

LEARNING FROM THE GRASSROOTS

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When I visited villages in Adilabad, I learnt that the Indian samaaj was very different from what I had learnt about Indian society through a Westernised education. I learnt that the larger part of rural Indian society is made up of closely inter-connected producer communities, who though they do not socialise with each other are professionally interdependent. My companions and I learnt about the traditions of village life from Ravindra Sharma of Kala Ashram. We found that Government interventions in local cotton textile production tended to centralize the process and to break traditional relationships among producers. We based our own interventions on our learning.

I began spending time in the villages of Adilabad in middle age. I came from an urban, English language-educated background, and my Macaulayan education had taught me that India had a strictly enforced vertical ‘caste system’. Higher castes at the top, lower ones at the bottom, like a ladder. This was in the late years of the 20th century, and the ‘development paradigm’ insisted that rural areas were backward and needed to be ‘developed’. Intuitively, I rejected that idea. I came to village India as a learner, as one who searches for one’s own lost heritage.

Nobody had told me that 90% of the Indian *samaaj*¹ was made up of producer *jatis*² with strong lateral, non-hierarchic relations among themselves. Nothing in my education had prepared me for the sophisticated technologies meshed seamlessly with society, for the ability of *jatis* to move in and out of occupations as circumstances changed, for the many and complex roles and interdependencies among them; the pride and self-esteem of the so-called ‘lower’ castes, even of those whom modern society calls ‘beggars’. This was, as I said, the closing years of the last century. Between the villages there were *kuchcha*³ roads and occasional, usually official, motorized traffic but no buses yet. The dense forests had gone half a century before and taken the tigers with them. The traditions of village life remained, just so.

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¹The word translates as ‘society’ in Hindi.

² Communities. The word is translated primarily as ‘caste’, see C.J. Fuller, *Caste*, in *THE OXFORD INDIA COMPANION TO SOCIOLOGY AND SOCIAL ANTHROPOLOGY* 477, 477 (Veena Das ed., 2003).

³ A Hindi word describing unsurfaced or untarred roads.

We were a diverse group: two young IIT graduates and me, a middle-aged, middle-class housewife. In common, we had a huge thirst for the real Indian *samaaj*. Outside that context we felt we ourselves could not be real, we were only cardboard figures with artificial wants and desires. Strangers were few in the remote villages, and we were regarded with suspicion. “Which kulam?”⁴ was a frequent question. ‘*Tirrigin’orlu*’,⁵ we would reply, wanderers. As we gradually meshed into the local textile making we made an identity for ourselves not as part of the *samaaj* but as familiar outsiders.

Ravindra Sharma was our teacher. A maverick child in his conventional Brahmin Punjabi family who had settled here a generation before as caterers to the Railways, he rebelled against family dress conventions of shirts and trousers and at the age of 8 adopted the *dhobi*⁶ instead. He would spend hours with the *Nakashis*⁷ learning their painting techniques, on his return submitting to ritual purification by his grandmother before being allowed to enter his house. Against the family’s wishes he studied sculpture and won a scholarship to the Baroda School of Fine Arts. Selling his sculptures earned him a substantial sum and he returned to Adilabad to set up the Kala Ashram with his old *Nakashis* teacher, now blind, as its presiding deity.

Sharmaji who had earned the title ‘Guruji’ as a joke when he led an *akbari*⁸ of martial arts companions in his teens, has immersed himself in the folk arts of the region. He has spent days in the forest with parrot-catchers and attended 10 day wedding celebrations of the *Mathuria*. He learnt the local techniques of pigment painting, pottery and the different metal casting techniques of the *Ohtaris* and the *Ojha*. In these 10 years as an art teacher at the tribal school he taught *Kolam* boys first how to draw, then to paint, to model in *matti*⁹ and later to cast metal, to express their own unique inner world.

We spent hours and days listening to Sharmaji’s recreation of the past. The village day was defined by the visits of the *sanchar jatis*,¹⁰ the itinerants, beginning before daybreak with the

⁴ ‘*Kulam*’ roughly translates as ‘community’.

⁵ ‘*Tirrigin’orlu*’ is a term we made up, which means ‘Wanderers’ in Telugu.

⁶ An Indian traditional men’s garment, made of unstitched cloth.

⁷ A local wooden figure-carving and -painting community.

⁸ A group of trained individuals, specifically of the martial arts.

⁹ A term meaning ‘clay’.

¹⁰ An umbrella term for nomadic communities; the term *sanchar* means ‘travel’ or ‘wandering’.

budubudukalodu,¹¹ whose songs drove away evil spirits, the *balasantodu* with conch and bell, and the *gosamolu*,¹² a husband and wife playing an *ektara*.¹³ There were people with skills such as water diving, general entertainers and educators, and story-tellers of particular communities, and the *bhikshavruthi*,¹⁴ who were each attached to a specific *jati* as oral historians for that *jati*, and were supported by their patrons. Each community, the weavers, the potters, the *Manevarlu*,¹⁵ the *Golla*¹⁶ shepherds, its own story-tellers who trace the history of the *jati* back to link it up to *Puranic* times, and each story is told with the help of a *patt*,¹⁷ and sometimes also with separate painted wooden figures. These histories connect the past to the present in a continuous thread. The weaving caste of the *Padmasalis* traces its origins through *Markandeya* to *Bhavanarushi*,¹⁸ their deity, clothes-maker to the gods. From these beginnings the stories are updated to today, and tell where the current generation of *Padmasalis* has migrated to, who has married whom, and the names of the newborn children. This relationship between the story tellers and the weavers amplifies the role of *bhiksha*¹⁹ in our *samaaj*, far from the pattern of dependency and condescension connoted by the words “begging” and “beggars”.

Sharmaji opened the curtain for us on the coherent, cohesive world of the close-knit community of artisan producers, service providers, artists and technologists that made up a society rich in myth and imagination, where each community was distinctive and separate, and each had its place. Though they would not eat together, each provided one particular special skill on which others depended.

The *Ojha* are brass casters. They make wax wire from beeswax, to be coated in mud and heated in charcoal, the wax replaced by molten brass to make the votive lamps they traditionally made for the *Gond* people. Their casting technique is different from that of *dhokra*, the better known brass casting of Madhya Pradesh, and both are different and more economical, more

¹¹ Name of a community.

¹² These are all names local communities identify themselves by.

¹³ Single stringed musical instrument.

¹⁴ The so-called ‘beggar’ communities.

¹⁵ The name of a local community.

¹⁶ The name of a shepherd community of Andhra Pradesh.

¹⁷ A painted scroll that illustrates and records the story, and with the help of which it is told.

¹⁸ Characters, sometimes deified, in the Indian *puranas*.

¹⁹ The term *bhiksha* means ‘begging’, and refers primarily to monks begging for alms.

ecologically sound, than the European ‘*cire perdue*’²⁰ process. Small groups of *Ojha* lived in the *Gond* villages they served, but the Government in its misplaced benevolence brought them together in their own settlement in ugly cement block houses, thus breaking the relationship between them and their traditional customers. The *Ojha* are now dependent on urban sales through the government handicraft agency, and the votive lamps have lost their significance to become tourist trivia.

Mandabechu are the historians of the *Golla* shepherds of that region. The *Golla* are paid to pasture their flocks in farmers’ fields; the sheeps’ dung is as valuable as their wool. They believe that listening to the tales of the *Mandabechu* will increase their flock, and so the shepherds pay and look after the story tellers and will gather round the fires each night to listen to their stories. The *Mandabechu* use a *patt*, a painted scroll of their particular story, with painted wooden figures of the deities and characters. The *patt* and figures are made for them by *Nakashis* to whom the *Mandabechu* will bring their old, damaged and smoke-blackened *patts* and figures to be repaired and repainted. Today these paintings and figures are available in urban craft shops in Hyderabad.

Shadow puppets made of translucent leather entertained the traditional village with *Puranic* tales. The puppet-makers used deer skin in earlier days, cow skin now. The puppets are painted and pierced and a light is held behind them to cast coloured shadows on a curtain. The puppet-makers are also the performers, singing the stories and playing musical instruments with their feet. Reduced to begging after cinema came to the villages, the puppeteers now make a precarious living selling their puppets as decorations.

To begin with we thought that such change is inevitable as an outcome of progress. But then, thinking a little more deeply we began to wonder: must modernity necessarily rid life of its diversity, must it iron out into boring sameness the rich and complex texture of traditional life? Once we had this thought we looked for clues to the factors that made change happen, particularly in local cotton textile production.

We made friends with the *Padmasali* and *Devangula* of the villages around Chinnur. Both are traditional weaving castes, and in this region the *Padmasalis* wove cotton while the others wove

²⁰ Lost-wax casting: the process by which brass or bronze casts are made from the original.

tassar.²¹ Everywhere we went we would ask how things had been in the past. The picture that emerged has changed for ever my way of thinking about progress and development, and the relation of tradition to modernity. I realized that progress is not linear from tradition to modernity, that both co-exist in time and space. I learnt that directions of progress are not inevitable natural processes. There is no one inevitable modernity; it is a complex of choices made by individuals who make up society.

This is what we learnt of the story of textile-making in Adilabad: Until the Second World War cotton was grown here for local use as well as for export. Most of it was traditional Indian varieties, *Omra* and *Gaurani*, which needed no irrigation and very little manure. The cotton was short or medium staple, used locally to weave sturdy long-lasting clothes and household linen. In 1937, the local handspun yarn was valued at Rs. 12,000/-. Because all the weaving was of plain stuff from local yarn for local use, Adilabad did not gain a reputation as a weaving centre.

In Bhimavaram village the fifty or so weaving families still have memories of using the yarn imported from England before the Second World War. Now none of them weave. The war stopped the yarn and they took to farm work. In Kollur, Vollala Rajam and his brother Shankar are the only two members of the extended family still weaving. Their uncles and cousins in Maharashtra and Karimnagar are masons or anything but weavers; another brother farms. Rajam says that fifteen years ago the weaving charges for one sari were sixteen rupees which bought four *kunche* of *jawari*, the equivalent of fifty kilos. He remembers when customers used to come and order all the household cloth needs for a bride, and how when this trousseau was ready it was taken by the customer from the weaver with gifts and ceremonies.

Here in Kollur as all over Andhra and Telangana it was the women of non-weaving families who spun yarn, as a leisure activity. Cotton was bought from neighbouring farmers. The Reddy women of Kollur used to buy it from Devulapalli in Maharashtra, and can do it now, except that now the farmer grows American cotton. Women gathered in twos and threes with their *charkehas*²² in the courtyards of their houses to spin and chat. The carding was done by itinerant carders, the *dhunakkars*. In the days before the *khadi sangams*, the weavers visited the houses and took orders for

²¹ A kind of silk, made from the cocoon of the *tassar* moth.

²² Roughly translates in Hindi as 'spinning wheel'.

cloth in exchange for the yarn. This casual and easy interchange was one of the crucial points of contact in the cloth making chain. It took place in thousands of homes between women of different communities and local weavers and provided, with no managerial, clerical or accounting interference, the vital yarn for weaving.

The move to collect handloom weavers into cooperatives was begun by the State with the best of intentions to protect weavers from unscrupulous traders. When the Chinnur society was formed in 1958, it had a thousand weaver members, weaving on pit looms in their own homes. The new Society began well by supplying them with mill-spun yarn for cloth which the weavers sold as they had done before, to local customers. That spelt the end of local hand-spinning. Then a weaving shed was built in Chinnur and frame looms installed, and yarn supply restricted only to the weavers who wove in the shed. This put an end to village weaving. Once the weavers moved to Chinnur, the nature of the industry changed from one of dispersed household production, serving local needs, to a centralized industry.

The output of the frame loom is much higher than that of a pit loom. The beam holds a warp of 200 metres, which means that a large quantity of one kind of cloth will be made at a time. It needs a lot of working capital to buy all that amount of yarn at once. So much cloth of one kind in one place needs accounting, clerical, managerial and sales staff. And so the whole superstructure is built up, of offices and shops and people, all supported by the only productive work that goes on: the work of the weaver.

When we came to Chinnur the number of weavers in the area had been declining steadily, from our estimate of thirty thousand families at the time of independence, to a hundred or so by 1989. The critical local links between cotton growing, yarn making and the local market were gone. We took up a government supported project with six weavers, providing them frame looms in their own homes. So began our lesson in the nature of technology and the small-small everyday choices that guide the direction of technology development.

Right away in setting up the looms some of the drawbacks of the frame loom became apparent. It needed parts like the steel reed and plastic bobbins which were not available locally. The reed came from the Imperial Textile Industries, Surat; the bobbins from Bombay. There is

only one dealer for these in the whole of the Karimnagar and Adilabad area, serving territory larger than Kerala. We had to wait three months for bobbins which for a pit loom would be made from bits of *jowari* stalk.

As soon as the cloth started coming off the looms, a great mismatch of frame looms and local marketing was shown up. The beam of a frame loom takes a much longer warp than the pit loom, 200 metres to the pit-loom's 35. Until one beam is completed the weaver cannot make anything else, he cannot change from towels, to *saris* for example, and it takes him about a month to weave 200 metres. This means that weavers cannot be responsive to customers' immediate needs, they cannot weave to small individual orders. Mass production of one thing rather than a variety makes local sales a burden. Most importantly, centralisation of technologies breaks the intricate professional relationships that have provided the framework of our indigenous industrial culture for millennia.

How we dealt with these problems is the key to our involvement in cotton textile production ever since. In the 20 years since our first lessons from the grassroots, we have involved the new generation of *Padmasali* in weaving. We have introduced natural dyeing in Chinnur, and taken technology in a different direction, one that will make and not break local relationships, that will remake the broken links between cotton farmers, yarn spinning and hand-weaving. But that is a different story.

JUSTICE IN HER INFINITE VARIETY

Mithi Mukherjee, *India in the Shadows of the Empire: A Legal and Political History 1774 – 1950* (New Delhi: Oxford University Press, 2010)

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I. ENGAGING PASTS AND FUTURES

Mithi Mukherjee’s *India in the Shadows of the Empire* offers a set of rich and provocative essays on a legal and political history of India from 1774 – 1950. Previous attempts have focused on outlining colonial legal developments or tracing the creation of legal institutions – chronicling court structures, council reform and codification attempts. Mukherjee chooses to focus on discursive practices surrounding categories of ‘law’ and ‘justice’ in this time period.¹ The argument running through the essays is that colonial and anticolonial politics were shaped by deploying ‘justice’ in particular ways. Taking the reader through nearly 200 years of ‘modern’ Indian history, the essays trace how ‘colonial justice’, marked by territorial conquest and plunder was replaced by ‘imperial justice’, that rests on notions of benevolence and mercy. The two are conflated with the idea of ‘justice as liberty’ and ‘justice as equity’ respectively in the events that the book discusses, from the Warren Hastings trial (1787 – 1795) to the framing of the Indian Constitution (1946 – 1950). She concludes that justice-as-equity or imperial-style justice was what found expression in the

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¹ Legal histories include those by M.P. Jain, A.B. Keith, Rama Jois, V.D. Kulshetra and S.V. Desika Char. These provide excellent renditions of the legal developments and a chronology of institutional developments, but are not connected in these writings to the social or political context. The classic exposition on the constitutional history of India is GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1966). Other interesting work has looked at particular aspects of constitutional history and include NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* (2003) and S.K. CHAUBE, *THE CONSTITUENT ASSEMBLY: SPRINGBOARD OF A REVOLUTION* (2000). Several critical essays, exploring historical aspects of constitutionalism have appeared in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* (Rajeev Bhargava ed., 2008) and *INDIA’S LIVING CONSTITUTION* (R. Sudarshan *et al* eds., 2005).

Constitution. Mukherjee's draws upon Foucauldian views on power, knowledge and politics, but she claims to go beyond this framework by arguing that discourse does not alter merely present realities, but also those of the future. The discourse on 'justice' was, and continues to be instrumental in determining the trajectory of Indian politics.

Monographs critically examining a legal history of colonial India are, at this time, few and far between. Several shorter essays have appeared in academic journals that have focused on discursive practices within and about the law – about a variety of subjects from religious conversion to the banning of cow slaughter. Many have been influenced by the work of Bernard Cohn on the relationship between law and the colonial state, one of Mukherjee's own mentors.² This book also contributes to a legal history of India in the context of the empire.³ Distinguishing her work from earlier attempts that have focused either on the transfer of ideas from the metropole to the colony or Marxist renderings that, in her opinion, emphasize economic developments, she joins a rank of younger scholars who have recently begun writing on, flows and counterflows of ideas and institutions within the empire, and of how politics and law are implicated in this process.⁴

In keeping with attempts to treat justice as a discursive category, each of the six chapters uses the court as a trope.⁵ It is worthwhile to note that the time period under study that Mukherjee has identified is coterminous with the establishments of 'real' courts. The first Supreme Court was set up under Letters Patent in Calcutta in 1774 and the Constituent Assembly concluded its debates in 1950; these years mark the beginning and end of her narrative. The use of courtroom spaces and case laws in and of themselves to make broader statements about social and political developments is a prominent method of analysis for legal historians of South Asia,⁶ but Mukherjee's concern is

² BERNARD COHN, *COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA* (1996).

³ Several monographs on the political thought in the empire have used India as a case study. See UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE* (1999); KARUNA MANTENA, *ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM* (2010). Other works that have focused on the 'making' of empire (using varied lens) include DURBA GHOSH, *SEX AND THE FAMILY IN COLONIAL INDIA: THE MAKING OF EMPIRE* (2006) and PREM CHOWDHRY, *COLONIAL INDIA AND THE MAKING OF EMPIRE CINEMA* (2000).

⁴ See e.g., ELIZABETH KOLSKY, *COLONIAL JUSTICE: WHITE VIOLENCE AND THE RULE OF LAW* (2010); RITU BIRLA, *STAGES OF CAPITAL: LAW, CULTURE AND MARKET GOVERNANCE IN LATE COLONIAL INDIA* (2009)

⁵ Other situations where courts are central to the scholarly arguments made are BYRON CANNON, *POLITICS OF LAW AND THE COURTS IN NINETEENTH-CENTURY EGYPT* (1988); LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY 1400 – 1900* (2002).

⁶ One of the earliest writings in this regard was Lloyd Rudolph and Susanne Rudolph, *Barristers and Brahmins in India: Legal Cultures and Social Change*, 8 (1) COMP. STUD. SOC'Y & HIST. 24 (1965) and David Washbrook, *Law, State and*

not just with these ‘real’ courts, but with spaces that operate with the trappings of a court. Here, the plaintiff and defendant appear as ‘enunciative personae’ and the courtroom is built up, literally speaking, around the contested subject matter.⁷ As a technique, this succeeds particularly in the first part of the book. Reading the fourth and fifth chapters which focus on Gandhi and the Constituent Assembly however, the trope seems almost restrictive of the analysis. I will first consider the more interesting implications of using the courtroom as a trope, and then go on to critically examine her arguments on the Constituent Assembly’s treatment of justice as a sovereign legislative principle.

II. ‘COURTS OF LAW AND STYLES OF SELF’:⁸ THE COURT AS A TROPE

The ‘courts of law’ in these chapters prove extremely useful in understanding the concept of justice that Mukherjee points to. In the first chapter on the Warren Hastings trial in London, Mukherjee uses the Privy Council in London as centrestage, while in the second, the Indian Legislative Council is treated as the ‘court’ in which the early “anticolonialists” would argue their case. In the final chapter, the Constituent Assembly is the court, where the provisions of the Draft Constitution are debated and finalized. Initially, the court as a trope is engaged to make the point that legal procedures ensure that subjective intentions of the parties cannot quite surface, being overcome by these institutional impulses. The implication of the argument is far more interesting. Subjective intentions may be inferred (if it is not immediately evident) from the manner in which parties in a court work institutional logics to their advantage. Perhaps legal procedures can be political – who invokes it and who it is invoked for can make for different styles and substance to

Agrarian Society in India, 15(3) MOD. ASIAN STUD. 649 (1981). See also JANAKI NAIR, WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY (1996); PARTHA CHATTERJEE, A PRINCELY IMPOSTER? : THE STRANGE AND UNIVERSAL HISTORY OF KUMAR OF BHAWAL (2002); Mattison Mines, *Courts of Law and Styles of Self in Eighteenth-Century Madras*, 35(1) MOD. ASIAN STUD., 33 (2001); Neil Brimnes, *Beyond Colonial Law: Indigenous Litigation and the Contestation of Property in the Mayor’s Court in Late Eighteenth Century Madras*, 37(3) MOD. ASIAN STUD. 513 (2003). Work that had adopted an ‘internal’ perspective to the law include RADHIKA SINGHA, A DESPOTISM OF LAW (1996); Mitra Sharafi, *The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism meets Anglo-Islamic Dower and Divorce Law*, 46(1) IND. ECON. & SOC. HIST. REV. 57 (2009); Anuj Bhuvania, *Very Wicked Children: ‘Indian Torture’ and the Madras Torture Commission Report of 1855*, 6(10) SUR J. HUM. RTS 7 (2009); Rohit De, *The Two Husbands of Vera Tiscenko: Apostasy, Conversion and Divorce in Late Colonial India*, 28(4) L. & HIST. REV. 1011 (2010); Matthew Groves, *Law, Religion and Public Order in Colonial India: Contextualising the 1887 Allahabad High Court Case on ‘Sacred Cons*, 33(1) S. ASIA: J. S. ASIAN STUD. 87 (2010). A number of book chapters also focus on the discursive potential of the law in colonial India and are too numerous to list here.

⁷ As an aside, using a court as a trope is particularly in keeping with an analysis largely centered on high politics. A great number of people are kept out of courtroom because of their lack of access to cultural and/or economic resources. See the classic work on this question Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change* 9(1) L. & SOC’Y REV. 95 (1974).

⁸ From the title of Mattison Mines, *Courts of Law and Styles of Self in Eighteenth-Century Madras*, 35(1) MOD. ASIAN STUD., 33 (2001).

one's argument in court, depending often on the 'relief' asked for. When Edmund Burke appears for the prosecution in the Warren Hastings trial, Mukherjee beautifully captures how Grotius on the laws of war is used to make the argument that plunder and conquest of territory must be within certain limits.⁹ The presiding judge in this question is 'empire' (and the monarch personifying empire). According to Burke's argument, which equated corruption with plunder, the empire should not allow its representatives, the East India Company officials, to violate these 'laws'. Although restricted by legal procedure, Burke also managed to push beyond existing precedent. Mukherjee's analysis of why Burke chose to adopt this line of argument shows how subjective intentions may still be indirectly inferred. However, where does this leave justice? By using the courtroom as trope, justice appears not as revolutionary transformation, but as calibrated and rule-bound. Was this the reason why, perhaps in a larger context, it was unsatisfactory? For this, Mukherjee offers an explanation in the second part of her book in her chapters on Gandhi and the Constituent Assembly.

Reading through the essays, one might ask why the courtroom is a chosen trope, given that 'justice' exists in multiple forms and is employed as frequently outside a courtroom, as it is within one. The chapter on *vakil raj*, or the role of the legal professional in the national movement, steps in to demonstrate the limits of legal justice. Can courtrooms actually *produce* justice through arguments between two self-interested parties arguing before an impartial judge? These limitations (of British law / legislative courts, to be precise), in Mukherjee's opinion, were overcome by Gandhi's role in anticolonial politics, till then spearheaded by the Indian National Congress. Gandhi drew upon the indigenous category of *moksha*, or spiritual liberation, to argue that in fact, imperial justice as liberty (as formerly articulated by the Congress could not result in actual self-government (or as he called it 'parliamentary swaraj')) So, Mukherjee argues, 'judicial precedents' and 'illustrations', too often staple lawyerly talk, would not result in independence; freedom would have to come through renunciation. Rather than wait for democracy to be '...introduced into India, one precedent at a time',¹⁰ Gandhian politics focused on negotiating freedom and politics - domains typically seen as being in conflict with each other. Mukherjee's argument that non-violence and renunciation afforded an opportunity

⁹ MITHI MUKHERJEE, *INDIA IN THE SHADOWS OF EMPIRE : A LEGAL AND POLITICAL HISTORY 1774 – 1950* 26–8 (2010).

¹⁰ *Id.*, 121.

to go beyond the question of identity that had long concerned colonial Indian society is to be closely investigated with reference to events during the 1920s – 1950s.¹¹ The ‘freedom’ struggle was frequently non-violent and identity-based high politics did not take a backseat at this time - Ambedkar or Jinnah or Periyar or Tara Singh are examples in support of this proposition. Neither did the nationalist elite within the Congress follow too closely in his footsteps. My inference from Mukherjee’s analysis would be to show how justice operated in multiple modes - while Gandhian politics transcended the limits of courtroom-circumscribed justice (and by extension, constitutional methods), liberal constitutional politics was still alive and well in other levels of the national movement.

Finally, the use of the court as a trope allows the reader to re-imagine the ‘cases’ that Mukherjee picks out. Across the essays, they include corruption in the East India Company, the formation of the Congress and the debates surrounding the nature of constitutionalism in postcolonial India. These are well-known “events” within mainstream histories, but Mukherjee investigates how these ‘cases’ were argued and ‘decided’ as per a particular conception of justice. In her treatment of the Constituent Assembly as a ‘case’, Mukherjee’s argument engages with Aditya Nigam’s views of the Assembly as an ‘event’ in interesting ways.¹² Nigam argues that it is as important to look at the socio-political currents leading up to the Assembly as it is to locate it as an ‘event’. His argument about the Bakhtinian polyphony of voices being drowned out by the institutional logics that animated the Assembly is in keeping with Mukherjee’s own views on court-style justice. Nigam, too, steers clear of the ‘temptation’ to read a liberal intent in the Constitution, much in keeping with Mukherjee’s own ideas of how justice as equity, rather than justice as liberty triumphed. Unlike Mukherjee however, Nigam does not go so far as to consider justice as equity as the sovereign governing principle of the constitutional text.

¹¹ Questions of law marking out identity and community have been addressed by many scholars, especially using the theoretical framework of colonial difference highlighted in PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS* (1993). See e.g. ELIZABETH KOLSKY, *COLONIAL JUSTICE: WHITE VIOLENCE AND THE RULE OF LAW* (2010) (discussing forms of racialised justice in colonial criminal courts); MRINALINI SINHA, *COLONIAL MASCULINITY: THE “MANLY ENGLISHMAN” AND THE “EFFEMINATE BENGALI” IN THE LATE NINETEENTH CENTURY* (1995) (discussing the constructions of colonizing and colonized elite in nineteenth century India along gendered lines).

¹² See Aditya Nigam, *A Text Without An Author: Locating the Constituent Assembly as an Event*, 39 (21) *ECON. & POL. WKLY* 2107 – 2113 (2004).

III. JUSTICE, EQUITY AND GOOD CONSCIENCE IN THE CONSTITUENT ASSEMBLY

The final chapter on the framing of the Indian Constitution is meant to demonstrate that justice as equity triumphed over justice as liberty. Most of Mukherjee's arguments here are centered around the Constituent Assembly's deliberations. I will address particular aspects of her arguments, testing them against a more "lawyerly" reading. I do not intend that lawyerly be equated to formalist here, for these readings also lead to substantive claims that are different from Mukherjee's. First, Mukherjee argues that the Preamble mentions 'justice' as the sovereign legislative principle owing to it being mentioned first in the Preamble to the Constitution. However, the Preamble does not function as an independent source of legislative power, nor was it, in practice, intended to be one.¹³ As per principles of statutory interpretation, there can be no hierarchy of values within a preamble.¹⁴ It may be argued that the preamble to a constitution, which is not an ordinary statute, may well be different. But a debate on whether the Preamble should be considered as a part of the Constitution started with the first Fundamental Rights case, *A.K. Gopalan v. State of Madras*, where the principles expressed in the Preamble were considered irrelevant to test the validity of laws.¹⁵ After the observations of judges in *Kesavananda Bharati v. State of Kerala*¹⁶ in 1973, appellate courts have progressively begun to use the Preamble to interpret the Fundamental Rights Chapter but this was hardly intended at the time of drafting.

Second, Mukherjee claims that communities, rather than individuals became the focus of constitutional provisions. There are two arguments in this respect. She initially argues that this was because the members of the Constituent Assembly, elected through a limited franchise, represented different communities. To transcend this 'problem' of representation, she says there should have been ratification by the people, perhaps through a referendum. This might not have been viable at the time. The Indian Constitution was not ratified through referendum; some scholars argue that (at

¹³ DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA 2 (2006)

¹⁴ Seervai does mention 'justice' as an autonomous ground and the only one of the values in the Preamble that is specifically incorporated into the text of the Constitution at Article 38. However, this opinion is not borne out by other commentaries on the Constitution, nor is there judicial precedent to this effect. See H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, Volume II 1944 (4th edn., 1993).

¹⁵ AIR 1950 SC 27.

¹⁶ AIR 1973 SC 1461.

the time that the Indian Constitution was drafted) very few modern constitutions were.¹⁷ Mukherjee further goes on to argue that communities are the focus of rights talk in the Constitution. Indeed, she says, the fundamental freedoms available to citizens could be reasonably restricted in the name of justice.¹⁸ This is not an entirely accurate characterization. For instance, the 1950 constitutional provision on freedom of speech was subject to ‘reasonable restrictions’ in the interests of the security of the state, friendly relations with foreign States, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Justice does not appear to be a common aspect of these restrictions. Perhaps a fairer assessment would be that the individual citizen is indeed the focus of much of Indian constitutionalism, except that it does not stop there, but goes on to create several categories of group rights, including anti-discrimination rights and cultural and educational rights for minorities.

Third, Mukherjee argues that universal adult franchise is the Gandhian “legacy” in the constitutional text. By placing ‘popular will’ back in the constitutional process, the Constituent Assembly places the text back in the hands of ‘We The People’ The focus in this argument is the Gandhian legacy, and not on whether there is popular sovereignty backing the Indian Constitution. There is ferocious debate¹⁹ on both the nature of Gandhi’s legacy,¹⁹ and on whether there ought to a debate on the legacy question at all.²⁰ The Congress’s turn to constitutionalism in the 1940s culminating in the written constitution of 1950 did not find favour with Gandhi, who intended the Indian National Congress to be a social service organization post Independence and not a political party. Although he was not a member of the Constituent Assembly, he attempted to engage the process. Two submissions to the Constituent Assembly, one in 1946 and the other in 1948, outlined his vision of economic development, although the “scientific” approach to nation building and planning in the 1940s in India had dubbed this approach “redundant” within the realm of

¹⁷ See K.C.WHEARE, *MODERN CONSTITUTIONS* (1966). But notable recent (post 2005) examples where the constitution was subject to a referendum include Egypt, Turkey and Kenya. For an extensive study on nation-wide referendums from 1900 – 1970s, see DAVID BUTLER AND AUSTIN RANNEY: *REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* (1994). For a theoretical discussion in the contemporary context, see Stephen Tierney, *Constitutional Referendums: A Theoretical Enquiry*, 72 *MODERN L. REV.* 360 (2009); Jon Elster, *Legislatures as Constituent Assemblies*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 181–97 (2006).

¹⁸ MUKHERJEE, *supra* note 9, 192–93.

¹⁹ See e.g., Thomas Pantham, *Gandhi and the Constitution: Parliamentary Swaraj and Village Swaraj*, in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 59 (Rajeev Bhargava ed., 2009).

²⁰ See e.g., Judith Brown, *The Mahatma and Modern India*, in *NATIONALIST MOVEMENT IN INDIA* 55 (Sekhar Bandopadhyay ed., 2008).

constitutional politics. His pleas for decentralized economies and call for prohibition were discussed and included in the text of the Constitution (albeit in the non-justiciable, supposedly symbolic Directive Principles of State Policy) and the Constituent Assembly frequently invoked his name, including at the time of passing of the Objectives Resolution – this all evidences the politics of possibility that the constitutional text had in common with Gandhi.²¹ To understand Gandhian legacies in the Constitution solely in terms of universal adult franchise alone would be problematic.²² Gandhi is the Constituent Assembly's absent presence.

IV. FINAL REFLECTIONS

Even accepting that 'justice as equity' remained the dominant tone of constitutional politics, would it be realized or remain an aporia? I was reminded of Ambedkar's speech at the end of the constitution drafting process (which Mukherjee refers to as well) where he exhorts people not to get carried away by ideas of a social revolution contained in the text of the Constitution. It would ultimately be the people who work the Constitution that are responsible for social and economic equality in the country, in addition to the political equality that was already guaranteed. For Ambedkar, liberty, equality and fraternity were the 'trinity' of ideals that the Constitution had to live up to. Summing up the achievements of the Constituent Assembly, he says:²³

²¹ Gandhi's understanding of 'social revolution' finds place in the impassioned speeches of Constituent Assembly member, Mahavir Tyagi:

"That there must be prohibition is admitted to by all. I submit that Gandhiji's foremost plank of constructive programme was prohibition (cheers), and we all stand pledged to this programme...I must submit that the Constitution as it is, and I have repeated this many times before, is devoid of Gandhiji's ideas. It is very poor from that point of view...This prohibition has been in his programme...If we cannot accommodate even the idea of prohibition in our Constitution, then what else have we been sent here for? We have been talking of revolutions, and about all sorts of progress. But if we cannot have even this small reform in our Constitution; the book will not be even worth touching with a pair of tongs." (CAD, 19 November 1948).

And on the other hand, Hansa Mehta argued for why Gandhian ideals were alive and well within the constitutional framework:

"Then there was a charge that Gandhian principles have been sacrificed. I already submitted that we have embodied provisions for removal of untouchability for national language, for communal harmony and for goodwill and guarantees to minorities, encouragement of Gram Panchayats and village industries and for protection of milch cattle. These are the planks on which Gandhism flourished in this country and it created a non violent revolution in this country. If these principles have been embodied in the Constitution, I want to ask how Gandhism has been sacrificed in this Constitution" (CAD, 22 November 1949).

²² David Gilmartin argues for instance, that universal adult franchise could be understood as a Congress and particularly Nehruvian legacy dating back to the 1920s, but I have not taken up this point for discussion here. David Gilmartin, *Election Law and the People in Colonial and Postcolonial India, FROM THE COLONIAL TO THE POSTCOLONIAL: INDIA AND PAKISTAN IN TRANSITION* 74 (Dipesh Chakrabarty et al, 2007).

²³ CAD, 25 November 1949.

“On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has laboriously built up.”

Mukherjee quotes an earlier part of this speech to show that Ambedkar feared that people would resort to *bhakti* or hero worship in politics, and that it would result in dictatorship instead of the parliamentary democracy that was envisaged by the provisions of the Constitution. She goes on to argue that a dictatorship seemed likely because Ambedkar was conscious of justice as equity as the sovereign principle, which necessarily required the person of the monarch. Perhaps Ambedkar had Gandhi in mind when he spoke of the hero of Indian politics, or perhaps it was Nehru. Nevertheless, Ambedkar was one of the strongest supporters of the inclusion of the Directive Principles of State Policy, which Mukherjee quotes as an example of justice as equity.²⁴ He is unlikely to have advocated for these, if he understood that it would be impossible in the absence of a dictator-state. Hence, to attribute Ambedkar’s fears to the role of ‘justice’-dispensing monarch seems secondary to his fears about the constitutional text being inadequate to a project of realizing social justice.

Perhaps the politics of possibility that a constitutional text captures cannot be enacted without these “impossibilities” that high politics would encounter in translating ideals into reality. These apprehensions are surely not restricted to Ambedkar’s speech in 1949. What is commendable about this volume is that by locating India “in the shadows of empire”, Mukherjee is writing a history of the present.²⁵ Justice as equity has echoes in contemporary politics in India. It takes on arguably less attractive forms in courtrooms, such as in the judgment of the Allahabad High Court in the Ram

²⁴ CAD, September 1 1949.

²⁵ Mukherjee also stresses this point in her response to Kunal Parker in the pages of the *Law and History Review*. See Mithi Mukherjee, *A History of the Present*, 23(3) L. & HIST. REV. 697 (2005).

Janmabhoomi-Babri Masjid dispute that partitioned the disputed land three ways in an attempt to avoid communal riots. It also reflects in ever-expanding jurisdiction of the Indian Supreme Court that purports to do ‘complete justice’.²⁶ The role of actual courts in determining the course of Indian politics (the real despot, after all?) is understated in Mukherjee’s reflections at the end of the book. Outside of courtrooms too, the state struggles with the large number of non-state formations, from corporations to NGOs to digital worlds, that create their own imaginations of fairness, justice or freedom that is too often blurs the traditional state-society formulation that the Constitution envisages. A theorisation of these trends will benefit from the insights that Mukherjee’s skillfully provides.

²⁶ Art. 142 of the Constitution of India: (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

Justice In Her Infinite Variety: Mithi Mukherjee, India in the Shadows of the Empire: A Legal and Political History 1774 – 1950 (New Delhi: Oxford University Press, 2010)