

ON INDIA'S POSTCOLONIAL ENGAGEMENT WITH THE RULE OF LAW

*Moiz Tundawala**

By rescuing the rule of law from ideological abuse, this paper explores in its postcolonial career in India, continuities with and distinctiveness from the colonial experience. Specifically focusing on the jurisprudence of the Supreme Court on civil liberties, equality and social rights, it claims that ideas of the exceptional and of the outsider have been integral to the modern rule of law project, and that marked continuities can be noticed with the colonial past in so far as they have been acknowledged in Indian public law practice. India's distinctiveness, though, lies in the invocation of exceptions for the sake of promoting popular welfare in a postcolonial democracy.

I. INTRODUCTION

As soon as India acquired independence in 1947, it was confronted with the most difficult challenges pertaining to its organization into a national community and state. Those who had once been at the forefront of its freedom struggle were now tasked with the exciting but daunting responsibility of institutionalizing governmental arrangements which would best facilitate its fresh tryst with destiny. What options were available to the founding framers as they began deliberating over possible constitutional principles for India's political organization? It was clear that something new was on the horizons; the British were leaving, and the thought of them being replaced by the descendant of the last Mughal ruler did not even occur to anyone. But then, was it possible to ignore history altogether and completely start afresh?

India, conceptualized in whichever way, was by no means a *tabula rasa*. It claimed inheritance to one of the oldest civilizations known to the world, and was home to a bewildering diversity of people and ways of living. But besides the numerous Indic legal and political traditions which flourished on the subcontinent over the ages, the lessons learnt from the long history of

* Research Associate, National Law University, Delhi. L.L.M., School of Oriental and African Studies ('SOAS'), London, 2011-12; B.A./L.L.B. (Hons.), The West Bengal National University of Juridical Sciences, Kolkata, 2005-2010. The author is an incoming PhD candidate at the London School of Economics and Political Science. This paper is a revised version of his LLM dissertation submitted to SOAS in 2012 and forms part of his larger doctoral research. He would like to thank Prof. Mahendra P. Singh for his mentorship and sustained interest in this project, Alexander Fischer for his supervision of the LLM dissertation at SOAS, Siddharth for being the most informed interlocuter, Vidya Venkat for her valuable insights on various ideas discussed in the paper, and Nivedita Saxena in particular and also Smaran Shetty for their able editorial assistance.

colonial rule also presented themselves to the makers of the Constitution in this moment of significance. Doubtless, the future of India as a free state could not have been envisaged in an epistemic vacuum; the Constitution is not and cannot be thought of as an ahistorical social contract. However, in the framing of the Constitution, experiences from certain periods in history were prioritized over others, and we ought to keep this in mind while trying to make sense of the postcolonial working of the Constitution.

The independent state and its Constitution were immediately preceded by a long history of colonial rule, which although problematical from the nationalist point of view, had the most lasting impression on the choices made by the Constituent Assembly. Instead of reverting to a pre-British institutional set up, the Constitution of 1950 borrowed heavily from the previous constitution—the Government of India Act, 1935 while designing the framework of governance for the state.¹ Perhaps this was the most practical option available under the circumstances; or may be the influence of modernity had robbed the founders of their capacity to imagine an alternative course for the nation. Probably, there was no concept of ‘nation’ for the pre-colonial non-moderns to work with in the first place, and so it was only natural that their institutional frameworks of government would not be of much relevance for the new Indian state.² Whatever may have been the actual case, the point is that the Constitution did not signify a radical departure from the colonial regime, at least as far as its preferred mode of government was concerned.

What specifically interests me is the affirmation of the British rule of law tradition in the Constitution and its enthusiastic embrace by the first generation of law persons in independent India. Right from the very early days of the working of the Constitution, respect for the rule of law had come to be seen as the most important and beneficial heritage of the British period.³ Later, it was even recognized by the Supreme Court as an essential feature of the basic structure of the Constitution.⁴ What does this entrenchment of the rule of law

¹ According to as central a figure in the Constituent Assembly as B.R. Ambedkar, some two hundred and fifty clauses of the Government of India Act, 1935 had been directly incorporated into the Constitution, and the Directive Principles of State Policy laid down in Part IV were in fact Instruments of Instructions which were issued to the Governor General and to the Government of the colonies and to those in India by the British Government under the Government of India Act, 1935. See MITHI MUKHERJEE, *INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY 1774-1950* 203-04 (2010).

² Indeed, Sudipta Kaviraj says that it is wrong to ask, as the early nationalists did, how such a large entity as India could so easily be colonized. For the British there was an externally given object called ‘India’ which they could make the target of their political control and conquest. On the other hand, the natives with their fuzzy sense of community, could not reason through the similar concept of ‘India’. For them it was as though ‘there was no India to conquer’. See Sudipta Kaviraj, *On State, Society and Discourse in India* in JAMES MANOR, *RETHINKING THIRD WORLD POLITICS* 72-99 (1991).

³ See MC SETALVAD, *THE COMMON LAW IN INDIA* (1960).

⁴ See, e.g., *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299.

say about the working of the postcolonial Indian state and government? James Fitzjames Stephen, an English political philosopher who served as law member to the Council of India in the 1870s, was of the opinion that, “Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.”⁵

So, was the constitutionalisation of the rule of law merely a case of a lesson well learnt? Did the end of British rule mean nothing other than a transfer of power from the colonizers to an independent Republic? Can we not find anything which is distinct about India’s postcolonial engagement with the rule of law? If not, does the largest democracy in the world still continue to remain subordinated to the imperialism of ideas regarding the modes of government, and restricted in practice to ways in which they have been conceptualized in the West?

In this essay on India’s postcolonial engagement with the rule of law, I explore the continuities with and distinctiveness from the colonial past with specific reference to the jurisprudence of the Supreme Court on civil liberties, equality and social rights. My central claim is that ideas of the ‘exceptional’ and the ‘outsider’ are integral to the rule of law project, and there are marked continuities with the colonial past in so far as they have been acknowledged in Indian public law practice. India’s distinctiveness though, lies in the invocation of exceptions for the sake of promoting popular welfare as a postcolonial democracy. While parts III, IV and V of the essay deal with civil liberties, equality and social rights respectively, I set the tone by reflecting on the colonial rule of law in part II.

II. THE RULE OF LAW AND ITS COLONIAL CONTEXTUALIZATION

I do not wish to prescribe a working definition for the rule of law; neither am I interested in repeating what has already been said about it before. It suffices to mention that although the rule of law is deemed normatively desirable in most parts of the world today, there is no consensus over its meaning. Perhaps it is one of those ‘essentially contested concepts’, which apart from a commonly acceptable core is subject to rival interpretations in so far as its detailed specifications are concerned.⁶ Many scholars have tried making sense of the vast literature addressing the ‘what is rule of law’ question by categorizing

⁵ Quoted in ERIC STOKES, *THE ENGLISH UTILITARIANS AND INDIA* 302 (1959).

⁶ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & Phil. 137, (2002); W.B. Gallie, *Essentially Contested Concepts*, Proceedings of the Aristotelian Society 56, 167-198 (1955-56).

its alternative conceptions through different frames of analysis.⁷ Since I am not interested in analyzing the alternative conceptualizations of rule of law as such, we need not trouble ourselves with their intricacies here. I only want to emphasize the contestedness of the concept, and the variety of uses it has been put to in the past. More interesting for me are the reasons for the diverging views on the idea of rule of law. On a close reading of this literature, it seems that all prominent accounts have sought to answer the following questions: What is the nature of law which is supposed to rule? And what does it mean for law to rule in the first place?

As with rule of law, the phenomenon of 'law' has also been understood in numerous different ways. Briefly, jurists have either viewed it as an instrument of government emanating from the commands of a sovereign, or as tradition and custom, or as a construction of reason embodying principles of just conduct.⁸ My point is that the particular conception of 'law' a person has naturally influences the distinct idea of rule of law he or she subscribes to. Second, the expression 'rule of law' often implies for many that laws can actually rule. That a government of laws is to be preferred over government of men is no doubt a powerful sentiment, yet at best it remains ambiguous. It is not that the government consists of laws; rather the idea is to bind the rulers to what the law establishes. Law as such is an artefact concept, subject to human will. It cannot rule on its own: ruling is an activity and laws cannot act.⁹ But then, if humans will still remains determinative, what work does rule of law do?

It will take me a while to get around this question. For the moment, I am suggesting that each rival use of rule of law is premised upon a definite use of a whole constellation of satellite concepts such that disputes indicating its essential contestedness are not just about the concept alone. Instead they are indicative of a conflict between divergent patterns of thought often constitutive of competing ways of life.¹⁰ Besides distinct conceptions of other concepts, the notion of rule of law a person has may also be influenced by his or her ideal form of government and other cherished values. So, to appreciate the conception of rule of law a legal system incorporates, we must remain mindful of the larger network of other concepts of government within which it is situated. In the case of India, the context of colonialism in which it was first transplanted from the English legal system becomes most important if we wish

⁷ See, e.g., Judith Shklar, *Political Theory and the Rule of Law* in THE RULE OF LAW: IDEAL OR IDEOLOGY 1-16 (Hutchinson & Monahan ed., 1987) (who distinguishes between the ancient and modern conceptions of the rule of law), and Paul Craig, *Formal and Substantive Conceptions of the Rule of Law*, (1997) PL 467 (who differentiates the formal and the substantive).

⁸ MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 9-12 (2000).

⁹ Ignacio Sanchez-Cuenca, *Power, Rules and Compliance* in MARAVALL & PRZEWORSKI, *DEMOCRACY AND THE RULE OF LAW* 62 (2003).

¹⁰ J.N. Gray, *On the Contestability of Social and Political Concepts*, *Political Theory* 5 (3) 344 (1977).

to make any sense of the manner in which it has been inherited or adopted by the postcolonial state.

Even though the independent nation unites in denouncing colonial rule and extolling the freedom struggle, it nonetheless holds many of the legal and political institutions established by the British in high regard. Indeed, a common refrain among public lawyers in independent India is to see the rule of law as one positive colonial legacy which the founding generation did well to retain. The talk of protecting it assiduously from all sorts of excesses enjoys a wide popular appeal; noticeable during election season is how different political groups commonly treat this as a major justifying factor in claiming moral legitimacy to wield state power for themselves and in dismissing the claims of their opponents. But then, what conception of rule of law are these people working with? Surely, the ambiguities surrounding the concept, which were briefly alluded to above could not have been missed. Without denying these ambiguities, I wish to ascertain the extent to which Western debates regarding its meaning can be considered relevant for the Indian case.

It can be said that if colonial India was a passive recipient of the British rule of law tradition, these scholarly deliberations which were playing out domestically within the Anglo American legal system should now naturally be extendable to its territories. Although well rehearsed in different garbs, an argument of such a nature is based on a flawed assumption which I want to problematize here. The assumption is that with colonialism, a well formed European modernity exported itself to faraway places, introducing its already sophisticated and advanced ways of living to primitive people everywhere. Empirical evidence, however, points to a different reality. European civilization was never a perfect finished product; instead it was a somewhat tentative set of cultural, social and material practices—more an aspirational work in progress rather than a fully realized achievement ready to be transported across the world. In fact, it can now be established with sufficient proof that many of the key political and economic institutions of the modern West were produced not indigenously but through interactions with the colonial world across the Atlantic and in the East.¹¹ It is becoming increasingly clear that European colonial possessions abroad were laboratories for experimentation with, even for the production of, new forms of rule through an ongoing process of trial and error, invention and reinvention. The result was an entire gamut of new lawfare,

¹¹ See Michel-Rolph Trouillot, *An Unthinkable History* in *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* 70-108 (1995) and SUSAN BUCK-MORSS, *HEGEL, HAITI, AND UNIVERSAL HISTORY* 41 (2009) (For example, to appreciate how the Haitian uprising of black slaves contributed to the development of the idea of universal citizenship and a consciousness of emancipation). The factory and the joint stock company, it must not be forgotten, were also first invented in colonial contexts. See SUSAN BUCK-MORSS, *HEGEL, HAITI, AND UNIVERSAL HISTORY* 101-103 (2009) and K.N. CHAUDHURI, *THE TRADING WORLD OF ASIA AND THE ENGLISH EAST INDIA COMPANY 1660-1760* (1978). This literature is cited in PARTHA CHATTERJEE, *LINEAGES OF POLITICAL SOCIETY: STUDIES IN POSTCOLONIAL DEMOCRACY* 22-23 (2011).

new technologies of order and regulation which were operationalized in colonies, and interestingly very often in the metropole as well.¹²

Returning to the rule of law, in what ways then did the colony help in shaping its Western meaning? We saw earlier that there is no consensus over a fixed definition; there are only alternative conceptions and ambiguities. Given all this, it may not be possible to address the 'what is rule of law' question without running into a dead end after a while. So instead, a better entry point to make sense of the infinite jurisprudential contests over the ages would be to ask what the rule of law is not. Perhaps this question will get us closer to the unifying and common themes in the divergent accounts of its meaning. And here I believe, the colonial sight becomes extremely important if we are to understand developments in the West of modernity.

It may be hard to find scholarly consensus on what the rule of law connotes, but nonetheless there is at least a broad agreement on what it is not. For most jurists, the starting premise is that arbitrary governmental action is the main threat to liberty and so must be contained. They try to do so by conceptualizing law as a system of rules rather than a mere set of commands, and then delineating institutional conditions for the protection of its integrity.¹³ Where did they get their ready images of unbridled exercise of arbitrary power from? What were their theoretical suppositions contrasted against? How was the new rule of law society going to be different from societies of the past? To address these questions, it will help if we turn our attention through Peter Fitzpatrick to the foundations of modernity in the West, and the crucial role of colonialism in providing modern law its constitutive negative.¹⁴ With great erudition, Fitzpatrick throws light on the contrast which the moderns have constantly been drawing between law, nation and civilization on the one hand, and custom, tribe and savagery on the other. Allow me to briefly highlight his main thesis before I turn to colonialism and law once again.

Contrary to standard accounts of modernity wherein myths are rejected as residue and aberrations of a static and closed past expected to be swept away by the tides of progress and civilization in a matter of time, Fitzpatrick forcefully asserts that myth is vibrantly operative in modernity; the denial of the mythic is itself the myth of modernity.¹⁵ He believes that the occidental being of enlightenment is created in the comprehensive denial of the myth ridden ancients and primitives. These oriental 'others' though, a little familiarity with Edward Said will tell us, in their uncivilized and pre-modern states, are nothing but constructions of the West in simple opposition to which it is created. To put

¹² J.L. Comaroff, *Colonialism, Culture and the Law: A Foreword*, Law and Social Enquiry 26 (1) 310-11 (2001).

¹³ MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 335 (2010).

¹⁴ PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992).

¹⁵ *Id.*, ix.

it more clearly, the liberated sovereign subject of enlightenment could not have come into existence had it not been for the savage 'other'. Previously, the insuperable limits and conflictual elements of the mundane world were reconciled or mediated in the transcendental realm of myths. With modernity's denial of the sacred, however, it is compelled to develop this new story of origin from the abode of savagery to high civilization for the purpose of reconciling the contingency of modernity on Western experiences with its universalist aspirations. As Marshall Sahlins tersely remarks, "So far as I know, we are the only people who think themselves risen from savages: everyone else believes they descend from Gods".¹⁶

As a key character in this mythology, modern law is created in the disjunction between the 'enlightened being' and its 'other'. Since modernity denies the sacred, the contradictory existences of law - its seeming autonomy and its social dependence - cannot be resolved by reference to an extraneous order; it must now derive its origin and identity purely from its intrinsic being. But in spite of the seeming triumph of secular reason, modern law still bears the character of the Christian God, the only difference being that now it does so in a mundane world.¹⁷ It continues to retain a transcendent dimension with deific qualities such as autonomy, omnipotence, pervasiveness and the like. Precisely the same tension between reason and revelation prevailing in the sacred world plays out in modernity in the contradiction between "law as avatar of the god of order and law as avatar of the god of illimitable sovereignty".¹⁸ But what is it that resolves these contradictions and gives law its being in the absence of the transcendental? For Fitzpatrick, law's deific qualities, and its unity and coherence are to be found not in terms of what law is, but in terms of what law is not; not with reference to what it is subordinate to, but with reference to what is subordinate to it. Here once again, he alludes to the mythic construction of the savages who, in their foundational difference with the enlightened being, confer identities to the European and European law.¹⁹

With some help from Fitzpatrick, I hope to have established the *naïveté* of the idea that a highly advanced and sophisticated rule of law was transplanted by the British to their Indian territories in the eighteenth and nineteenth centuries. Rather, I have indicated the essential indispensability of the constructed oriental 'other' in the shaping and development of the rule of law ideal in the West itself. The exact details of the nature of this influence are not our concern here, and so I skip elaboration. Of particular interest to me is the way in which the rule of law discourse played out in a distinctly colonial setting of India.

¹⁶ MARSHALL SAHLINS, *CULTURE AND PRACTICAL REASON* 52-53 (1976) as quoted in FITZPATRICK, *Id.*

¹⁷ *Id.*, 55.

¹⁸ *Id.*, 59.

¹⁹ *Id.*, 62-63.

Nasser Hussain places the colonial rule of law as a median category within primitivism and oriental despotism.²⁰ That is, somewhere between a lawless scenario and the whims of a capricious ruler. But while the rhetoric of a civilizing law was the prime justification of imperialism, it was at the same time used to bring order to the subject population through the infliction of an immense violence.²¹ What explains this paradox? To borrow from Fitzpatrick one final time, this apparent inconsistency was mediated by the “mythic equation of order exclusively with an order that was imperially imposed”.²² Actually, it could not have been any other way; the colonial project of exploitation would constantly need an authoritarian legal regime at its service rendering it impossible to have a uniform rule of law applicable to all alike. As George Couper, Lieutenant Governor of the Northwestern Provinces remarked in 1878, “We all know that in point of fact black is not white. . . . That there should be one law alike for the European and Native is an excellent thing in theory, but if it could really be introduced in practice we should have no business in the country.”²³

Rejecting the revisionist challenge of historians belonging to the Cambridge school to the idea that colonial rule marked a fundamental break in Indian history, Partha Chatterjee emphasizes the analytical distinctiveness of the colonial state as a form of the modern state. This distinctiveness is rooted in what he calls the ‘rule of colonial difference’. In his view, the universality of the modern regime of power was constrained and limited in the exceptional context of the colonial state and society by the institutionalization of different legal procedures and practices for the British and the natives essentially based on a racial marker.²⁴ By focusing attention on the official privileging of a racial hierarchy, Chatterjee demonstrates to us “the inherent impossibility of completing the project of the modern state without superseding the conditions of colonial rule”.²⁵

Reading Fitzpatrick and Chatterjee together, Hussain suggests that the colonial is both foundational to conceptions of modern law, as well as the limit condition for the normalization of modern power.²⁶ Now, what happens to the law-modernity interface after the colonial is removed from the equation? Does it lead to the completion of the project of modernity, and in what ways? Are there absolutely no exceptions to the universally applicable rule of law? I

²⁰ NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* 31-32 (2003).

²¹ FITZPATRICK, *supra* note 14, 107.

²² *Id.*, 108.

²³ As cited in PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POST COLONIAL HISTORIES* 21 (1993).

²⁴ *Id.* See also ELIZABETH KOLSKY, *COLONIAL JUSTICE IN BRITISH INDIA* (2010) (For a similar perspective on how the colonial legal regime based on the rule of racial difference was complicit in the infliction of white violence).

²⁵ Chatterjee, *Id.*, 21.

²⁶ HUSSAIN, *supra* note 20, 31.

address these questions in the next two sections through a careful study of the jurisprudence of the Supreme Court on civil liberties and equality.

III. CIVIL LIBERTIES

On June 26, 1975, President Fakhruddin Ali Ahmed proclaimed an emergency under Article 352(1) of the Constitution on the advice of Prime Minister Indira Gandhi.²⁷ Later, he issued a proclamation suspending the right to approach the courts for the enforcement of the fundamental rights guaranteed under Articles 14, 21 and 22. The imposition of emergency was necessitated, according to Mrs. Gandhi, because of the turmoil and incipient rebellion in the country. Besides the maintenance of order justification, the government pointed to the imperatives of saving democracy, protecting the social revolution and preserving national integrity—all of which together compelled the resort to such a drastic step. On the contrary, for the critics, the emergency was nothing short of a scandal on the Constitution, and smacked of Mrs. Gandhi's dictatorial ambitions. The justifications notwithstanding, some of its tangible consequences on the ground were the following: detention of nearly 1,11,000 persons, a significant number of whom belonged to the opposition, under the Maintenance of Internal Security Act, 1971 and the Defence of India Act/ Rules, 1961; infliction of torture on many of these detainees; press censorship and curbs on the freedom of speech and expression; demolition of shanty towns in and around Delhi; and the subjection of rural and urban poor, and the lower middle class in North India to forced sterilization programmes.²⁸ Fortunately for those who suffered, the emergency was revoked and normalcy restored in eighteen months, and for the first time in the history of independent India, a non-Congress government came to power at the centre after the Parliamentary elections in 1977.

In order to appreciate the way in which the rule of law principle functions in its core and essence, I believe we must focus on the work it does in extraordinary times, like the emergency of 1975. In everyday affairs of the legal system, no one doubts the considerable weight it carries with governing authorities. But what happens when the state, enjoying a monopoly over coercion, suspends the regular constitution and decides to express its force and might, if its own security is under threat? Is the rule of law a powerful enough check under such circumstances when all other protective mechanisms are slowly taken

²⁷ In 1975, Constitution of India, 1950, Art. 352(1), stated thus:

“If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.”

²⁸ I have taken these details from GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 295-313 (1999).

away? And what exactly can we expect it to do as a final bastion for actual or potential victims of state violence?

To address these questions, I turn to *ADM, Jabalpur v. Shivakant Shukla* ('ADM Jabalpur'),²⁹ unarguably the most notorious decision of the Indian Supreme Court till date. The main issue in the case was whether High Courts could issue writs of habeas corpus under Article 226 to secure the release of detainees on grounds that their detention was not consistent with the provisions of the Maintenance of Internal Security Act, 1971 ('MISA') or was *mala fide*.³⁰ In other words, could the courts provide any remedies to petitioners against illegal detentions? Actually, things were slightly more complicated. To tackle all anticipated challenges, the MISA was amended through successive ordinances to incorporate provisions barring courts from applying the concept of natural justice in detention cases, permitting detentions without disclosure of grounds of detention and prohibiting their communication to courts, and refusing detainees any recourse to the right of personal liberty by virtue of common law or natural law. Given these strictures, and the unavailability of fundamental rights, could the rule of law still come to the aid of detainees?

I mentioned in part II that the Constitution of independent India affirmed the British rule of law tradition. In what way did this affirmation come about? We must know this to understand the proper context for the questions posed above. Here it will help if we familiarize ourselves with English constitutionalist Alexander Venn Dicey's formulation of the rule of law in the nineteenth century. As one who played the most influential role in shaping the dominant tradition in British public law, he would undoubtedly have been read with great interest by the framers of the Constitution.

Dicey ascribes three constituent meanings to the rule of law. *First*, "the absolute supremacy...of regular law as opposed to the influence of arbitrary power". *Second*, "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts". And last, in a specifically English mode, it expresses the fact that "the law of the constitution ... [is] not the source but the consequence of the rights of individuals", that "the principles of private law have ... been by the action of the courts and Parliament so extended as to determine the position of the

²⁹ (1976) 2 SCC 521; AIR 1976 SC 1207.

³⁰ The Constitution of India, 1950, Art. 226(1):

"Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

Crown and of its servants”, and that in effect, “the constitution is the result of the ordinary law of the land”.³¹

The influence of the Diceyan conception of rule of law is clearly visible in Article 14 of the Constitution providing to all persons equality before the law and equal protection of the laws, and in Article 21 laying down that the right to life and personal liberty cannot be denied to any person except according to procedure established by law. Although not relevant for us, Article 300-A similarly enjoins that no person can be deprived of his property other than by the authority of law. Now returning to ADM Jabalpur, we have learnt that by virtue of a Presidential proclamation, the courts could no longer be approached for the vindication of rights under Articles 14, 21 and 22. For four out of the five judges, the unavailability of Article 21 was reason enough to reject the claims of the detainees and emphatically conclude that no person had any *locus standi* as long as the proclamation was in operation, to file a *habeas corpus* petition before any High Court to challenge the legality of a detention order on grounds that it is inconsistent with MISA or is vitiated by *mala fide* factual or legal or is based on extraneous considerations.³² Justice Khanna famously dissented, and it is his opinion that I am more interested in, as it takes us back to the pre-constitutional British period.

The most salient feature of Justice Khanna’s decision was that Article 21 could not be viewed as the sole repository of the right to life and personal liberty, and that therefore its suspension did not give executive officers of the government *carte blanche* powers to detain persons without the authority of law. For him, this right was not the gift of the Constitution; it had existed long before the Constitution came into force. Merely because an aspect of the right was incorporated in the fundamental rights chapter did not mean that its independent identity had been exterminated. In effect Article 21 required a proper procedure under a valid law before a person could be deprived of his or her right. So at the most, its suspension meant the deprivation of the right to a procedure, and not the denial of the right in the absence of authority of law.³³

For standing by the courage of his convictions in difficult times, Justice Khanna commands my respect and reverence. Nonetheless, contrary to a near common consensus in legal circles about the plausibility of his basic argument elaborated above, I believe that it was based on a mistaken reading of history. What makes me say so? How could he have gone wrong, especially when the Constitution explicitly lays down in Article 372 that all pre-existing laws will continue to remain in force unless altered or repealed or amended? Even though Article 21 could not be enforced, the rule of law as bequeathed

³¹ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-203 (1959).

³² ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521: AIR 1976 SC 1207, ¶574.

³³ *Id.*, ¶¶ 163, 169.

from Coke, Blackstone and Dicey could surely be relied upon as an independent constitutional principle to obtain a writ of *habeas corpus*.³⁴

What this strand in Justice Khanna's thinking ignores or omits is the particular context of a colonial modernity in which the rule of law was transplanted on Indian soil. We saw in Part II how the notion of a civilizing law was used as a prime justification for colonial rule, and yet at the same time, it facilitated the infliction of immense violence on the subject population. This violence could not be of the same nature and magnitude as was associated with the 'oriental despot', for surely the British would not want to revert to the anarchy and chaos of savagery. As Nasser Hussain notes, it was not possible to summarily extinguish the colonial life of *habeas corpus*. Too much rested on it at a number of levels: "On an institutional and ideological plane, the writ [was] the source and sign of the historically specific and jealously guarded power of the judiciary. On a level of political rationality, [it facilitated] the very operation of law".³⁵ What was needed under the circumstances then, was the 'manoeuvre of suspension'.³⁶ His research into *habeas corpus* cases decided in British India shows us that although colonial courts did not capitulate to the depths of ADM Jabalpur by meekly surrendering to the argument that for reasons of state they did not have jurisdiction over *habeas* matters, nevertheless they could refuse to grant the writ by holding the conferment of exceptional powers to the executive for extended periods, such as the power to detain without judicial proceedings, valid under the conditions of colonial rule.³⁷ He concludes that such a temporary suspension of *habeas* during an emergency, far from being an abrogation of the rule of law, was actually its logical completion.³⁸

To draw a parallel from Part II, just as the 'enlightened being' depends upon the oriental 'other' for its existence, at a foundational level, modern law cannot be understood without reference to the exceptional during which its normal operation remains suspended. Carl Schmitt, perhaps the leading political theorist of Weimar Germany, asserts that, "The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception".³⁹ And determining this exception is in his scheme the essence of sovereignty. We may contrast the law bound image of the sovereign which Justice Khanna had in mind with Schmitt's provocative definition: "Sovereign is he who decides on the exception".⁴⁰ That he may have exaggerated the point about the centrality of the exceptional situation cannot

³⁴ See *Id.*, ¶173 (*per* Khanna J.).

³⁵ HUSSAIN, *supra* note 20, 92.

³⁶ *Id.*

³⁷ *Id.*, 92-95.

³⁸ *Id.*, 94.

³⁹ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 15 (George Schwab trans.) (1922).

⁴⁰ *Id.*, 5.

be denied, but his observation that it has juristic significance⁴¹ is critical for understanding the modes of operation of the colonial and later on the postcolonial state. As also seen in the judicial validation of the suspension of *habeas* in British India, Schmitt's exception is different from anarchy and chaos; "order in the juristic sense still prevails [here] even if it is not of the ordinary kind".⁴² This order in the state of exception is of a different nature as the strict distinction between legality and illegality is not available for lawyers to work with, and yet while the law recedes, the state remains.⁴³

Justice Khanna's unabiding faith in the rule of law failed to countenance this facticity of the exceptional. As a distinct juridical phenomenon, it was observable in British India as well as during the emergency of 1975. Recalling the crucial question with which I ended the last part, what then is so special about the removal of the colonial from the law-modernity equation? Justice Khanna would perhaps say nothing much. In his account, the moment of independence and the subsequent adoption of the Constitution could not have signified a new dawn of any sort. Given the particular circumstances of the case, he was compelled to establish that the rule of law pre-existed the coming into force of the Constitution and continued to remain so even when some of its provisions could not be relied upon to strike down executive actions not authorized under law. However on the contrary, these continuities characterizing the transition to the postcolonial include a frequent resort to the exceptional as integral to the rule of law tradition inherited from the British.

Interestingly, these insights about the state of exception have been borrowed from Schmitt, who wrote in the non-colonial context of Weimar Germany. So it cannot be said that what I have described above is a distinctly colonial phenomenon. The suspension of *habeas corpus* and the subsequent enactment of extraordinary legislations to tackle perceived security challenges are not unknown to the metropole. Even though Dicey is emphatic in celebrating the absence of a British equivalent to the French state of siege,⁴⁴ Parliamentary supremacy unrestrained by any fetters, and the continuing shift towards a stronger executive branch, has tended to have the same effect as a declared state of exception in the continental system. Today, the issuance of exceptional laws has become more common at a global level, so much so that Giorgio Agamben now sees it as the dominant paradigm of government in contemporary politics.⁴⁵ Actually, in an inversion of enlightenment's logic

⁴¹ *Id.*, 13.

⁴² *Id.*, 12.

⁴³ *Id.*

⁴⁴ DICEY, *supra* note 31, 287-288:

"We have nothing equivalent to what is called in France the "Declaration of the State of Siege," under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (autorite militaire). This is an unmistakable proof of the permanent supremacy of the law under our constitution."

⁴⁵ GIORGIO AGAM BEN, *STATE OF EXCEPTION* (Kevin Attell trans.) (2005).

of progress, modern states, both totalitarian and democratic, have perfected the modes of appropriating what he calls ‘bare life’; the concentration camp, far from being a horrendous exception to the civilized norm, is in his view the rule towards which we are dangerously tending.⁴⁶ No doubt controversial and perhaps overstated, these remarks nonetheless point to important trends which we would do well not to ignore.

In solidarity with the comity of nations, India has also experimented with these modes of operation. Besides express declarations of emergency, it has enacted preventive detention laws, as well as legislations to deal with the threat of terrorism, which to start with are supposed to remain in force temporarily, but have gradually become more or less permanent by interlocking with the regular criminal justice system.⁴⁷ What is more, in continuation of the colonial judiciary’s acquiescence to the executive decision of suspending *habeas corpus*, courts in independent India have always upheld their constitutional validity.⁴⁸ So, resort to the exceptional is inscribed in the rule of law project both for a colonial as well as non-colonial modern state, and it is no different with India.

IV. EQUALITY

We saw how the rule of colonial difference was so critical to the British mode of governing in India. It was expected that at least one significant change which would come about with independence would be the denunciation of this rule, for surely, the flag bearers of the newly formed nation, who had not so long ago set the highest moral standards of probity in their struggle with a colonial power, would not endorse or prescribe any means by which the state could subordinate particular sections of its population. Lingered doubts about the future course were put to rest by the opening words of the Preamble emphatically proclaiming that it is “We the People of India” who “give to ourselves this Constitution”, not anyone else: not the British rulership, not any privileged caste or community, not even “We the members of the Constituent Assembly in our capacity as representatives of the people of India”. Contrasting the “equality of status and of opportunity” promised in the Preamble with the British sense of superiority over the natives would have made the people of the country wonder in excitement about the limitless possibilities which lay ahead as the project of modernity with its agenda of progress, constrained by a racial hierarchy in colonialism, could now reach its logical completion.

⁴⁶ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller trans.) (1998).

⁴⁷ UJJWAL KUMAR SINGH, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS IN INDIA* (2008).

⁴⁸ See *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569; *Naga People’s Movement of Human Rights v. Union of India*, (1998) 2 SCC 109; AIR 1998 SC 431; *People’s Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580; AIR 2004 SC 456.

These preambular sentiments also find expression in the main text of the Constitution. Influenced by A.V. Dicey and the Fourteenth Amendment to the American Constitution, Article 14 guarantees to all persons equality before the law and the equal protection of the laws. Actually, as P.K. Tripathi points out, its scope extends far beyond the English and American equivalents taken together.⁴⁹ Let us look at it closely.

When Dicey talks about equality before the law, what he seeks to emphasize is the point that under common law, as opposed to the French *droit administratif*, all classes including public officials are equally subjected to the ordinary law of the land administered by ordinary law courts; the idea of having separate courts or tribunals for the adjudication of cases involving the government or its servants is fundamentally inconsistent with English traditions and customs.⁵⁰ In India, equality does not only require the subjection of public officials to law, but also that “law, which includes subordinate legislation ... should itself satisfy certain objective standards of equality and even-handedness, not merely ... between a state official and a private individual, but also between one private individual and another”.⁵¹ As far as a comparison with the Fourteenth Amendment is concerned, the Indian Constitution does not stop at the abstract ‘equal protection of the laws’ clause; it proceeds to give equality substantive content in the anti-discrimination and affirmative action provisions of Articles 15 to 18, and Articles 29 and 30. Notable here is Article 17’s abolition of ‘untouchability’, a particularly egregious practice associated with the caste system in India. Moreover, the prohibition of discrimination with regard to accessing certain designated public spaces in Article 15(2) applies not only to the state but also to private individuals.⁵²

We can clearly see in these provisions an intention to break with the colonial past and set up a political system with equality as a key foundational postulate. With the passage of time, so powerful has the currency of equality become that it has regularly been resorted to by the Supreme Court not only to check arbitrary government actions, but also as a linchpin for its much celebrated activist jurisprudence along with Articles 19 and 21. So much so that for Justice Bhagwati, the principle of reasonableness and non-arbitrariness, which was first extracted from Article 14, “pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution”, and therefore, “every state action whether it be of the legislature or of the executive or of an authority under Article 12 that does not comply with the requirement of reasonableness shall be struck down by the Court”.⁵³

⁴⁹ P.K. TRIPATHI, SOME INSIGHTS INTO FUNDAMENTAL RIGHTS 47 (1972).

⁵⁰ DICEY, *supra* note 31, 202-203.

⁵¹ TRIPATHI, *supra* note 49, 48.

⁵² *Id.*, 50.

⁵³ *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

These assertions only confirm the place of pride which the idea of equality enjoys in the postcolonial polity of today. The subjection of more and more actions to the touchstone of Article 14 in a sense parallels an interesting development in the West, that of the increased positivization of natural rights or human rights particularly in the post Second World War period. Impacted by the rights revolution in the middle of the last century, what was previously a political discourse of natural rights slowly began permeating the legal discourse through the institutionalization of a conception of law as an expression of basic rights.⁵⁴ These basic rights were transmuted from a sphere of subjective right into fundamental norms now seen as penetrating and giving shape to an objective law.⁵⁵ Basically, the idea was to subject the conduct of politics to the precepts of a moral law derived from human reason. At the centre of this transformation was the figure of Hercules, the ideal judge who had the capacity to offer the 'right answer' to all legal issues brought before him.⁵⁶ Actually, comparatively speaking, there is a stronger tendency for courts in India to proffer legal solutions to social and political conflicts than in the West, and Article 14 has proved to be most crucial in the expansion of the scope of judicial review over the years. Without getting into the debate pertaining to the desirability of this increased judicialization, let me at least mention borrowing from Martin Loughlin that we should not lose sight of the fact that public law adjudication, be it about rights or equality or anything else, is intrinsically political; rather than exclusively relying on the language of law, judges here duly consider the relative importance of conflicting social, political and cultural interests before deciding a case.⁵⁷

So, saying that equality is widely accepted as a foundational principle of the polity does not amount to much, unless there is any clarification about its preferred meaning. I need not belabour the point that the term is sufficiently abstract and susceptible to political manoeuvring. What Justice Bhagwati has done is to lend it an equally abstract gloss in the form of the principle of reasonableness. Under the circumstances, I wish to know, how does equality actually play out in constitutional adjudication? What exactly does it secure, what is it in respect of? Whom does it apply to? Are all persons equally entitled to the same equality? And if equality has become so ubiquitous, can the colonial rule of difference be safely discarded from our analytical frames as a thing of the past? I address these questions below with the help of the Supreme Court's 2005 decision in *Sarbananda Sonowal v. Union of India* ('Sarbananda Sonowal').⁵⁸

⁵⁴ MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 114 (2004).

⁵⁵ *Id.*, 127.

⁵⁶ RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 126 (1977).

⁵⁷ LOUGHLIN, *supra* note 54, 129.

⁵⁸ (2005) 5 SCC 665.

The case before the Supreme Court pertained to the constitutional validity of the Illegal Migrants (Determination by Tribunals) Act, 1983 ('IMDT Act') and the rules framed thereunder, providing for the establishment of tribunals for the detection of foreigners who had migrated to India on or after March 25, 1971 and stayed in the country illegally, so that they could be expelled by the Central Government. While the Act was supposed to be extended to the whole of India, for the moment it was only made applicable to the State of Assam; in the rest of the country, the Foreigners Act, 1946 continued to remain in force. To understand the constitutional challenge, it is important to contextualize the Act in the Assam of the 1980s which was witnessing agitations over the issue of 'outsiders' in the State, in particular the influx of East Pakistani and later on Bangladeshi immigrants across what had always remained a porous Eastern border. An already disaffected local Assamese population was alarmed by the presence of foreigners in large numbers, the resulting change in demography, and the adverse effects on their prospects to obtain access to resources including land and employment. A prolonged struggle ensued, and with a view to ease some of the insecurities, the Prime Minister Rajiv Gandhi entered into an accord with the leaders of the movement in 1985 promising them numerous sops and addressing some of their major concerns. The issue of foreigners was specifically dealt with by an amendment in 1986 to the Citizenship Act, 1955 which in effect declared foreigners who had arrived in India on or after March 25, 1971 as illegal aliens.⁵⁹

It is for the identification of such foreigners that the IMDT Act was to be pressed into service, and not the regular Foreigners Act. The petitioner was irked by the prescription of a comparatively more cumbersome procedure for the identification of illegal migrants in the IMDT Act. I do not want to get into details, but most importantly, the absence of a section corresponding to § 9 of the Foreigners Act in the IMDT Act meant that the onus of proving legal residence shifted from the identified person to a prescribed authority.⁶⁰ Moreover, with a view to prevent frivolous and vexatious applications, it imposed a number of conditions and restrictions on the applicant identifying an alleged illegal immigrant. Given these exacting stipulations, the petitioner averred that the Act was wholly arbitrary, unreasonable and discriminatory against Assamese citizens of India, in so far as it made it difficult, rather virtually impossible for

⁵⁹ For details regarding the intricacies of the Assam movement and the response of the state, *see* ANUPAMA ROY, *MAPPING CITIZENSHIP IN INDIA* 92-106 (2010).

⁶⁰ Foreigners Act, 1946, § 9, states thus:

"Burden of proof: If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class- or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person."

them to secure the detection and deportation of illegal immigrants residing in Assam.⁶¹

Going by the universalist equality principle, the Court should not have faced much of a difficulty in dismissing the constitutional challenge. Broadly, what the Act was seeking to do was to restore the general evidentiary principle laid down in the Evidence Act, 1872 that the burden of proof is on the person who asserts a fact, and not on the opposite party against whom the assertion is being made as was the case under § 9 of the Foreigners Act.⁶² Rather, if there was anything that the Court should have done, it was to advocate the early extension of the IMDT Act to the rest of the country. Even if the Court did not want to resort to the equality argument, on a narrower plane, it should have been able to argue that a reading of the Statement of Objects and Reasons shows that while laying down a procedure for the identification of illegal immigrants, the Act was also conscious of protecting genuine citizens of India from frivolous and vexatious applications, and hence the emphasis on fairness in the identification procedure. But the Court had other ideas. It struck down the IMDT Act and the rules framed thereunder as violative of the Constitution.

How could such a decision have come about? What happened to the constitutional commitment to equality? Did the Court conveniently overlook it, or was the final outcome mindful of its demands? What did it require if not the equality between the alleged illegal immigrant and the ordinary citizen? I stated above that equality is a sufficiently abstract expression and is therefore susceptible to political manoeuvring. In the case at hand, the Court had the option of preferring another alternative to the one I just suggested. Rather than equalizing the situation of the illegal immigrant with that of the common citizen, it could compare citizens residing in Assam with citizens residing in the rest of the country. Even though both these categories of citizens had the same interest in the identification and deportation of foreigners, only Assam was subjected to the tedium of the IMDT Act, and therefore Article 14 was implicated. This basically was the argumentative strategy of the petitioner, and was in effect accepted by the Court when it said, in a language commonly associated with its equality jurisprudence, that the classification of the State of Assam for the application of the IMDT Act had no rational nexus with its avowed objective of detecting and expelling foreigners.⁶³ In fact, under the peculiar circumstances of the huge influx of Bangladeshi nationals into Assam, the Parliament was obliged to enact a more stringent legislation exclusively for the state, and that according to the Court would not be *ultra vires* of Article 14.⁶⁴

⁶¹ Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665, ¶2.

⁶² Indian Evidence Act, 1872, §101: "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence to facts which he asserts, must prove that those facts exist."

⁶³ Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665, ¶70.

⁶⁴ *Id.*

The case clearly throws into focus the underdeterminacy of legal language; contrary to the right answer thesis, at least two alternatives were available here for judges to choose from. An example like this proves that judges make law and that their predilections can have a bearing on the final outcome. Since this essay is not concerned with the nature of law question or the role of judges in adjudication, I need not harp on the point too much. What I wish to do is to link the underdeterminacy claim with the earlier remark about the intrinsically political character of public law practice. Reading both of them together, we can say that in public law, a judgment is not merely an expression of the judge's personal preferences; it is at the same time deeply imbricated in the political. Thus, rather than treating *Sarbananda Sonowal* merely as a legal decision which may or may not have been good in law or under the Constitution, we should more importantly read it as a political statement from judges as agents of the state. Keeping this in mind, what can we gauge from it about the working of the postcolonial polity?

Let me emphasize here that the case was more about the duties of the Union Government under Article 355 than about Article 14.⁶⁵ The scrapping of the IMDT Act was justified by invoking the state sovereignty in peril argument. In the Court's view, the large scale illegal immigration of Bangladeshi nationals was posing a major threat to the integrity and security of the North Eastern region, in fact, to the nation at large. Significantly, Assam was facing an 'external aggression and internal disturbance', and the Union was duty bound under Article 355 to take all possible measures to protect it from such dangers. Under the circumstances, it was essential that foreign nationals be identified and deported to their own country: a task which according to the Court, the IMDT Act was hindering more than facilitating, thereby negating the constitutional mandate in Article 355.⁶⁶

To explain this decision, I draw upon Carl Schmitt's provocative insight that political action is founded on the distinction between friend and enemy.⁶⁷ In order to make sense of a primordially conflict ridden world and survive in it, human beings come together in political collectivities. A collectivity is formed once it can define itself in contrast to an 'other' which it is not. This 'other', or Schmitt's enemy, is not the private adversary whom one hates; it is solely the public enemy who must be defeated.⁶⁸ In *Sarbananda Sonowal*, the Court could clearly be seen as working with this distinction: the illegal immigrant from Bangladesh was the public enemy who had to be identified and expelled from the territory of India by the Union Government, and since

⁶⁵ The Constitution of India, 1950, Art. 355: "It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution".

⁶⁶ *Sarbananda Sonowal v. Union of India*, (2005) 5 SCC 665, ¶¶63-64 and ¶67.

⁶⁷ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans.) (1996).

⁶⁸ *Id.*, 28.

the IMDT Act could not achieve this goal swiftly and efficiently, it had to be struck down so that the Foreigners Act could operate. I would like to emphasize borrowing from Gayatri Spivak that this relationship of ‘otherness’ with the public enemy is not one of simple opposition which manifests itself in exclusion; rather it is one of *forclusion*, where the ‘other’ is constantly implied in the identity and unity of the self.⁶⁹ Thus, the illegal Bangladeshi immigrant was not a mere outsider posited in simple opposition with the citizens of India. Instead, in the bounded notion of citizenship that the Court was working with, he or she was indispensable for the construction of the ethnically determined membership of the nation-state.⁷⁰

I want to conclude this part by making the larger point that the modern state as a political entity has mastered the techniques of differentiating and discriminating between people. It enumerates and classifies its own population, based on empirically observable characteristics to make it amenable to governmental policy.⁷¹ Thus, we see in India that in spite of the universalist equality before the law principle laid down in Article 14, courts have never rejected the making of reasonable classifications in legislations and other governmental actions. I do not want to say anything about the specific uses such classifications may be put to. What I am trying to get to is that once this capacity of the state is recognized, it should not be difficult to appreciate how the category of a hostile foreigner immigrant is created *vis-à-vis* the common citizen. The object here is not to make the former amenable to its governmental policy; rather the idea is to use it as an external referent against which its own identity and being is constructed. And this, in my understanding is true for all modern states, colonial or otherwise. So, with independence, the rule of colonial difference may have been rejected in India in so far as race was no longer salient in politics, but only to be replaced by another marker, perhaps that of the Bangladeshi or Pakistani national as the oppositional ‘other’, and yet someone whose being is essential for India’s own identity as a nation state.

V. SOCIAL RIGHTS

In the last two sections, I have demonstrated how a transition to the postcolonial did not mark a radical break from the colonial past in the sense that the same rule of law tradition which was received from the British continued to remain in operation in the newly independent state. Today, no one seriously contests the thesis that India inherited the rule of law from its colonizers; rarely do we see people making a case for treating it as a product of India’s own genius. Even though I have challenged the widely held perception that the

⁶⁹ GAYATRI SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* (1999) as cited in ROY, *supra* note 59, 92.

⁷⁰ ROY, *supra* note 59, 116.

⁷¹ CHATTERJEE, *supra* note 11, 14; Michel Foucault, *Governmentality* in J.D. FAUBION, *POWER: ESSENTIAL WORKS OF FOUCAULT 1954-1984* 201-222 (1994).

rule of law was transferred to India as a highly refined and finished product by iterating the significant role which interactions with the colonial world played in its development, it is the British who still remained central in shaping its course and giving it direction. But then, what about the agency of Indians as free people? Can we not find anything which is distinct about their postcolonial engagement with the rule of law? If not, does the largest democracy in the world still continue to remain subordinated to the imperialism of ideas regarding the modes of government, and restricted in practice to ways in which they have been conceptualized in the West?

Partha Chatterjee confronts similar questions while talking about the distinctiveness of Indian nationalism and perhaps some of his insights may be of some use to us here.⁷² Responding to Benedict Anderson's observation that nationalist elites in Asia and Africa could only choose their preferred nationalisms from a set of modular forms which were supplied to them by the historical experience of nationalism in the West,⁷³ Chatterjee forcefully throws into focus the issue of their agency. He puts across his objection to Anderson thus:

"I have one central objection to Anderson's argument. If nationalisms in the rest of the world have to choose their imagined community from certain "modular" forms already made available to them by Europe and the Americas, what do they have left to imagine? History, it would seem, has decreed that we in the postcolonial world shall only be perpetual consumers of modernity. Europe and the Americas, the only true subjects of history, have thought out on our behalf not only the script of colonial enlightenment and exploitation, but also that of our anticolonial resistance and postcolonial misery. Even our imaginations must remain forever colonized".⁷⁴

For Chatterjee, the convergence of a standard nationalist history with Anderson's formulations aside, the most powerful and creative results of the nationalist imagination in Asia and Africa are posited not on an identity but on a difference with its Western modular forms.⁷⁵ In his scheme, anti colonial nationalisms divide the world of social institutions and practices into 'material' and 'spiritual' domains, declare their sovereignty over the latter, and seek to replicate the West in the former. What are these material and spiritual domains? The material in Chatterjee, is the domain of the "outside, of the economy and of statecraft, of science and technology"; the spiritual on the other hand, is

⁷² CHATTERJEE, *supra* note 23.

⁷³ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2006).

⁷⁴ CHATTERJEE, *supra* note 23, 5.

⁷⁵ *Id.*

an “inner domain bearing the essential marks of cultural identity”.⁷⁶ Although sovereignty over the spiritual domain entailed resisting colonial interference with tradition, it by no means involved a rejection of change and reform. In fact, it is here that the distinctiveness of the nationalist project is clearly noticeable, that is, in its endeavour to “fashion a modern national culture that is never the less not Western”.⁷⁷ The reason why conventional histories of nationalism fail to grasp these dynamics is because they reduce the story of nationalism to a story about the contest for political power.⁷⁸

These ideas have given many a postcolonial theorist new light to conceptualize alternative nationalisms which better capture the experiences of non-Western societies. But how do they help in our quest to explore the distinctiveness of India’s postcolonial engagement with the rule of law? Chatterjee after all mentions the nationalist elites acknowledging Western superiority in the material domain: its accomplishments were only to be imitated; not to be shunned or challenged. The struggle in the material domain was merely against the rule of colonial difference, a struggle which could be said to have been won when independence was achieved, so that now the “normalizing mission of the modern state” could finally be fulfilled.⁷⁹ This should lead us to conclude that since the rule of law is an element of the material domain, it could not have a uniquely Indian conception, and so what lawyers have been thus far working with is nothing but a legacy of the empire.

This story must be quite familiar by now, yet it is important that I reiterate it. It is true that in all this and even in other writings of Chatterjee, there is no talk of an alternative conceptualization of the rule of law. What he does not discount, given his singular emphasis on agency, is the possibility of alternative ways of engaging with it. However, before getting to the rule of law, one clarification is in order. For Chatterjee, the material spiritual dichotomy is not the same as the public private bifurcation commonly associated with liberal constitutional democracies.⁸⁰ It is not his case that the imagined national community only plays out in the private realm, whilst the public sphere is governed by what has been learned from the West. Actually, the nationalist project which he has in mind aspires a cultural synthesis between ‘European industries and Indian *dharma*’, in other words, an amalgamation of what is authentically Indian with what is valuable in the West.⁸¹ And this synthesis is to be achieved in all walks of life. More details are not necessary. Important for us is how this dichotomy enables him to discern in his later writings new possibilities for imagining a different mediation between the population and the state in what he

⁷⁶ *Id.*, 6.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*, 10.

⁸⁰ *Id.*

⁸¹ PARTHA CHATTERJEE, *EMPIRE AND NATION: SELECTED ESSAYS* 45-46 (2010).

calls the ‘political society’ away from the associational principles of a modernized bourgeois ‘civil society’.⁸² In subsequent writings, he shifts his attention to the workings of postcolonial democracy with a view to understand it in its difference with normative liberal theory.⁸³ It is here, particularly in his use of civil society and political society to explain the distinctiveness of postcolonial democratic practices, that we find allusions to an alternate possibility of engaging with the rule of law.

Chatterjee makes the point that in postcolonial settings, the modernity of civil society and constitutional state faces an unexpected rival in democracy which plays out in the realm of political society. The distinctiveness of democratic practices in political society lies in their resistance to the regular application of laws. He notes that with the legitimacy of governments increasingly depending on the provision of popular welfare, illegal exceptions are often carved out in favour of those who succeed in mobilizing support for pressurizing the government to withhold the application of what are seen as unjust and unfair laws.⁸⁴ For Chatterjee, it is in this domain where settlements are negotiated between governmental authorities and moral communities of disadvantaged populations that we see a new and potentially richer development of democracy. Note that this resistance does not seek to disturb the fundamental rule of law; what it demands is only the exceptional treatment of a particular case.⁸⁵ So, at a general level, he is not suggesting “the irrelevance of the norm of the impersonal and non-arbitrary application of the law”; rather he is emphasizing its “critical revaluation in the light of emergent practices in many postcolonial countries that seek to punctuate or supplement it by appealing to personal and contextual circumstances”.⁸⁶

Basically, Chatterjee’s insightful reflections bring into focus the reference to the exceptional which I have already established as integral to the rule of law project. The difference is that here it is being resorted to, not for the sake of depriving people of their civil liberties or to cast some classes among them as outsiders unworthy of the benefits of equal protection, but for the sake of securing welfare concessions to disadvantaged groups. He undoubtedly observes an interesting way in which rule of law is being engaged with, but can we make juridical sense of this new theorizing? To find out, let me turn to the field of social rights adjudication, and in particular to *Olga Tellis v. Bombay Municipal Corporation* (‘*Olga Tellis*’),⁸⁷ a case which presented before the Supreme Court a fact situation very similar to what Chatterjee countenances in his work on democracy and political society. However, before proceeding, I

⁸² *Id.*, 171-173.

⁸³ CHATTERJEE, *supra* note 11, XI-XII.

⁸⁴ PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* 41 (2004).

⁸⁵ CHATTERJEE, *supra* note 11, 13-16.

⁸⁶ *Id.*, 18.

⁸⁷ (1985) 3 SCC 545: AIR 1986 SC 180.

should mention that for him, courts are part of the bourgeois civil society and hence tethered to the British rule of law tradition, which being an element of the material domain, continues to be enthusiastically embraced by the lawyers. It is the government, being closer to the political society, which strikes bargains and makes exceptions. So to him, my study of judicial behaviour might not mean anything, as courts cannot but uphold the rule of law. This caveat notwithstanding, I move to the case, intending to respond to Chatterjee in the course of the discussion.

Olga Tellis involved a constitutional challenge to a decision of the State of Maharashtra and the Bombay Municipal Corporation to forcibly evict all slum and pavement dwellers in the city of Bombay and to deport them to their respective places of origin or to remove them to places outside the city. Pursuant to this decision, some pavement dwellings and slum hutments were in fact demolished by the Bombay Municipal Corporation. Aggrieved by these actions, some of these pavement and slum dwellers petitioned the Bombay High Court and later on the Supreme Court arguing that the decision to demolish pavement dwellings and slum hutments without any provision of alternative accommodation was violative of their right to livelihood comprehensible under Article 21, their right to reside freely in any part of the territory of India enshrined in Article 19(1)(e), and their right to carry out any occupation, trade or profession guaranteed under Article 19(1)(g). Further, they challenged the constitutional validity of § 314 of the Bombay Municipal Corporation Act, 1888 ('BMC Act'), in so far as it authorized the removal of encroachments on public spaces without the issuance of notice. The state on the other hand, contended that the Constitution nowhere granted anyone the licence to encroach and trespass upon public spaces, that municipal authorities had an obligation to remove obstructions from pavements, public streets and other public places, and that the impugned provision of law merely sought to facilitate the performance of this obligation.

Someone who believes that there is place for a thick conception of rule of law or of substantive due process in Indian constitutional law should not find this case difficult to adjudicate. Even though the right to livelihood is not explicitly mentioned in Part III, there are enough precedents for reading in provisions from the Directive Principles into Article 21 from the days of *Maneka Gandhi v. Union of India*⁸⁸ if not earlier. Articles 39(a) and 41 could surely come to aid in building an argument in favour of pavement and slum dwellers.⁸⁹ In fact, looking at the case from this lens, no law or executive action

⁸⁸ (1978) 1 SCC 248; (1978) 2 SCR 621.

⁸⁹ The Constitution of India, 1950, Art. 39(a) (It provides that the State shall direct its policy towards securing that "the citizens, men and women equally, have the right to an adequate means of livelihood"); The Constitution of India, 1950, Art. 41 (It lays down that the "State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work ... in cases of unemployment, ... and of undeserved want").

which hindered the exercise of such a right ought to pass constitutional muster. Many statements in Justice Chandrachud's decision on behalf of the five judge constitutional bench give the impression that the Court precisely had this position in mind. The judgment began by portraying the miserable plight of those who reside in slums and pavements of Bombay:

"They constitute nearly half the population of the city. ... Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they eat, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passersby, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: 'Who doesn't commit crimes in this city?' It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation."⁹⁰

Where did this rhetorical flourish take Chandrachud? Much to the satisfaction of the petitioners, he did go on to acknowledge that the right to life includes the right to livelihood. Absent such recognition, "the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation".⁹¹ However, in the business part of the judgment, the competing interests of the public at large held more sway over him. Brushing aside the claims of pavement and slum dwellers, he pronounced that "footpaths or pavements are public properties which are intended to serve the convenience of the general public. [...] No one has the right to make use of a public property for a private purpose ... [and] it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon".⁹²

What brought about this change in tact? How did the judge end up siding with the State after showing promise to the petitioners initially? One must remember that § 314 of the BMC Act, vested in the Commissioner the discretion to remove encroachments from public spaces without notice. Thus what the State was doing was perfectly under the authority of law. There was no reference to thick conceptions of rule of law or to substantive due process

⁹⁰ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545: AIR 1986 SC 180, ¶¶1-2.

⁹¹ *Id.*, ¶32.

⁹² *Id.*, ¶43.

in the judgment. Indeed, contrary to what some recent writings will have us believe,⁹³ the Supreme Court has never read an all purpose substantive due process requirement into Article 21. What it does mandate however, is a just, fair and reasonable procedure under a valid law before a person can be deprived of the right to life and personal liberty.⁹⁴ According to the Court, this criterion of validity was fulfilled by § 314 if it was interpreted to enable the Commissioner to dispense with the notice requirement only in exceptional circumstances and not normally.⁹⁵

Thus, Chatterjee is right it would seem; courts are capable of nothing but empty rhetoric. Perhaps, exceptions can be carved out only in the governmental domain. But let us not jump to this conclusion so soon. The story of Olga Tellis does not end with the Court upholding the validity of actions taken in pursuance of § 314. Since the decision to evict pavement and slum dwellers did not suffer from any constitutional vice, no one should have been entitled to any remedy from the Court. But the judgment suggests otherwise. True that no individualized or general remedy was accorded directly flowing from the right to livelihood as such, the Court nonetheless did require the State to provide alternate sites for the resettlement of one set of petitioners. Who were these petitioners, and how did the Court manage to give them relief? The State Government had taken a decision to allot some vacant lands to slum dwellers in 1976. Accordingly, a census was carried out to enumerate slum dwellers spread in about 850 colonies all over Bombay, and nearly two thirds of them were issued identity cards. It is for this set of slum dwellers who were issued identity cards that the Court said, “despite the finding recorded by us that the provision contained in § 314 of the BMC Act is valid, ... slum dwellers who were censused and were given identity cards must be provided with alternate accommodation before they are evicted”.⁹⁶

So, contrary to Chatterjee, this decision in a way establishes that courts can in fact recognize and require the exceptional to be given effect to. The Court was clear enough in saying that one set of petitioners could not be evicted in spite of the Commissioner having the legal authority to do so, unless they were granted alternate accommodation. No doubt, the exception was carved out by the government, but so are declarations of emergency and enactment of exceptional laws non-judicial decisions. It is not the business of courts to rule the country after all. My point is that just as the latter can have juristic significance, so can the former. Even though the exception in the political society is brought into operation by the “arbitrary power of the government

⁹³ See ABHINAV CHANDRACHUD, *DUE PROCESS OF LAW* (2011).

⁹⁴ See generally M.P. Singh, *The Constitutional Principle of Reasonableness*, (1987) 3 SCC J-31 and M.P. Singh, *Decriminalization of Homosexuality and the Constitution*, 2 NUJS L. Rev. 361 (2009).

⁹⁵ See *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545: AIR 1986 SC 180, ¶¶44-48.

⁹⁶ *Id.*, ¶53.

to mitigate the potentially tyrannical power of the law”,⁹⁷ to recall Carl Schmitt writing in a completely different context, what results is not the same as anarchy or chaos; order in the juristic sense can still be said to prevail here. What Chatterjee fails to appreciate and is perhaps not interested in, given his particular focus on democracy, is the nature of public law. Treating law courts as part of the bourgeois civil society, he sees the task of a judge to simply uphold the rule of law. While this may be true for private law adjudication, public law, as Martin Loughlin brings out, is a form of political reasoning driven by prudential considerations, and cannot be subsumed into the rule based logic of legal decision making.⁹⁸ Hence I reckon that if we are to make juridical sense of Chatterjee’s incisive account of postcolonial democracy, we must seriously examine the court’s resort to the exceptional in social rights adjudication. And may be, herein lies the distinctiveness of India’s postcolonial engagement with the rule of law.

To avoid the accusation of overstating the point, let me clarify that what I have said thus far should only be treated as an indicative trend. I am not offering a new paradigm for the study of social rights adjudication based on the evidence of one case. What I hope to have done, however, is to have punctured the thesis that judicial activism on social rights necessarily depends upon a thick conception of the rule of law. One question often comes up before every serious student of Indian constitutional law: what explains the disparities in the adjudicative record of the Supreme Court in civil and social rights cases? While it can be seen as toeing the state line when it comes to the denial of civil liberties, considerable progress has been made in the social justice sector through its enumeration of more rights and the fashioning of innovative remedies. The somewhat easy explanation which is readily made available is that the Court is actually working with thin and thick conceptions of the rule of law; while the former entails “procedural restraints on forms of sovereign power and governmental conduct, which may also authorize Holocaustian practices of politics”, the latter pertains to theories about the ‘good’, the ‘right’, and the ‘just’.⁹⁹ So, a thin rule of law which shows up in civil liberties cases yields outcomes in favour of the state, whereas a thick rule of law which is invoked in social rights cases yields outcomes which safeguard the interests of citizens. With due respect, I believe this assessment to be mistaken. In my opinion, what the three cases analyzed above show is that there are no two conceptions of the rule of law; there are only different ways of engaging with it. To say that the rule of law changes colour depending on the nature of the case in hand robs it of its coherence as a constitutional concept.¹⁰⁰ What better explains the different outcomes

⁹⁷ CHATTERJEE, *supra* note 11, 17.

⁹⁸ LOUGHLIN, *supra* note 54, 44.

⁹⁹ Upendra Baxi, *The Rule of Law in India*, SUR. 6 (4) 7 (2007).

¹⁰⁰ Here I have been influenced by Michael Oakeshott’s attempt to understand the rule of law as a coherent and foundational public law concept. He distinguishes the rule of law as an expression of a mode of association in which associates come together not for the purpose of procuring substantive satisfactions, but to adhere to the common obligation to non-instrumental

is the reference to the exception which I have argued has always been integral to the rule of law project.

In Olga Tellis, the right to livelihood which was read into Article 21 was derived from the Directive Principles, and not from any notion of a just, right or good law. In fact, this right stood in opposition to a law which was valid under the Constitution. In this contest, broadly speaking, it is the law which prevailed over the right. But an exception was carved out for those who had, by whatever way, managed to extract from the government a promise for an alternate accommodation. Madhav Khosla is not entirely inaccurate in observing that the approach of the Court in the case mirrored a private law contractual model of adjudication.¹⁰¹ The remedy was no doubt a result of a contract like understanding between the government and some of the petitioners. However, rather than treating this as a purely private affair between two formally equal entities, I prefer to view the outcome of the case as resulting from negotiations between a government generally viewed as owing an obligation to provide for the poor and underprivileged, and a moral community among formally sovereign people in the context of a postcolonial democracy.¹⁰² Needless to say that Chatterjee's political society is not the most perfect society: not all disadvantaged peoples are able to organize themselves effectively; not all negotiations work out in their favour. And if things do not go as per plan, the taint of criminality from the highest court of the land is what awaits them, "The promise of free land at the tax payers' cost, in place of a jhuggi is a proposal which attracts many land grabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket".¹⁰³

VI. CONCLUSION

Never in its history has the Indian civilization possessed a real concept of the 'other'. But with the experience of colonialism and the subsequent evolution of the independent nation state in the 'shadows of empire',¹⁰⁴ it may finally have found a hospitable and welcoming home. That it has come to command ontological significance is evidenced by India's willing engagement with the British rule of law tradition, which I submit cannot be understood but in tandem with the exceptional and the outsider. I have argued in this essay that the transition to the postcolonial did not mark a radical break from the past as clear continuities are visible with the colonial rule of law. This though, was not a highly advanced and sophisticated rule of law as many lawyers in

rules; a set of rules recognized not in terms of their values, but of their authenticity. See Michael Oakeshott, *The Rule of Law* in *ON HISTORY AND OTHER ESSAYS* 119-164 (1983).

¹⁰¹ Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, *Intl. J. Constitutional Law* 8, 748 (2010).

¹⁰² CHATTERJEE, *supra* note 11, 15.

¹⁰³ Almitra H. Patel v. Union of India, (2000) 2 SCC 679; AIR 2000 SC 1256, ¶14.

¹⁰⁴ MUKHERJEE, *supra* note 1.

independent India assume, but always a work in progress, and in fact intrinsically dependent on the image of the oriental 'other' and its anarchy and chaos for its shaping and development in the West. Situating it in the context of colonial modernity, I have explored the continuities with regard to the declaration of exceptions during which its normal operation would be suspended, and the marking of closures by casting out categories of people who would be deemed unworthy of its equal protection.

I have also addressed the question regarding the distinctiveness of India's postcolonial engagement with the rule of law. What is new or unique is not that an alternative conception of the rule of law has been developed; indeed, as an element of the material rather than the spiritual domain, its career in the West has been studied carefully and sought to be replicated. Rather, the distinctiveness lies in the way it is engaged by postcolonial people with agency. For help, I have relied upon Partha Chatterjee's insights on postcolonial democratic practices which play out in the political society as opposed to civil society and are about resisting the regular application of what are seen as unfair and unjust laws by negotiating the creation of illegal exceptions in favour of groups of people who can organize themselves into moral communities against a mighty yet welfare oriented government. I submit that these exceptions can have juristic significance just as exceptions in the Schmittian sense can, and it is important that public law as a prudential political practice is able to account for them in the Indian context.

The rule of law may be an 'unqualified human good'¹⁰⁵ no doubt, but let us not harbour any false illusions about it. A regime of laws can guarantee predictability, certainty and stability and nothing else. And here too, the essay should immediately lead us to ask: these virtues can be secured alright, but for whom and under what conditions? Believing the rule of law to be synonymous with the rule of good law is not only being conceptually incoherent, but worse, it is disrespectful of the experiences and collective wisdom of the oppressed and disadvantaged who have engaged the legal system and come to the conclusion that the singular solution to escape their miseries is to resist the laws which have been instrumental in depriving and dispossessing them. Eventually, as Irom Sharmila and the stone pelters in Kashmir and Narmada Bachao Andolan will testify in our times, and as Gandhi showed us during British rule, the struggle against unjust and unfair laws will have to be waged on the political front. And here, the means of resistance may not be morally appropriate all the time, but the critique of the modern regime of power implicit in them is definitely a moral one.

¹⁰⁵ E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

