

GRANVILLE AUSTIN: A TRIBUTE

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I.

I write a longish tribute to Granville Austin (known as ‘Red’ to his friends because of his youthful red hair turned in later life to majestic grey) for several reasons. His work on the Indian Constitution is well-known but not well studied; while he is well-cited by Justices and scholars, his work has not been accorded a careful and studious exploration and examination. The very few exponents of a new tradition, which I name as ‘comparative constitutional studies’ (COCOS), have attained as much fame as him.

Austin described himself as an ‘independent scholar’; this was a puzzling description because all true ‘scholars’ were in my view ‘independent’ both of the state and the market. I began to like the expression in later life not as someone who was a salaried or tenured academic but as someone who was nonetheless scholarly. There are many academics in India who are not scholarly and many scholars who are not academics (i.e., campus careerists or campus-based teachers or fellows).

I had the privilege to know Granville Austin personally since the mid-seventies; I wrote a monographic review of his classic *The Indian Constitution: The Cornerstone of a Nation*¹ in 1967. At the urging of Professor Lotika Sarkar and Chachal Sarkar, I sent him the bulky copy of my review article, never to hear from him! In the mid-seventies when we finally met, he was kind enough to acknowledge the receipt but never entered into any discussion on our differences. We met many a time at conferences which resulted into valuable works², but Red never discussed the review. In the mid-eighties, I

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¹ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1996). See also, Upendra Baxi, “*The Little Done, The Vast Undone*”: *Reflections on Reading Granville Austin, The Indian Constitution* 9 JILI 323-430 (1967).

² See INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES [Z. Hasan, E. Sridharana & R. Sudarshan (Eds.), 2002]; Upendra Baxi, *Modelling “Optimal” Constitutional Designs for Government Structures: Some Debutant Remarks* in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* 23-44 [S. Khilnani, V. Raghavan & A. Thiruvengadam (Eds.), 2013].

met R. Sudarshan (the then representative of Ford Foundation, who generously aided Red's second book) and told him that he should not do it, as we were barely recovering from his first book which promoted a consensus or accommodative view of constituent assembly debates and history!

There is an air of mystery to the second coming of Granville Austin. After his first book, Austin took a quarter century 'sabbatical' from India. He did not revise it. He did not respond to reviews, including my monographic review article; it is as if he exiled Indian constitution from his universe. We do not know what interested him in the interim and what revived his interest in the Indian Constitution. Red nevertheless went ahead with what became a major tome, surveying the scene since the *Cornerstone*. I reviewed the second book in the *EPW* as 'Gospel According to St. Granville'³; in part it was provocative enough to draw Red into a wider engagement and discussion with his theory of the Indian State. Apart from the acknowledgement that I was a 'friend and critic' of his work and that it was a 'privilege' to chair a discussion in which I was taking part, Red (in SOAS, London in late eighties) did not say anymore. This reticence has always puzzled me.

The only thing Austin is willing to say about himself is that he is an 'independent scholar'. This is more than the bravado of the blurb. He comes back, sees, and conquers. The other of an 'independent scholar' is an immersed one, in an enviable position. Untouched by the pathos and the bathos of politics of the times, he is able to revisit the scene of the crime, as it were, at the time, manner, and circumstance of her own choosing and then claim for her narrative the manifest merit of 'objectivity.' An independent scholar does not lack a measure of commitment to the object of his discourse. Austin's affection for the Indian democratic triumph is written large on this book. However, unlike the immersed scholars, whose work and experience he so generously cites, Austin speaks to us, as it were, from an Olympian height.

Not too many authors have enjoyed the privilege, in one lifetime, of writing two definitive, and much cited, books on the origins and development of a constitution; and Granville Austin will always be known for his books and articles on the Indian Constitution. He wrote frequently and with a felicity that eludes most writers on the subject and will always command a wide and abiding readership.

³ Upendra Baxi, *Saint Granville's Gospel: Reflections* (Review of Granville Austin's, *Working a Democratic Constitution: A History of the Indian Experience*), 36(11) *ECON. & POL. WKLY.* 921-930 (2001). (I borrow here some formulations from this article). See also, Vikram Raghavan, "INDIA'S CONSTITUTIONAL HISTORIAN: GRANVILLE AUSTIN (1927-2014)" *Economic & Political Weekly* XLIX: 37, 40-43. Raghavan offers a full history (as is known) of the making of Austin's second book; also he ends with a tantalizing suggestion that there was third book (on the Emergency) that was in the offing.

Even as I bid him an adieu, I shall forever miss his invitation to share a bed and bourbon at his home in Washington DC.

II.

Granville Austin endeavours to place chaotic constitutional happenings in some sensible order of explanation. Unlike the immersed scholar who thinks that she knows what has happened and why, her task is to certify or combat constitutional events within the context of situated critique, Granville Austin offers an alternative and a worthwhile caution: constitutional politics remains easy to *judge*, but difficult to *explain*. Not merely is it the case that we do not know, but the situation is that we may *never* know why certain constitutional events occurred as they did. Even as Austin brings to us in abundant measure the realm of the constitutional *unknowable*, he exemplifies the craft of a constitutional sleuth. In every sense of the word, Granville Austin is the Sherlock Holmes of the Indian constitutional development, even as ‘My Dear Watson’ may still remain very puzzled!

In a few well-chosen words, Austin tells us that his second book is “a history, and not a law book”; it is also a book about “politics and economics, conditions and culture”. The book offers narratives about “what human beings do ill or well while governing themselves”.⁴ Austin’s method (only in India, thanks to the ICSSR, we use the expression ‘methodology’ which stands for a science of methods and not methods actually chosen for the work) is simple but rigorous; he does contemporary history by consulting all available written sources and supplements this by talking with, as many as possible, constitutional elites. The contemporary history that he writes about with rare felicity is about political leaders and other actors; not the history of subaltern citizens or their struggles for justice. Measured by the objectives frankly exposed, Austin succeeds in his method and objective: his narrative is one of the fractured and scattered constitutional hegemonies. He is aware, no doubt, of other ways of narrating contemporary history (as we discussed in Section 111 in some detail) but he prefers to take a ringside view of what are changing political and constitutional entities. So seductive is Granville Austin’s style, that an unwary reader is likely to believe that this meta-narrative of putting the Indian Constitution to work is the only, even the best, genre for telling stories about the constitutional life of Bharat that once upon a time was truly called India.

Granville Austin deserves to be called a saint for a variety of reasons. He dispenses benedictions like a saint would do; he also has a benign view of the world as a whole; the evil of the world is a temporary phenomenon distracting

⁴ GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE I* (1997). Austin is in distinguished company of many scholars who tend to ignore the competing Arathasrastra tradition.

from much that is good. A true hermit, he contemplates for long, nearly a quarter century, before emerging with a new benediction for the Indian Constitution. Like a true hermit, his *poorva ashram* (earlier life) is neither relevant nor decisive. The *tapasya* is awe-inspiring; he converses with all varieties of constitutional mortals to enunciate the power and the glory of Indian constitutionalism at work. Yet he manages to stand tall, above them, bearing the gift of prophecy. He remains interested in ferreting out mundane and venal reasons for the deterioration of the body of the constitution. Nevertheless, he believes that even as the flesh is weak, the spirit is strong, and forever, he is questing for the soul of the Indian constitution. Twenty-four years ago, he enunciated (what Sanford Levinson names in the American context) ‘constitutional faith’⁵. Now, St. Granville renews it in an abundant measure.

The faith he proselytises is a secular one. Constitutionalism is for him a civic religion; its fallible deities serve a higher purpose, despite themselves. ‘The citizens of India’, he writes, ‘have taken this Constitution as the text- the scripture, even a new *Dharmasastra* – for public life’.⁶ The civic religion has a mission, quintessentially Nehruvian at its core. In his first book, Austin symbolised the constitution as a charter of ‘social revolution,’ the ‘conscience of a Nation,’ and as its ‘cornerstone.’ In this work, the Constitution emerges as the ‘touchstone,’ a true ‘window into India’.⁷ The movement from ‘cornerstone’ to ‘touchstone’ imagery marks the passage between the foundational and the reiterative social action. Each ‘daily’ and ‘hourly’ ‘use’ of the constitution by ‘citizens in pursuit of their personal interests or in their desire to serve the public good’⁸ reinforces it, even when the most wicked and vile political actors invoke it. The Sacred Book may never be profaned. The ‘touchstone,’ the *parasmani*, retains its spiritual power to transform the base metal into gold. The ‘touchstone’ forever provides the alchemy of constitutional truths, in which all political lies ultimately perish. This, indeed, is the essence of holiness of the Book.

A civic religion needs its secular Pantheon; even when Nehru, says St. Granville somewhat reluctantly, may not be said to have ushered in a ‘golden age’ for Indian constitutionalism. He explicitly states that ‘the Nehru years set standards against which others would be measured – and many fall short’⁹. Even secular religions need their iconography; post-Nehru constitutional

⁵ STANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2nd Edn., 2011). (This is my favourite US Constitution bicentennial book). For Levinson, that faith is the set of beliefs in the Constitution as a higher law by which all political action may be judged and adjudged. At one end of the spectrum, the set of beliefs is robust (on the pale of the values enshrined in the US Declaration of Independence); and at the other end (the plane of constitutional law), it is creatively conflicted and contradictory; the American constitutional interpretation is thus influenced by Catholic and Protestant approaches to the Bible and the world.

⁶ Austin, *supra* note 4, at 635.

⁷ Austin, *supra* note 4, at 10.

⁸ Austin, *supra* note 4, at 10.

⁹ Austin, *supra* note 4, at 37.

development deforms and denatures this constitutional inheritance; St. Granville bemoans the ancestor massacre though he wisely falls short of overtly advocating ancestor worship. At the end of the day, however, the entire corpus of Granville Austin tends to regenerate constitutional hagiography.

The most notable achievement of Red is that he succeeds admirably in placing constitutional theory and practice at the very centre of Indian development. This achievement carries with it many messages for contemporary history writing and the practices of social and political theory in India, where constitutional law developments make at best a fugitive appearance. Austin also provides a role model for legal and constitutional historians; the range of source materials consulted, digested, and evaluated by Austin is truly astonishing.

III.

The self-styled 'political history' that Austin writes is a history of constitutional development and constitutional politics. Even so, as his second book makes it explicit, he does not write a book about the constitution as a site of state formative practices in India. Here he is uncomfortably candid: 'The terms 'the state' and 'elites' do not appear in this book because I find them more misleading than enlightening'.¹⁰ He acknowledges the frequent use of the notion of 'governance' and his own preferred version is distinctly republican: governance means, 'what citizens do when governing themselves'.¹¹ This wholesome clarity dissipates in the next sentence: 'Governance is a process; government is an object.' He is aware that 'governance' is a 'fancy word unpleasing to some ears', but he does not explore the logics or the histories of this displeasure.

In a republic, as Aristotle reminded a long time ago, citizenship stands both for the ability to rule and a capacity to be ruled. The account Austin provides of putting the Indian Constitution to work exemplifies the reverse situation: citizens who govern have no inclination or taste for being ruled and those that are ruled are afforded very little opportunity to govern. Governance in India then signifies contingent histories of power, where a class of *super-citizens do things to* themselves as well as to the ordinary constitutional citizens. Austin here provides a rich narrative of such doings.

The 'process' that seems to absorb Austin is that of *constitutional politics*. He does not develop this integral notion. Constitutional politics emerges, in his work, as a conflicted site where a broad range of political actors pursue their special interests by invoking the languages and rhetoric, the

¹⁰ Austin, *supra* note 4, at 3.

¹¹ Austin, *supra* note 4, at 3.

logics and paralogics, of constitutionalism; the symbolic capital (to evoke Pierre Bourdieu's fecund notion) of the constitutional ideals of human rights and the rule of law. Assorted political actors deploy the languages of the constitution to serve strategic political interests, individually and through associations and shifting, unstable, coalitions of conflicting interests, manifesting at one moment as political accommodation, and another as political confrontation, somehow held together by a thin allegiance to the basic constitutional values.

The political history that the second book offers is the history of *un* (often *anti*) constitutional people in power and things they do *to* and *with* the logics and languages of Indian Constitution¹². It is a history of constitutionally insincere and insecure constitutional classes, at times ambushed by anti-systemic movements but still somehow in 'control.' The histories of constitutional politics narrated by Austin do not belong to the craft, and the genre, of subaltern histories, those that entail struggles of the constitutional underclasses to recover Indian constitutionalism from the political practices of predation. One looks in vain, for example, for narratives of struggles that led to radical redrawing of the federal map of India, the social histories of Dalit movements or the genesis, growth, and endowment of the *Sampurna Kranti* (or Total Revolution movement.)

Even so, it will be a mistake for the subaltern inclination to neglect the Austinian narrative. The social pathology of power, the macro and micro fascism of the politics of political desires, the craving for 'legitimacy' (mission impossible), and the vast internal bloodlettings within the ruling classes, are here laid bare, in a great painstaking detail. The subaltern historian of the Indian constitutional development finds in this work an embarrassment of riches. The 'seamless web' metaphor dominates Austin's writings; for a subaltern historian of Indian constitutionalism, this 'web' emerges as a bloodied and bruised labyrinth for the masses of Indian impoverished citizens, the *atisudras* as Babasaheb Ambedkar named the constitutional proletariat.

¹² Austin, *supra* note 4, at 373. Of the Forty Second Amendment, Austin writes: "The shift in the balance of power within the new Constitution made it all but unrecognisable". The struggle for making the unrecognisable, though the discipline of the basic structure, in turn also makes the new (judicially enunciated) Constitution, which is similarly unrecognisable in terms of the original intent. So do the contemporary profiles of social action litigation, or progressive judicial activism. All this supports my view that India has had many Constitutions: the Constitution of 1950, the State-finance capitalism of Ms Indira Gandhi, her emergency constitutionalism, the Mandal/Masjid Constitution, constitutionalism of the basic structure and only self-limited adjudicatory leadership or demoprudence, and the contemporary economic global constitution, which divides itself into many phases — from coalition to supermajority politics. All this, in addition, blows to the wind the favourite notion of contemporary constitutionalism that draws distinction between changes *in*, and *of*, constitutions.

Of course, contentment with archives of contingency (the 'seamless web') remains one way of doing 'history'. Austin's narratives embody the virtues of such an archival. However, the 'causes' he deals with are, in an Aristotelian sense, the 'immediate', rather than 'efficient' causes; or put another way, we know more about the *dramatis personae*, less about the script. Of what may a script consist?

Let us stay with just one area: the notorious *Shiv Kant* (habeas corpus) decision during the Emergency. A historian will probably seek answers to the questions that provide a structural rather than episodic narrative. On this plane, the question would be: Did Justices Chandrachud and Bhagwati 'betray' or 'affirm' their legal liberalism (rule of law) lineage? In contrast, an episodic narrative looks at judicial biography: Was their constitutional cowardice a result of inarticulate fear concerning the institutional future of the Apex Court? Or was it a function of their judicial career ambitions? Was their pusillanimity generated by veiled personal threats, those 'Deep Throat' kinds of telephone calls suggesting expose for the violation of the Draconian Foreign Exchange Act (most Justices have relatives abroad and remain exposed to charges of technical violation)? Or were they even subject to more dire threats of possible impeachment or detention?¹³ Or was it a distinctive product of lawyering, which stopped short of the argument that the security legislation (the dreaded MISA) was unconstitutional because the proclamation of Emergency was itself similarly tainted?

A structural understanding would suggest that while individual motivations were important, these do not amount to an explanation. The explanation that eludes the episodic narrative is rather simple: as wielders of state adjudicatory power, summit courts remain prone to reinforce the centralized unity of the state. The 'structural logic' of the Emergency was symbolised by the representation of danger to the life of the Indian State; times of 'emergency' were held to exclude the times of human rights. I know of no summit court, which

¹³ Such intimidation was commonplace. As the Dean of Delhi Law School, I was subjected to these frequently. I insisted that jail authorities allow detenué students access to reading materials and that they be allowed to sit for semester examinations. When some students were brought manacled to the Law School, I insisted that these be removed. There were high profile students like Arun Jaitley, the President of Delhi University Student Union, now the Union Minister of Finance, and there were scores of "lesser" students, some of whom wrote post cards from jail thanking us (Professor Lotika Sarkar and myself) for helping them with our cause of opposing the emergency! The Home Ministry sent to the then Vice-Chancellor, Professor R.C. Mehrotra, a briefing listing my "leanings" towards the BJP opposition! The threats of detention following in the wake of my polite refusal to contribute to a felicitation volume to Indira Gandhi (on the theme of the "jurisprudence" of Twenty Point Program) ceased mysteriously, after I wrote a protest letter to her.

I mention these personal details here to suggest the reality of structured coercion, which would magnify a hundred times in case of a Supreme Court Justice exposed to more discreet hints.

has not traded off democratic rights of citizens in war or warlike situations. The Emergency was a war against the Indian Constitution.

The *Shivakant*¹⁴ decision, however, is not atypical. Its prototypical precursor is *Gopalan*¹⁵, which grants the Parliament the plenary power to enact dragnet security legislations, even further protected for more than a quarter-century long judicial validation of the notorious Ninth Schedule of the Constitution. Even after the Emergency, the Supreme Court sustained the validity of the awesome Fifty Ninth Amendment that provided state power impunity for extinguishing the right to life in Punjab, produced post Emergency discourse sustaining the constitutional validity of the National Security Act, and Justice Jeevan Reddy's (in his second constitutional birthing as the Chair of Indian Law Commission) open unconstitutional advocacy of enacting a more permanent regime of state of emergency against Indian citizens by a recommendation that would make preventive detention an integral aspect of the Indian Criminal Procedure Code!

I am not trained as a historian. However, as one, who has learnt immeasurably from their craft, I remain inclined to the belief that historians would have produced orders of explanation, not just catalogues of explanatory variables. Even the tracing of critical constitutional events must entail some explanation of the phenomenon of the convenient co-optation of eminent Indian Justices by evil political regimes, unscrupulous governance intentionality's, and genocidal administrative styles.

The much-vaunted judicial independence remains, after all, *dependant independence*, a form of institutional constitutional politics, and politics of judicial exigency or expediency. In sum, it is unsurprising, from the perspective of structural historical explanation, that eminent justices, on and off the Bench, emerge as an aspect of (to evoke an Althusserian phrase) "repressive state apparatus," wielding the power of the State to serve regime specific clusters of political interests against the constitutional logic of human rights and fundamental freedoms.

IV.

Granville Austin overall prefers a narrative path that *normalises* constitutional crises. We are thus told that "ugly as the Emergency was, New Delhi in 1976 was not Berlin under Hitler"¹⁶ and that "the Emergency had its limits," in ways that exemplified considerable "individual and political freedom existed within it." Austin is thus able to write that:

¹⁴ *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521.

¹⁵ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

¹⁶ Austin, *supra* note 4, at 343.

*“...ideological purity was not demanded; opponents were not shot. And the Forty Second Amendment, with all the ills here described, did not abolish the Supreme Court; left the judiciary with considerable power; did not end the elections and legislatures of representative government; and did not abolish the Fundamental Rights..”*¹⁷

All this could have happened and some of it was assiduously planned. However, it did not come to pass. Undoubtedly, constitutional dictatorship was not such that resulted in a total liquidation of the constitutional estate. Not merely was ‘India’s flirtation with dictatorship mercifully brief’ but it had the unintended consequence of the ‘saving of democracy’.¹⁸ It:

*“taught Indians about the dangers to democracy that lurk everywhere: of demagoguery, of leaders uncaring of liberty, of hero worship and placing power in the hands of the few, of the dangers from citizen abdication of responsibility. Like the ‘McCarthy period’ in the United States, it taught that vigilance would be then price of it not happening again.”*¹⁹

What ‘historic’ sense are we to make of these observations? Do the world historic measures authorising judgements concerning catastrophic practices of the politics of cruelty exist? If desirable, how ought one to construct these? Or may we regard each situation of ongoing, flagrant, and massive violations of human rights and fundamental freedoms as ‘unique,’ thwarting comparative studies? If comparative studies of such politics remain desirable or possible, does it matter whether the ‘measure’ is derived from Euro American centric perspectives? (The horrors of the Third Reich, or the McCarthy period analogy that Austin offers?) Or one should even here privilege frames of reference distinctively South (Idi Amin, Papa ‘Doc,’ Yayah Khan, Pol Pot, Augusto Pinochet)?

I do not know save to say that all comparative exercises need a number of reflexivities, based on the experience of the violated rather than on the intentionality of the perpetrators. At any rate, the analogy Austin deploys normalises human violation in the period of the Indian Emergency by comparison with the Third Reich; the McCarthy period analogy offers a more contemporaneous alternative but hopefully an inaccurate one. The Indian constitutional experience was not of the Cold War American constitutional patriotism. The vaunted ‘vigilance’ of American citizens exemplified the ‘best’ and the worst excesses of the Cold War warriorism, of little relevance to the Indian experience.

¹⁷ Austin, *supra* note 4, at 349.

¹⁸ Austin, *supra* note 4, at 390.

¹⁹ Austin, *supra* note 4, at 390.

V.

Of abiding relevance are Red's views on secularism. The 'history' that interests Austin is the history of change within stability, or the ways of adjusting both 'social revolution' and 'more effective democracy' to the imperatives of 'national unity and integrity'.²⁰ Austin's depiction of the itinerary of meanings ascribed to 'unity and integrity' are fascinating, and the reduction of threats to these by five 'isms' is compelling²¹. However, his notion of the sixth 'ism' - secularism - is problematic indeed. It may be the case that secularism was, in nationalist political rhetoric, touted as 'antidote' to these five sources of threat. But this scarcely justifies the reduction of constitutional secularism as a mere servitor to the 'nation-building' practices of power. In effect, this reductionism tends to empower the Hindutva critiques of Indian constitutionalism²² a consequence that I know would cause grave anxiety to Austin in the present constitutional conjuncture. Constitutional secularism, as judicially enunciated, is a very different phenomenon than its party-political constructions may suggest from time to time. Constitutional secularism, in its affirmation of the right to freedom of *conscience* and religion, and its regime of distinction between religious 'belief' and 'practice', that enables the State to regulate the 'secular' aspects of religious traditions is an extraordinary juridical invention, which seeks to discipline runaway practices of political power that seek to harness to partisan ends the historic gains of the processes of secularisation of Indian society.²³

Granville Austin traces the 'cosmology' of Indian constitutional development in a variety of strands of the so called 'Hindu' Indian belief systems. First, there is the notion of constitutional beliefs pitted against the *karmic* beliefs. *Karma* for St. Granville is thus deterministic, now rivalled by the 'Constitution's concept of individual freedoms.' This 'millennia old' belief system is 'waning slowly, more slowly among the poorest, who need *karma's* solace'²⁴, and that form of solace furnishes the moral roots of state paternalism, often named as disposition towards a *Mai-Baap Sarkar*. Apart from this intuitive leap from a cosmic belief system to the daily, but eventful, experience of governance, St. Granville spares himself of the burdens of empirical evidence.

²⁰ Austin, *supra* note 4, at 555.

²¹ Austin, *supra* note 4, at 555. ("For most persons ... the gravest danger to unity and integrity came from four "isms: casteism, communalism, linguism, and provincialism/regionalism", manifesting varieties of 'communalism').

²² Upendra Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes Indian Constitutionalism* in Z. Hasan et. al (Eds.), *supra* note 2.

²³ But see, the little noticed works such as SECULARISM IN INDIA [Iqbal Narain (Ed.), 1995] which contains Justice Krishna Iyer's inaugural address *Manifesto of Man* at 13-56 and my keynote address *Redefinition of Secularism in India: Some Preliminary Reflections* at 57-82; THE CRISIS OF SECULARISM IN INDIA [Anuradha Dingwaney Needham & Rajeswari Sunder Rajan (Eds.), 2007] which contains my article *Siting Secularism in the Uniform Civil Code: A Riddle Wrapped Inside an Enigma* at 287-293.

²⁴ Austin, *supra* note 4, at 595.

A revelatory truth, of course, needs no such evidence. However it is hard to believe that the poorest, the actually *impoverished*, in such dire need of *kar-mic* solace, should with such frequency so overwhelmingly cast their votes to change their rulers, or participate so robustly in people's movements for democratic rights and an 'open society.'

Second, St. Granville would have us believe that India is a 'survival society.' Everyone needs to *survive*, 'those at its top to those at the bottom of its vast disparity.'²⁵ In a sense, then, constitutional India represents a Hobbesian State of Nature, in which the cannibalism of a people produces civic indifference (outside times of 'difficulty and disaster') to 'the well-being of others and to the condition of society as a whole.'²⁶ Those at the bottom include the poor "quite literally ... trying to have two *chapattis* where they have had one" and those who 'scramble for classification as an 'Other Backward Class' member within the Mandal Commission criteria in order to receive special consideration in employment.'²⁷ Whose, and what, constitutional interests or values are harmed by the search for the second chapatti or a place in the state employment markets is not a question that engages St. Granville.

How does the 'survival society' affect those at the middle and the top levels of Indian society? Middle classes well-disposed to 'minor corruption', 'supine and sycophantic civil servants', university teachers who 'form their own groups' for maintaining their 'superior' power positions, and Professors who 'court politicians with the view of being appointed Vice Chancellors'²⁸ as well as dynastic political formations²⁹ provide illustrations of 'survival society.' This also suggests that every exception to this 'regime' proves the rule! What is more, St. Granville frowns upon every expression, individual or associational, for desire for power. Power deforms and power corrupts the constitutional 'spirit.'

'Survival' then is a moralising, even sermonising, notion. It is a figure, which expresses the moral economy of the constitutional order, not its political economy. St. Granville is not interested in the mundane and profane, but the structural, both global and national reasons pushing India to ever new levels of scarcity and survival. He is not interested in the economy of difference, in the ways in which the impoverished and the affluent both seek to survive. Instead, St. Granville expects all citizens to be equally constitutionally virtuous.

The keyword is 'social revolution' but it is forever postponed. However, that keyword summates multitudinous constitutional sins of commission and

²⁵ Austin, *supra* note 4, at 640.

²⁶ Austin, *supra* note 4, at 641.

²⁷ Austin, *supra* note 4, at 641.

²⁸ Austin, *supra* note 4, at 641-642.

²⁹ Austin, *supra* note 4, at 643.

omission. Of these Austin is well aware. For these, St. Granville has little use. For both, however, 'social revolution' remains the estate of the constitutional elites. It does not occur to either that communities in struggle and people in resistance may initiate 'social revolution' and begin to own (and reshape) the constitutional vision. How does one explain otherwise the abundance, within a so-called 'survival society,' of human rights and social movements in the half century of the Indian constitution at work? How does one account for the well-springs of moral altruism, as well as communitarian vitality, within the framework of the gospel according to St. Granville?

Third, 'rhetoric or empty-promise syndrome' has 'deep cultural sources'³⁰ St. Granville would have us believe that

*"Closely related to the word-equals-deeds syndrome is that of initiations equals completion: a programme is started, an institution is established, but follow up is ignored"*³¹

St. Granville, in a few well-sculpted formulae and eminently quotable words, dismisses the art and science of political or governance rhetoric. There is not a tattle of evidence that something named as Indian 'culture' is responsible for this 'empty-promise syndrome.' I know of no extant democratic society, which may not be fully described in these Austinian terms!

Does the Indian Constitution at work demonstrate the related syndrome: 'initiation equals completion?' Are 'impractical' goals set by political regimes 'because they are consonant with the ideology fashionable in the West?'³² Here again we find an aggravated form of mimesis; Indian constitutional elites even when they think themselves to be responsive to the upsurge for social justice stand represented as playing to the 'Western' galleries and lobbies. St. Granville has no inclination at all, of course, to explore the ways in which the international financial institutions, through structural adjustment programmes, and the heavily corporatized White House, dictate and subvert the 'developmental' priorities of the Indian constitution. The anti-people and human rights unfriendly impact of the emergent global economic constitutionalism³³ remains irrelevant to the meditation of St. Granville.

Fourth, Austin reverts to his familiar explanatory figure: 'accommodation', invoked heavily in his first book. I had severely, and extensively, questioned this notion in my nearly 150 page monographic review.³⁴ Austin finds

³⁰ Austin, *supra* note 4, at 644.

³¹ Austin, *supra* note 4, at 644.

³² Austin, *supra* note 4, at 645.

³³ DAVID SCHNEIDERMAN, RESISTING ECONOMIC GLOBALIZATION: CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW (2013).

³⁴ Baxi, *supra* note 1, at 323-430.

the objections I raised concerning this notion altogether unworthy, even of a brief mention. I respect his authorial privilege but continue to insist that the notion is treacherous, concealing more than it reveals. He now adds to this problematic notion even more aggravating theoretic, even theatrical, consequences. Now, in this work, political practice of 'accommodation' stands endowed with mythic 'cultural' qualities: it has allowed 'democracy and social revolution to operate at one level while traditional norms operate at another'.³⁵ The first level is 'ideal', the second is 'real'. And it is the second that subverts 'social revolution' (though not the 'open society') by its 'downward indifference of hierarchy, caste groups being uncaring about the well-being of those below them...and the complex of ingredients composing the survival society'.³⁶ Societal culture, rife with 'complex of ingredients' that constitute survival society, is then 'harmful' for 'democracy' and 'social justice.'

Precisely what it is that Granville Austin wants us to think about is not clear. Are we to think that the two levels are hermetically sealed disabling renegotiation of 'culture' through the means of constitutional 'politics'? Or are we invited to think that 'traditional norms' are inherently and invariably subversive of democracy and justice? Or, that the fifty years of working of the constitution has made little or no 'impact', on the bulk and generality of these unjust norms? Or are we asked to consider that the ancient 'caste' culture has somehow provided the stable 'complex of ingredients' for a 'survival society,' in ways that render effete the constitutional assurances of rights and justice?

While no one can gainsay the fact that Indian constitutional politics stands mediated by 'culturally' formed expectations that diverse constituencies entertain of politics, India is scarcely unique on this count among contemporary democracies. Further, there is ample evidence of reverse processes at work. Moreover it is also extremely vexatious to be presented with something named as the 'culture,' with invariant properties. Even at a superficial level, one would have thought the constitutional politics, and jurisprudence of the Mandal Commission, for once, brought down the Berlin Wall, of the 'indifference of hierarchy'. One would have thought that contemporary constitutional development, especially through forms of judicial activism, adjudicatory leadership, and demospudence encased in social action litigation³⁷, at least redefined the constituents of a so-called 'survival society'. Reading St. Granville offers an altogether de-familiarising experience about the meanings of the word 'culture'.

Perhaps, the deeper and more general point made by St. Granville is that 'the' 'Indian' 'culture' can grasp the meaning of social suffering only through

³⁵ Austin, *supra* note 4, at 649.

³⁶ Austin, *supra* note 4, at 649.

³⁷ See more recently, Upendra Baxi, *Demospudence v. Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 MACQUARIE L.J. 3-23 (2014).

the lens of hierarchy. Furthermore, practices of ‘accommodation’ reinforce, in sum, an *uncaring* society. This is too vast a cultural generalisation to tackle here. It is a notable fact that Indian society is callous to social suffering. However, it is not clear that there are other human societies out there, which are not similarly callous. Nor is it clear that forms of caste hierarchy even when more abundantly vicious are less immutable than those of class, race, and gender hierarchies, within and outside India. Perhaps, then, St. Granville is drawing our attention to the notable failure of a ‘survival society’ in linking notions of *justice* with cultures of *caring*³⁸, the ways in which constitutional culture, at the end of the day, stands cloned by the societal culture.

This last observation needs some elaboration. In what senses may one speak of ‘constitutional culture(s)’ and in what ways may we say these stand be related to societal culture(s)? India has developed an assortment of material as well as non-material, dominant as well as subaltern, constitutional cultures. A useful way of reading Austin would be to garner a sense of the variety of constitutional cultures, emerging in this narration primarily as ‘institutional cultures’ (whether of political parties, the executive or the judiciary.³⁹) The ‘empty–promise’ or the ‘word–equals–deeds’ syndrome may be read as being bereft of either logic. Neither justice nor care can then be said to characterise dominant constitutional cultures. However, perhaps a deeper thematic arises when the governing rhetoric of rights and justice stands *altogether* removed from the obligation arising from the spheres of caring. Constitutional policy makers present themselves as being *just*, even when not *caring*. For, caring at least implies nurturance, even to the point of self-sacrifice. It is unsurprising that St. Granville inveighs against forms and practices of Indian constitutionalism that so conspicuously lack the spirit of caring⁴⁰.

³⁸ Carol Gilligan has sought to educate us into thinking about the different logics of moral development attached to notions of “justice” and “caring”. See her classic study *In a Different Voice: Psychological Theory and Women’s Development* (1977). For the numerous problems associated with this distinction, see VIRGINIA HELD, *JUSTICE AND CARE: ESSENTIAL READING IN FEMINIST ETHICS* (1995).

³⁹ One usually thinks of “justice” as being a prime value around which constitutional cultures stand organised. Those visions that identify “development” with “justice” differ from those that insist on the integrity of the “basic” rights that limit the power of constitutional classes to negotiate “rights” as a strategy of “development”. Those oxymoronic visions that seek to combine economic growth with social justice shape constitutional cultures somewhat differently. This is not a theme that I can develop here. Suffice it to say that in all these and other related visions, the integral emphasis remain on the values of “justice”, not “caring”.

⁴⁰ To take a few, and rather harsh, examples: *Chacha* (uncle) Nehru, as he liked to be called (for he loved Indian children and so did they), exemplified love without caring. It surely lay within his power to have ordered full implementation of the only time-bound provision of the Indian Constitution: the provision of free and compulsory education of children below the age of fourteen years. He did not. Indira Gandhi initiated the *Garibi Hatao* movement (with her admirable planning measures); she had no time or inclination to assume responsibility for any meaningful rehabilitation of bonded and forced agricultural labour or to generally move towards the amelioration of un/disorganised labour. It took India forty odd years to establish her first National Commission on Unorganised Labour; very likely, it will take an equal

However, it is notorious that constitutional cultures remain rights bound, not care bound. Adjudicatory cultures, even of judicial activism, furnish a rather brutal illustrative domain. I describe this as 'brutal' because activist judicial stances evoke at least the rhetoric of constitutional care in a larger measure than the practices of party politics and governance.⁴¹

I deploy here the notion of *caring* perhaps in ways not quite contemplated by the original authors of the discourse on caring. Yet, this transgression is, perhaps, not altogether unworthy. It remains important to ask why out of the four cardinal preambulatory values (justice, liberty, equality, and *fraternity*), the last, so manifestly related to notions about caring, has so little informed Indian constitutional development. Why has 'fraternity' or *sisterhood* been so systematically downplayed in the Indian constitutional theory and practice? How is it that its only manifestations (Articles 17, 23 and 24 of the Constitution) played such an inconspicuous role in the development of constitutional cultures of contemporary India? Fraternity, in its most minimal sense of concern for the fellow - citizens, has scarcely informed the half-century old dominant practices of Indian constitutional politics.⁴²

number of decades to implement even one tenth of its sage recommendations. It is pointless to multiply these poignant examples.

⁴¹ The Brother Venkatachaliah act of judicial nationalisation of *Sheela Barse* social action petition against the unconstitutional detention of juveniles in prisons still (after over a decade) leaves them where they are, even as His Lordship moves post-retirement to the Chair of National Human Rights Commission, and now the ominous Constitution Review Commission. Despite impressive judicial pronouncements on the rights of prisoners, and inmates of other custodial institutions (like the Agra Home Women in State remand institutions or the inmates of psychiatric care institutional regimes), these hapless citizens have yet to experience the threshold taste of the human rights-based amelioration. And, of course, the 200,000 judicially revictimized victims still survive as such, nearly sixteen years after the judicially sanctioned "largest industrial peacetime disaster" (to invoke Judge Keenan) in the contemporary world. See as to "care", Upendra Baxi, *Justice and Care*, adapted and abridged from the Rosalind Wilson Memorial Lecture delivered on 28-7-2009, 37(2) IIC QUARTERLY 118-132 (2010).

⁴² Judicial construction of the preambulatory value of fraternity is very infrequent, although Part III gives very many rights to fellow-feeling (fraternity) as a basic human right of all human citizens. Noteworthy remain (as mentioned in the text) Articles 17, 23 and 24; the last two explicitly appear as "rights against exploitation". Fraternity, thus conceived, is a paramount constitutional right, further elaborated by Part IV. Article 35 declares that conduct declared by Part III as offences [and these extend to Articles 17 and 23(a)] shall be governed by law made by Parliament notwithstanding the detailing of division of legislative powers; this article supersedes the federal principle and detail. Moreover, ours is the first, if not perhaps the only, constitution that creates offences against the right to fraternity and fundamental rights.

Although it takes me far afield, I must here gratefully respond to the anonymous reviewers and the editor; they have drawn my attention to *All India Scheduled Castes v. Western Coalfields Ltd.*, [Writ Petition No. 2296 of 1998, per A.B. Chaudhari & P.R. Bora, JJ.]. The Nagpur Bench of the Bombay High Court held that the provisions of Payment of Wages Act ought to run subservient to the preambulatory value of fraternity and the Fundamental Duties: the Court ruled that it was neither feasible nor desirable to consult all the employees of Western Coalfields Ltd. Nothing should be "destructive" of the value of fraternity than refusing or contesting payments to the Prime Minister's Relief Fund. The Court ruled that

I speak of the ‘dominant’ ways, and forms, of Indian constitutional politics. The constitutional politics of neo Mohandasians⁴³ such as Acharya Vinoba Bhave, Jay Prakash Narain, Siddharaj Dhahhda, Narendra Dev, Baba Amte, Mother Teresa, for example, offer rich histories, in word and deed, of caring, of the daring of constitutional *karuna*. The problem is not the intransigent one concerning societal cultures. Rather, it concerns the poverty of social theory imagination. Why are these grammars of care not an integral aspect of contemporary Indian ‘constitutional politics?’ Why should that notion be severely impoverished as a narrative of what some citizens in power *do* to those subject to their power?

To add yet another interrogation: Is the logic and the paralogic of institutional caring, then necessarily North-South different? Red’s account would at least implicitly suggest so. Regardless of any polemical intent, I remain wholly unpersuaded. Indeed, the study of conflict between the realms of justice and rights and those of caring remains, I believe, a priority task for comparative constitutional studies.

VI.

To ‘conclude’, Granville Austin is well worth the labour of several readings; even when St. Granville’s holy generalisations concerning ‘culture’ do not. Yet, Austin puts to severe test, Professor Andre Beteille’s rather majestic enunciation: ‘A constitution may indicate the direction in which we are to move,

it is “the fundamental duty of every citizen and the employees of the WCL and the Trade Unions to obey the constitutional mandate about “Brotherhood”. These Trade Unions are not above the law or the Constitution. The Unions as well as the employees of the WCL must understand that there is a responsibility on them to help the brothers and sisters in other States, affected because of the floods, cyclone, tsunami and so on....”.

This is rather a facile interpretation; any judicial interpretation of a term in the Preamble must distinguish analytically between a moral idea and a juristic one. When in either interpretation, disobedience to Fundamental Duties of all citizens is “destructive” of the desired constitutional order is an empirical matter; it is any event doubtful that before the articulation of such duties there was any constitutional obligation to contribute to the Prime Minister’s Relief Fund. It is doubtful that the moral or juristic concept of fraternity compels only one mode of fulfilling the obligations thus cast on all citizens. It is well established further that the power to legislate is set out in Part XI, Chapter 1, of the Constitution of India. Where the makers of the Constitution wanted Parliament to legislate and not the States, it explicitly so provides.

As a moral concept, the relationship between the values of “fraternity” and “solidarity” is very complicated; so it is even if we were to equate these two notions between these and “social inclusion”. See as to this, Upendra Baxi, “Representation, Inclusion, and Governance: A Constitutional Perspective”, Zakir Hussain Memorial Lecture, 21-1-2015 (mimeo).

This is not to say that the Court was wrong in its missionary moral zeal; but I do suggest that careful analysis is needed at every step; the Court seems inexplicably extremely reluctant to do so.

⁴³ I do not say “neo-Gandhian” because the category “Gandhi” confuses and complicates the contemporary Indian constitutional discourse! The singular Gandhi stands avenged by the multiple ones, bearing his last name.

but the social structure will decide how far we are able to move and at what pace.⁴⁴ This ‘prophecy’ is, at the end of the day, wholly social structure-centric, as if the constitution and laws remain somehow unrelated to, even outside of, ‘social structure.’ Constitutional (re-)directions re-write old maps and cancel colonial signposts. Progressive constitutions help move the tectonic plates of many an *ancien regime*. The *bhadralok* theorists of social development often fail to experience the intensity and frequency of constitutional aftershocks; *pro-active* constitutionalism may not always enact the ascendancy of ‘social structure.’ The agony and ecstasy of Indian constitutionalism at work, fortunately, goes beyond the conventional Indian sociological theory, not always fully conversant with its dynamic hermeneutic, though contingent, practices.

Austin does not overtly contest Professor Beteille’s dictum. However, he unmistakably shows that the constitution does not merely set the directions for change but in fact directly impacts upon ‘social structure’.⁴⁵ Indeed, Austin insists that the ‘Constitution, for all its promise yet unfulfilled, has opened the door to *national rebirth*’.⁴⁶ And the

*“oppressive effects of hierarchy are waning as the open society unwraps national talents. Awareness of rights is becoming unquenchable.... Representative government and constitutional democracy are firmly established... The open society is a grand achievement even when sullied by personal selfishness and police- and class- perpetrated brutality. India is among the handful of modern democracies that has not descended into absolutism and risen again to freedom, having learnt the lessons of vigilance.”*⁴⁷

All this is, partially, true. But that partial truth also contains a litany of constitutional lies. Constitutional politics of India, far from constituting a ‘survival’ political economy, constitutes an economy of ‘excess’, a phrase regime, which Georges Bataille inaugurally enunciates.⁴⁸ Indian constitutional development is a register of excess because it seeks to manage ‘the ‘heterogeneous’ into orders of an imperialist unity’.⁴⁹ Increasingly also sovereignty expresses itself ‘in

⁴⁴ Austin, *supra* note 4, at 665.

⁴⁵ Austin, *supra* note 4, at 666-67. Thus, the “initially disparaged citizens” (the educationally and socially backward classes or the other backward classes) “have embraced the vote and turned it to their own account”, using “the weapon of their oppression, their caste(s), as the focus for mobilisation”. It is this “grain of sand” around which they seek to “build the pearls of upward social and economic mobility and political influence”.

⁴⁶ Austin, *supra* note 4, at 666.

⁴⁷ Austin, *supra* note 4, at 667-668.

⁴⁸ Georges Bataille, *Visions of Excess: Selected Writings 1927-1939* [Allan Stoekl (Ed.), 1985].

⁴⁹ “The simple fact of rule by men over men implies the heterogeneity of the ruler, at least to the extent that he is a ruler; to the extent that he appeals to his nature or personal qualities for the legitimation of his authority, he characterises this nature as the totally other, without being able to give a rational account of it.” [JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 219 (Fredrick G. Lawrence trans., 1993)].

acts of waste'.⁵⁰ Extended to the context of the practices of Indian constitutional politics, this Bataillean insight signifies both the conspicuous consumption of the symbolic capital of the Constitution and the consciously planned and systematically pursued policies that by denying modicum of rights, justice, and care to most impoverished citizens extravagantly wastes their lives.

Contemporary globalising Indian constitutional politics is not an economy of a 'survival society'. Rather, it is a history of excesses of the politics of governance desires, shaping variegated tendencies and forms of constitutional fascism, manifest in the cultic honouring of leaders as sacred personages, the artfully staged mass rituals, the manifestly violent and hypnotic elements, the breach of legality, the renunciation of even the appearance of democracy and all egalitarian values⁵¹.

This description of constitutional elements at least constitutes the *minima moralis* of the subaltern perspective on Indian constitutionalism. It would be unjust on my part to expect Granville Austin to agree. However, the future of Indian constitutionalism lies on this contested terrain.

I know that many of my readers will say that all this is "jargonised". I invite them to study this observation in relation to assorted regional *el supremo* of their own choice.

⁵⁰ Habermas, *supra* note 49, at 226.

⁵¹ *Id.*