles which that constitution should institutionalize; a revolution that has now been definitively ended by the constitution. In Delhi, they were not talking about what happened in the past. Every time one of the assembly members spoke of revolution(s), the reference was to an uncertain and troublingly near future. The Indian constitution makers found themselves not at the end but on the 'eve of revolutionary changes'.¹⁷

The anticolonial mass movement was the result of a contingent and fragile alliance between the urban elites and the largely peasant masses. The contingency was their shared unfreedom under colonial rule. The fragility was the outcome of the fact that the departure of the British did not in itself change the unequal, hierarchical, and exploitative social conditions in which the vast majority of Indians lived. Even if directed against an alien enemy, mass mobilizations have an inherent tendency for radicalization. The militant energy of the masses had fuelled the ability of the Congress to credibly challenge the colonial state. At the same time, popular political expressions were frequently directed against Indian elites who exploited their putative fellow travellers on the nationalist journey. As a result, the anticolonial struggle generated multiple insurgent images of freedom which the Congress could hope to harness, but never fully control. Over the last decade of colonial rule, the Congress began to transform itself from a party of mass mobilization to a party of government. The corridors of the statehouses, rather than streets and barricades, became the staging ground for the last act of elite anticolonial politics. And from such corridors, the streets appeared treacherous. The success of the mass mobilization made a postcolonial government an inevitability, while that same mobilization generated unease in the minds of the governors in waiting. So, the Congress accepted a transfer of power in an orderly fashion under the immaculate legality of the British parliament, betraying several of their stated principles.¹⁸ Consequently it inherited in near pristine condition the formidable apparatus of the colonial state – with its administrators and its army. ‘Through a fortunate or unfortunate chance, it turned out that it was not through a bloody revolution that we have worked out our emancipation,’ the Congress president Pattabhi Sitaramayya said in the Constituent Assembly.¹⁹ There was no revolution in India. At least not yet. On that ‘not yet’ hinged the entire project of postcolonial constitution making.

In its various iterations, constitutional theory has been a theory of closures. It has influentially suggested a narrative for modern politics. Revolutions bring an end to the old regime and generate foundational norms for a new world. They are then followed by a constituent moment, which institutionalizes these new norms, thus inaugurating the orderly constitutional time of everyday politics. It is a script with a clear beginning, middle, and end: revolutionary chaos, constituent moment, constitutional order.²⁰ In this script, revolutions and constitutions are related through

a specific temporal sequence and analytical distinction: crisis followed by stability, change followed by order, insurrections followed by law. Constitutions bring closures – the peaceful ever after following upheavals. They end revolutions.

In India there was no revolution to end. But there was one to be prevented. Absent from the anticolonial past, the revolution demanded a place in the postcolonial future. From where the constitution makers stood, this future ‘revolution’ had two possible incarnations. It could take the shape of a violent uprising of the disaffected masses, fuelled by inequality, exploitation, and unfulfilled aspirations for freedom, causing ‘insurrections and bloodshed’.²¹ Alternatively it could be a thoroughgoing transformation of the socio-economic conditions, carefully planned and managed. Their challenge was authoring a revolution of the second kind, to avoid a revolution of the first kind authored in the streets. The nascent postcolonial present, Nehru told his colleagues in the Constituent Assembly, was ‘something which is dynamic, moving, changing and revolutionary’. ‘[I]f law and Parliament do not fit themselves into the changing picture they cannot control the situation completely.’²² Rather than extra-legal insurrections, revolution had to mean large-scale, yet orderly change: ‘[a] peaceful transference of society,’ as Purnima Banerji defined it in the assembly.²³ The spectre of insurrection caused anxiety; planned transformation was the aspiration. ‘People seem to think of revolutions as a big war, or a big internal struggle, violent struggle,’ Nehru said. ‘Rather, revolution is something which changes the structure of the society, the lives of the people, the way they live and the way they work. That is what is happening in India.’²⁴ It had to be a revolution without a revolution. And the constitution had to be its institutional architecture. It had to legalize the revolution.

Laws and revolutions, generally speaking, do not sit well together. Revolutions do not abide by laws; laws do not authorize revolutions. Forced into an uneasy cohabitation, both the nature of the law (constitution) and the revolution (decolonization) changed. Tracking these two trajectories, concurrently, is the goal of the book, with the first corresponding to the question: what does the postcolonial transition tell us about what a constitution can and should do? The second: what does an analysis of the constitution tell us about the nature of the transition from an anticolonial past to a postcolonial future? These are the two main threads the book brings together. In simple terms: what decolonization can tell us about constitutions

and, conversely, what constitutions can tell us about decolonization. The introduction is divided along these two themes.

Decolonizing Constitutions

Constitutions are meant to bind future generations. They seek to constrain the scope of political imagination and creativity. In this attempt, constitutional theory – by which I mean the enormous body of literature on what constitutions can and should be – has arguably been more successful than any actual constitution. Actual constitutions have been made, remade, and fought over, for two and a half centuries. On the other hand, the dominant version of constitutional theory – liberal democratic in vintage and Anglo-American in origin – offers a set of stable and hegemonic conceptual coordinates, abstracted from any historical or political referent.²⁵ This version erases the scars of contestations and contingencies on actually existing constitutional histories and presents us with an idea of constitutions as a particular set of institutional arrangements and normative ideals. Roberto Unger has called this belief that our collective political and social existence has a ‘single, natural, and necessary institutional expression’, a kind of ‘institutional fetishism’.²⁶ James Tully, borrowing from Ludwig Wittgenstein, has called this uniformity a ‘craving for generality’ that suppresses the diversity of social and historical experiences.²⁷ That belief has a history.

Constitutions and American Hegemony

In an influential article published in 1962, the Italian political scientist Giovanni Sartori laid out the case for why the word ‘constitution’ had to have a single correct definition that could answer the question what constitutions ought to be.²⁸ That definition was that ‘constitutions are a means for limited government’.²⁹ ‘Constitutionalism’ or ‘constitutional’ under this definition becomes synonymous with a particular institutional matrix consisting of separation of powers, guaranteed individual rights against the state, and judicial review.³⁰ There exists an immense body of literature arguing for, against, or for a modification of this position, but its overall pre-eminence remains well established.³¹ Rather than rehearsing that debate, what interests us is another part of the article where Sartori lays out the historical conditions

of the debate. He writes, we ought to find a ‘correct meaning that we find advisable to propose’, instead of asking ‘Russians, Chinese, Egyptians, and so forth’ what they think a constitution is. By 1962, this had already become (to use his words) an ‘is’ rather than an ‘ought’ statement because ‘Americans decided the issue’.³² ‘Limited government’ as an institutional principle originated as a demand of the ascendant bourgeoisie of Europe against the absolutist monarchies and vestiges of the feudal order.³³ ‘Limited government’ as an indispensable feature of constitutional governance tout court followed America’s rise as a global hegemon in the twentieth century. Constitutionalism, Aslı Bâli and Aziz Rana have argued, was the ideological staging of the post-war American imperium.³⁴ It had been America’s self-image.³⁵ Now it sought to build a world after its own image. There was a distinct break with the formal European empires that preceded it. The old empires were self-consciously ‘enlightened despotisms’.³⁶ The new imperium created a ‘rule based liberal international order’, with its own ‘bill of rights’.³⁷ In the place of ‘civilization’, it held up liberal constitutionalism as the *telos* for the global periphery.³⁸

The intellectual effect of this new ideological constellation was noticeable in the way constitutions were studied. Chris Thornhill has noted how sociological (hence historically specific) accounts of constitutions gave way in the post-war years to a normative and prescriptive idea of constitutions.³⁹ The most influential political theorist of the time, John Rawls, wrote that ‘the idea of a right and just constitution and basic laws is always ascertained by the most reasonable conception of justice and not by the result of an actual political process’.⁴⁰ The most influential legal theorist of the time, Ronald Dworkin, called for a ‘fusion of constitutional law and moral theory’.⁴¹ The normative certainty and prescriptive legitimacy of this tradition were derived from its contrast to the new evil of ‘totalitarianism’.⁴² Totalitarianism was the mobilizing idea of the Cold War, which channelled the anti-fascist sentiments of the Second World War seamlessly into the new war against communism and delegitimized the progressive traditions within American constitutional history itself.⁴³ Viewing constitutions as political and juridical orders (plural) created by societies at particular points in their history was deemed to be too ethically ambiguous.⁴⁴ Constitutions now were an ideal set of norms and institutional attributes that granted membership to the liberal family of nations. Instead of politics creating their constitutional forms, adherence to a constitutional form made politics legitimate.⁴⁵ The legitimizing force of these norms was so great that the new West German constitution – exhibit A for

constitutionalism as an antithesis to totalitarianism – made some of them unamendable.⁴⁶

Constitutions of Decolonization

The time this consensus was taking shape also happened to be the most prolific decade for constitution making in history. After the dissolution of the European empires, the newly decolonized countries, almost without exception, adopted written constitutions. By the 1970s, postcolonial constitutions accounted for nearly two-thirds of all constitutions in existence.⁴⁷ In terms of constitutional theories or principles, however, they barely left a mark. A contemporaneous survey called these new constitutions formulaic and generic, adopted as a ‘necessary part of the formal impedimenta’ of statehood.⁴⁸ A few years later the German constitutional theorist Karl Loewenstein would propose his influential categories of ‘original’ and ‘derivative’ constitutions.⁴⁹ All the new postcolonial constitutions found themselves in the latter category. This view complemented the prevailing ‘diffusionist’ conception of decolonization – that is, the idea that institutions and norms originated from the metropole and dispersed to the peripheries over time.⁵⁰ Whether through tutelage or appropriation, the formerly colonized found the image of their emancipated selves already supplied to them by their erstwhile colonial masters. The script was already written. The point of decolonization was for those hitherto excluded to finally enter the stage, re-enacting the lines already perfected in the western parts of Europe and the northern parts of the Americas. Decolonization was a chronicle of a constitutional closure foretold. In interpreting postcolonial constitution making as an adaptive rather than creative process, its remit was limited to various case studies of comparative successes and failures.

The nascent postcolonial regime in India did not seek legitimacy by adopting certain ‘impedimenta of statehood’. It drew its legitimacy from the popular anticolonial struggle that preceded the Constituent Assembly. The assembly, in turn, spent more than three years reflecting and deliberating on their particular historical conjuncture, rethinking what a constitution can and should do. Their undertaking demanded not the wherewithal of adaptation, but the anxious labour of creation. A full account of that undertaking therefore must depart from the idea of a constitution as an established normative template. The word ‘constitution’ is derived from the Latin word *constituere* – which means to make, to create, collectively.⁵¹ It is

a verb, not just a noun. This is the meaning of ‘constitution’ that we plan to recover through India’s postcolonial transition – a creative act that demands not only our empirical but also our theoretical attention. To historicize is to undo reification, to acknowledge the specific ‘birthmarks’ of the postcolonial constitutional form. This book theorizes the Indian constitution-making experience as a way to write (to) constitutional theory from the postcolony.

Transformational Constitutionalism: A Political Theory of the Postcolonial Constitution

We need to begin by describing the problem space of the postcolonial constitution-making project. That is, ask what the questions were to which the postcolonial constitution makers sought answers.⁵² The problem space of the Indian constitution makers was not oriented around ‘limits’ or ‘constraints’. It was not about declaring the end of an extraordinary or revolutionary time. The Indian constitution makers could not afford the presumption of closure. Instead of an event of the past to be consecrated, revolution was a possibility in the future to be anticipated. Consequently, the constitution makers suggested a different sequence and distinct analytical relation between revolutions and constitutions. Purnima Banerji said in the assembly that the objective of the nascent postcolonial regime was to have ‘political power in our hands with which we could fashion and remould and change the whole structure of society’. That was the goal. ‘To apply that test to this Constitution,’ she concluded, ‘I feel that it does provide those minimum necessities with which we can change things.’⁵³ The orienting concept of the Indian constitution-making exercise was change. Instead of formalizing the end of a revolution, the constitution had to facilitate and mediate necessary revolutionary changes in society. This was the problem space constituted by the specificities of the postcolonial transition.

The response to this challenge was a reconfiguration of the established tenets of the constitutional form: a reinterpretation of what constitutions can and should do. I identify that reconfigured form as ‘transformational constitutionalism’. Transformational constitutionalism was a constitutional order whose orienting principle was planned social transformation. This is why its main motif was not ‘limit’ or ‘constraint’. It sought to facilitate change, not constrain it. To limit implies looking back: to preserve, to respect precedent. Transformational constitutionalism looked forward: to alter, to anticipate the future. The constitutionalism of transformation was