

Introduction

Decolonization and Constitution

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

—Mircea Eliade, *The Profane and the Sacred*

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

—Gabriel Garcia Marquez, Nobel Lecture, 1982

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

—Jawaharlal Nehru, Constitutional Assembly Debates,
13 December 1946

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

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

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

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

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

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

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

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

To Legalize the Revolution

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

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

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

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

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

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

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

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

Decolonizing Constitutions

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

Constitutions and American Hegemony

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

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

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

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

Constitutions of Decolonization

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

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

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

Transformational Constitutionalism: A Political Theory of the Postcolonial Constitution

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

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

articulated, deliberately, as distinct from ‘the antiquated beliefs of ... old time constitutional lawyers’.⁵⁴ Constitutional theory has told us stories of constitutions written in the triumphant aftermath of past revolutions. But how does one write a constitution in uneasy anticipation of a future one? What kind of a constitution does one craft that takes change and transformation rather than abiding order as its organizing principle? How does that reorganize the relationship between revolutions and constitutions, between ends and beginnings? The answers to these questions require a political theory of constitutions apposite to postcolonial histories. Transformational constitutionalism is one such theoretical framework.

There are many conversations in the Constituent Assembly which have escaped the attention of scholars because they are not about major issues or principles. Instead, they are quotidian reflections on the conditions and context within which the assembly worked. This book is built around such conversations. And it is one such conversation that suggested the term ‘transformational constitutionalism’ to me. During the last days of the assembly, the president of the Congress, Pattabhi Sitaramayya, was responding to criticisms that the constitution borrowed excessively from colonial laws. Acknowledging that there was some truth to that allegation, he argued that India did not have a revolutionary rupture with its colonial past. It was able to pass from ‘one civil government to another’, hence necessitating the borrowings of laws and rules. The continuity of government (and civility) should not, however, obscure the significance of the change. ‘It was by an imperceptible transition ... that we have wrought these transformations.’⁵⁵ What caught my eye about this phrasing was the juxtaposition of ‘imperceptible transition’ and ‘transformation’ – both used in a positive sense. It was a transformation which did not trouble one’s perception. Things changed, but no one could notice it. This ambiguity stood in for the various uneasy cohabitations that the constitution-making project kept generating: revolution through law, break through continuity, orderly change. Transformation, Sitaramayya was trying to say, can and should be achieved through an ‘imperceptible transition’ – deliberate, controlled, conflict-free; transformational and yet constitutional.

The association of transformation with constitutionalism is not in itself novel in legal scholarship from and of the Global South. In an article published soon after the new South African constitution, the American legal scholar Karl Klare coined the term ‘transformative constitutionalism’.⁵⁶ The term has since been widely used to describe the trend of judges creatively

utilizing constitutional rights to advance progressive social policies, often for the benefit of the poor and marginalized sections of society.⁵⁷ This included the Indian Supreme Court, which was something of a pioneer in this regard.⁵⁸ The similar-but-not-quite-the-same nature of the terms 'transformational' and 'transformative' is not coincidental. The shared context of that tradition and this book is the persistence of immiseration and unrest, and hence the necessity of transformative interventions in the global periphery. The transformative constitutional literature is generally celebratory of the courts stepping into the breach to address that need. This book, on the other hand, is an account of the construction of a constitutional form for mediating the project of social transformation following decolonization. The change envisaged in that instance was far greater than specific welfare redressals.⁵⁹ The hope was to fundamentally transform socio-economic conditions that were severely underdeveloped and troublingly unequal as a result of two centuries of colonial rule.

Far from depending upon the judiciary to be the instrument of that change, the constitution makers tried to ensure that the judiciary played little to no role in the process, since they were seen as incapable of (and potentially an obstacle to) devising and managing a project of social engineering at this scale.⁶⁰ The judiciary was structurally, not just ideologically, unsuitable for the future-oriented creativity that transformational constitutionalism demanded. When subsequently the judges and lawyers would claim their customary custodianship, Nehru would complain that the constitution has been 'purloined by lawyers'.⁶¹ Due to the inherent limitations of the adjudicative form, the courts actually diminished the horizon of transformation to particularized redressals. As I argue in chapter 8 of this book, through their interventions, the Indian Supreme Court would eventually end up individuating and privatizing social transformation, to its detriment.

It was precisely the scale of the ambition that made the conjugation of transformation and constitution in 'transformational constitutionalism' theoretically generative. The constitution makers were well aware that their ambitions of thoroughgoing change exerted significant demands on both the concepts of transformation and constitution, making their cohabitation overwrought and precarious. Transformational constitutionalism was therefore far less confident of its own self in comparison to what both the practitioners and scholars of transformative constitutionalism display. In dictionary terms, transformative means 'having the power to transform'. Transformational, on the other hand, means 'relating to transformation'.

Transformative constitutionalism is the optimism in the ability of laws and constitutions to deliver social change. Transformational constitutionalism was an apprehensive yet ambitious attempt to bring together the seemingly contradictory projects of constitutionalism and social change – an uncertain endeavour to make the constitution relate to transformation. The eclipse of that project created the conditions for the far less ambitious, yet far more self-assured, project of transformative constitutionalism. If transformative constitutionalism was interested in proposing answers for the age of globalization, transformational constitutionalism had once asked the question for the age of decolonization: can the revolution be legalized?

Autonomy and Unevenness: A Social Theory of the Postcolonial Constitution

The Constituent Assembly debates are not only an archive for a distinct political theory of constitutions. Underlying it was a distinct social theory. After the fall of the Soviet Union and the exhaustion of Third Worldism, the process of global integration under a hegemonic, United States-led ‘liberal international order’ could proceed unimpeded.⁶² A principal component of this integration was the ‘rule of law’ or ‘law and development’ projects propagated by all levels of the new international society – from private foundations to non-governmental organizations, from Western state agencies to global institutions like the World Bank and the United Nations (UN).⁶³ These were projects to refashion the constitutional and legal orders of the formerly Second World and Third World countries along a particular template.⁶⁴ This was the apotheosis of the empire of constitutions that began with the Cold War – the ‘age of constitutionalism’ in the words of an enthusiastic observer.⁶⁵ The political-economic basis of ‘global constitutionalism’ (as it was commonly known) was the neoliberal revolution. A contested term, ‘neoliberalism’ came to stand in for a cluster of policies – privatization, free trade, cuts to social welfare, dismantling of regulations – that spread across the globe from the 1980s, after the demise of both the socialist and the postcolonial alternatives.⁶⁶ Despite internal variations, neoliberalism universally promoted the primacy of market imperatives against interventions due to state regulations and democratic aspirations. However, it was not anti-statism *tout court*.⁶⁷ Markets did not emerge from nature. They had to be instituted, facilitated, and protected.⁶⁸ And it was law that was ‘deeply imbricated within the very basis of productive relations’ and that ‘maintained the bounds of wealth and power’.⁶⁹ This was the core political-economic logic of constitutionalism in

these decades: a legal system to facilitate market relations and to protect them from democratic or administrative interventions.⁷⁰

The political-economic theory underlying postcolonial constitution making was not just distinct from this, it was opposed to it. Colonialism was not merely a political subjugation by an alien power. It was also a specific form of economic unfreedom. The periphery was integrated into the global economy but on terms that were differential and detrimental. Decolonization hence was not just a struggle for political freedom, but also for autonomy from the imperial economy – in the language of the time, ‘economic sovereignty’ to accompany ‘political sovereignty’.⁷¹ ‘The break with the world market,’ wrote Samir Amin, ‘was the primary condition for [postcolonial] development.’⁷² Peripheral economies were shaped by their involuntary dependence on the metropole, in whose interest they were constituted. Hence, economic sovereignty meant (as I argue in chapter 7) the capacity of the newly sovereign nations to disassemble imperial regimes of property.⁷³ At the international level it meant questioning the existent terms of assimilation, nationalizing privatized resources, and establishing new norms and institutions.⁷⁴ At the national level it meant projects of land reforms, state-directed industrialization, public investment, and modest redistribution.⁷⁵ This was the socio-economic context that produced the transformational constitution.

Viewed from the periphery, the neoliberal moment felt like a reiteration of the original process of capitalist integration under formal imperial rule.⁷⁶ The two moments shared the structural features of loss of peripheral autonomy, the centrality of trading regimes, sanctity of property rights, privatization, and what Indian planners called the ‘unequal international division of labour’.⁷⁷ The difference was that during the era of formal imperialism, the mutual reinforcement of political and economic power was much more explicit and codified, while the new regime operated under the abstractly equivalent logic of ‘rule of law’, ‘liberalization’, and ‘transnational law’. The practices of prescriptive ‘global constitutionalism’ were one of the more significant institutional manifestations of this heteronomous integration that effectively divorced constitutionalism in the periphery from expressions of democratic autonomy and creativity. Hence, transformational constitutionalism remains a practical antithesis to the prescriptive constitutionalism extant in our time.⁷⁸ Its goal was not the autonomy of the market, but autonomy *from* the market. It had many limits and internal contradictions – not the least of which was reliance on the state over and against democratic mobilizations – but

transformational constitutionalism was the first draft of a constitution of anti-imperialism. With all its failings – and especially *in* all its failings – it remains a concrete institutional manifestation of the periphery's assertion of independence from the metropole.

The relevance of that assertion is as resonant today. Underlying globalization and 'global constitutionalism' was a social theory that suggested that through integration Third World societies would eventually come to resemble the societies of the metropole.⁷⁹ This was the assumption inherent to 'modernization theory' that dominated the post-war world and was subsequently inherited by globalizing neoliberalism.⁸⁰ The qualifiers 'democratization' and 'developing economies' in comparative constitutional studies all signalled that the distances between the metropole and the periphery were temporary and surmountable.⁸¹ The eventual equalization and homogenization of socio-economic conditions made the institutional correspondence suggested by global constitutionalism both desirable and necessary. A preordained destination came with its prefabricated institutional architecture. In Mahmood Mamdani's words, the 'concrete historical experience' of the metropole was turned 'into the basis of a general and prescriptive theory'.⁸² That assumption, however, remained unsupported by history. Neoliberal development did not lead to the evening out of the social terrain; rather, its effect was to produce polarizations and differentiations.⁸³ The 'necessary illusion of eventual even development' in the Third World was nothing more than 'a kind of promissory note on the future that is never delivered, even in the last instance'.⁸⁴ Inequality and underdevelopment were not remnants of an earlier era, but were continually constituted by the dynamics of a capitalist present.⁸⁵ The 'backward' and the 'underdeveloped' were not lagging images of the metropole; they were its necessary complement. The Indian constitution was written from this uneven terrain that was the inheritance of the peripheral world. Read against the grain, the assembly debates divulge an acknowledgement of this condition. The making of the postcolonial constitution solicited on its own terms a social theory of unevenness.

Unevenness is very different from indigeneity. The problem with prescribing constitutional templates to the periphery lies not with their foreign origins. The Indian constitution makers undertook an extensive study and comparative analysis of different constitutions of the world to borrow 'not only the substance but even the language of established constitutions'.⁸⁶

Charges of mimicry were levelled in the assembly itself.⁸⁷ In response, B. R. Ambedkar said,

One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their Constitutions to writing.... Given these facts, all Constitutions in their main provisions must look similar.⁸⁸

There was, however, a however. Their work was not a 'blind and slavish imitation'. The assembly made 'variations ... to accommodate it to the needs of the country'.⁸⁹ Modern constitutions, as Ambedkar said, were by now an established genre. Like all genres, it had its conventions.⁹⁰ Yet the text of the Indian constitution frequently militates against the conventions of its genre without ever fully discarding them.⁹¹ These were the 'variations' Ambedkar talked about. That is where our analytical attention should be focused. Fredric Jameson suggested that 'the deviation of the individual text from [the] narrative structure directs our attention to those determinate changes in the historical situation which block a full replication of the structure on the discursive level'.⁹² In other words, the deviations – or variations, in Ambedkar's terms – are the analytical keys to the historical specificity of the postcolonial constitution.

The deviations were signposts to blockages to the path of pure mimicry, to unproblematic diffusions of metropolitan institutions and ideas to the periphery. Those blockages forced the constitution makers to contend with the unevenness of the grounds they stood on; to reflect on 'the logic of content', including the 'raw materials of social life, the constraints of determinate social contradictions ... and the dynamics and specific temporal rhythms of historicity' (which Ambedkar called the 'needs of our country' and Rajendra Prasad the 'realities and facts of history'), that forced them to deviate from the formal demands of constitutional texts.⁹³ History did not offer the peripheries a point of innocence outside the space-time of empire and capital. On the other hand, the legacy of anticolonial social theory reminded the constitution makers that the promise of egalitarian assimilation within that space-time was not an available option, let alone a credible one.⁹⁴ Neither pure indigeneity nor pure mimicry was an option. The history of the periphery was the history of uneven integration. Hence, at the ideational level the people of

the periphery articulated their hopes of autonomy with, against, and through concepts that originated in the metropole. The Constituent Assembly debates were a record of the situated reflections on the dissonance (not similarity or alterity) between those concepts and their own condition. The uneven terrains of the periphery, Frantz Fanon wrote, demanded concepts to be stretched.⁹⁵ The Indian constitution makers stretched – reimagined, reconfigured, renovated – constitutional theory, standing on the uncertain grounds of the postcolonial transition. The variances were the records of those creative choices as well as their limitations. The relentless assimilative drive of globalizing capital has made many in the periphery seek redemption in the pure alterity of the indigenous or the authentic. Such images of authenticity and indigeneity are not just phantasmagoric; their political use is more often than not in the service of authoritarian nationalism, against democratic creativity. The best hope for postcolonial autonomy remains in working through the variegated terrain of empire and capital to construct institutions that are apposite to the inequality and unevenness of our time. The Indian constitution makers did not necessarily succeed. Yet in reckoning with the predicaments of the periphery, they left behind methodological and political notes for that difficult, unrealized task. A constitution written on the uneven surface of the postcolony displayed the creases and fissures of its history.

Constituting Decolonization

Constitutions are, by and large, analysed by lawyers, for lawyers. Lawyers are specially ordained to be the custodians of the sacred text for our secular times. They are trained to find internal coherence amongst texts and subject their particularities to ‘timeless’ legal categories and precedents.⁹⁶ This is how we get an appearance of certainty, stability, and permanence of meaning, on which the rule of law, and indeed the rule of lawyers, depends.⁹⁷ The battle scars of history – the conflicts and contradictions, conjectures and compromises – have to be glossed over to achieve this congruence. The product of a particular socio-historical moment is generalized into an abstraction that claims to have fantastical powers of its own.⁹⁸ History is subsumed into norms. In the words of Karl Marx, the constitution loses ‘the birthmarks of its origins’.⁹⁹ Things without origins or history cannot comprehend change, let alone something as epoch altering as decolonization. To read the Constituent Assembly debates as an archive of postcolonial founding, one has to first defy

the liturgy: make the constitution-making process profane by bringing it down into the realm of politics and history.¹⁰⁰ ‘The realities and facts’ of the postcolonial terrain, as we noted, did not allow the luxury of mimesis or a faith in the sacrality of abstract principles.¹⁰¹ The task of the assembly was to construct an institutional structure on the uneven and fragile ground of the nascent postcolony. This required sober reflections on said unevenness and fragility. The fractures of the world outside pushed through the walls of the assembly and left their indelible marks on the deliberations. The record of the debates became a contemporaneous and immanent account of the tumults and ambiguities of the postcolonial founding moment. Read differently, the debates record not the aspired coherences of a postcolonial constitution, but the turbulent tale of the constitution of the postcolony. That tale, of hopeful anxiety or anxious hope, has three primary conceptual strands. I identify them as the antinomies of the postcolonial transition: revolution without a revolution, change through continuity, and popular sovereignty without popular politics.

Revolution without a Revolution

When we try to reconstruct the word-concept ‘revolution’, as it was used in and around the Constituent Assembly debates, we encounter a challenge. The word was evoked, in equal proportions, in two opposing senses.¹⁰² There were proclamations of accomplishing a revolution (‘we are conducting a revolution’) and avoiding one (‘a revolution might take the place of evolution’). It was both peaceful (‘revolutions are not violent’) and bloody (‘insurrections and bloodshed’). It was calm and deliberate (‘deliberately aiming at a new type of society’) and disruptive and unpredictable (‘not in the control of laws and the parliament’). It was a harbinger of gentle hope (‘there is some magic in this moment of transition from the old to the new’) and the desperate cry of the oppressed (‘there is not going to be much more waiting by these millions outside’). The word ‘revolution’, as used in the assembly, pointed to two contrasting images.

The first image was that of the ‘fire in the minds of men’, set ablaze ever since the French Revolution.¹⁰³ It cleared away all the detritus of the *ancien régime* and made inevitable the ‘problem of new beginnings’.¹⁰⁴ It overwhelmed existing institutions of the state, and it sought nothing less than fundamental changes to both the political and the social order.¹⁰⁵ Its temporality was rapid

and unpredictable.¹⁰⁶ In the words of Vladimir Mayakovsky, it was a 'march into the unknown'.¹⁰⁷ No one person could control it.¹⁰⁸ It was unavoidably violent.¹⁰⁹ And it was driven by substantial popular political activity.¹¹⁰ As Charles Tilly pointed out, there are few if any historical events that could measure up to this image in its entirety.¹¹¹ But as the assembly debates testified, that did nothing to lessen the power of the image itself. In contrast to this, the postcolonial founders suggested an alternative. It shared with the first image the idea of change, but differed entirely on how that change was to come about. Its metaphor was not Fyodor Dostoevsky's uncontrolled blaze, but the giant controlled furnaces that became the talisman of industrialization in the twentieth century.¹¹² It was a deliberate project of social transformation. Its temporality was measured, controlled, and predictable. Its protagonists were not the masses in the streets but the planners in the commissions.¹¹³ It avoided – and this was the part that was stressed most often in the assembly – major conflicts and violence. Finally, there was no tearing down of the old regime. Instead of being constructed anew over the ruins of its former colonial self, the state became the organizer of the project of social change. This was the image of revolution that the postcolonial founders aspired to. 'Revolution does not mean fighting or quarrelling, as you might have read in some books, as it happened in the French or the Russian revolutions. That age is over now,' declared Nehru.¹¹⁴

The relationship between the two images was not just of symbolic antinomy. The former leaders of a decades-long struggle that had generated polychronic ideas of freedom and equality could not just deny or repress the revolutionary aspirations of 'those unhappy millions outside'. The postcolonial ruling elite could not simply declare the end of a revolution that never was. So, they had to substitute the (feared) first image with the (desired) second: materially, a transformation of the social conditions forestalling insurrectionary social unrest; symbolically, five-year plans and land reform legislation in place of general strikes and liberated zones. When accused of being responsible for the violence of the revolutionary mob, Maximilien Robespierre had asked, 'Citizens, did you want a revolution without a revolution?'¹¹⁵ The Indian constitution makers answered in the affirmative. Robespierre had meant to signal a fatal contradiction, as the predicate (without a revolution) negated the subject (revolution) of the sentence. He meant to question whether it was ever possible to have a revolution without the tumult that accompanied it. The Indian constitution makers sought to

resolve that contradiction by assigning two distinct images to the predicate (feared disruptive upheaval) and the subject (desired planned transformation). In the postcolonial constituent moment, the word-concept 'revolution' was disambiguated and reassembled. It was to be change without conflict, progress without violence, history without its battles. It was to be a revolution without a revolution. This was the first antinomy of the postcolonial transition. To what extent this was possible would be a question that would trouble them, and a question that would run through this book. The Constituent Assembly designed institutions around this dual image of revolution. Each side of the image had a corresponding subject: the presumptive revolutionaries for the respective revolutions. For the feared revolution, it was the masses. For the desired revolution, it was the expert administrator.

Change with Continuity

To the first-time observer, one of the most puzzling facts about the Indian constitution is that more than half of it is a copy of the Government of India Act, 1935 – the final colonial 'constitutional' statute. At the time it was passed, the Congress had denounced the Act as a 'charter of slavery'.¹¹⁶ Now it was the most substantial source material for independent India's constitution. Responding to criticisms, Ambedkar stressed that the borrowings 'relate mostly to the details of administration'.¹¹⁷ He was referring to the inclusion of exhaustive details about administrative arrangements, apportionment of various governmental duties, lengthy schedules, and so on. What were such 'details of administration' doing in a constitution? Normally such 'administrative details should have no place in the Constitution', Ambedkar remarked. But there was a 'necessity which justifies their inclusion'.¹¹⁸

That necessity was the modality of the desired revolution. Till the end of the Raj, the colonial state remained functioning, and hence available as an inheritance. The streets, turbulent as they were, had not torn down the statehouses. Now those statehouses became the place where the path of the desired revolution was mapped. Like all the putative constitutional acts of the colonial government, the Government of India Act, 1935, was primarily an administrative manual – a comprehensive rule book for operating the complex and vast machineries of the state. A section of the postcolonial elites, as bureaucrats, lawyers, and ministers, were already trained in that manual. Its language and grammar and levers and pulleys were familiar to them. So, when the time came for them to devise their own institutional

architecture, they drew heavily from the text they knew well. They sought to counter the uncertainties posed by the unknown future of transformations through the certainties of a familiar calculus of governing. 'Change was not apparent because there was a continuity, because many things appeared to go on as they had been going on previously,' Nehru tried to explain in unavoidably imprecise terms. 'There was no break as such but there was an enormous break all the same under the surface of the things which seemed to be much the same.'¹¹⁹ The colonial-era state was to be marshalled in aid of postcolonial transformation. A break from the colonial past, they argued, required an element of continuity. The continuity of the state machinery served as a counterpoint to a revolutionary disruption. 'I confess to this house that I am not brave and gallant enough to go about destroying anymore,' Nehru said in the assembly. Instead of revolution's seductive promise of a 'clean slate ... so that we may have the pleasure of writing anew', what the Indian constitution makers sought was 'to rub out here and there in order to write on it again, gradually to replace the writing on the whole slate'.¹²⁰

The postcolonial constitution did not design the state, it was designed around the state. The apparatus of the colonial state had been constructed and used primarily for the purposes of extraction and repression.¹²¹ Now it had to be repurposed to achieve the much more complex task of transformation and development. The acquired skills in operating it, however, were still valuable, even if the mechanics had to be reminded that their assignments have changed. 'The function of the services [colloquial name for the bureaucracy] is not only to preserve the peace but to actively assist in this tremendous undertaking [of development],' Nehru said in a speech to the officers of the new regime.¹²² 'This Constitution,' declared Vallabhbhai Patel, 'is meant to be worked by a ring of Service.'¹²³ The literary style of the constitutional text reflected this, containing numerous subclauses and caveats, eight lengthy schedules, and an entire section dedicated to definitions of specific words. It was functionalist, purposive, and drew a lot of its grammar from the province of administrative law.¹²⁴ A contemporary critic said that it resembled a 'Motor Vehicles Taxation Act' rather than a constitution 'animated by the living faith of revolutionary founders'.¹²⁵ The postcolonial future was conceived through the calculus of the state, not the poesis of popular politics. The constituent subject of the postcolony was the administrator. Questions remained, as we shall explore over the book, as to whether something new could be built with old tools. How much of a new postcolonial future could be written with the

pen of the colonial administrator? The uneasy cohabitation of break and continuity was the second antinomy of the postcolony.

Popular Sovereignty without Popular Politics

The formal papers of authorial identification, however, carried a different name. 'We, the People' was the familiar first-person declarative that began the constitution. Most theorists of the Indian constitution have found little need to question this identification.¹²⁶ Nowhere do the people author constitutions in the literal sense. The fictional 'People' of constitutional authorship and the empirical 'people' never are – nor can they be – identical.¹²⁷ In Pierre Rosanvallon's terms, there is always a distance between the 'real' people and the authorial People, which 'results neither from dysfunction nor betrayal: it is consubstantial with its very object'.¹²⁸ However that distance is neither predetermined nor stable. The dialectic of defining the undefinable sovereign people 'vivifies democratic practice'.¹²⁹ To be sceptical of the imputed authorial identity is to question the correspondence of the constituent process with the popular and democratic politics of the anticolonial movement. The sparse critical attention paid to this correspondence (or the absence of it) underwrites the generally celebratory appraisals of both Indian democracy and the Indian constitution over the last decades.¹³⁰ However, the records of the assembly debates themselves draw our attention to a persistent dissonance.¹³¹ When the 'people' were invoked in the assembly, it was almost always in the third person, as 'they'. 'These down-trodden classes are tired of being governed,' Ambedkar said. 'They are impatient to govern themselves.'¹³² The non-correspondence between popular politics and the constituent process would be the basis of the third – and perhaps the most significant – antinomy of postcolonial transition.

To begin with, the popular was the condition of possibility for the constituent. There was no successful anticolonial movement possible without popular participation – not just strategically, but conceptually. The core justification for colonial rule was the inability of the colonized to govern themselves.¹³³ They had no political agency, and hence they had to be ruled by a benevolent despot. The initial expressions of dissent by a professional class produced by colonial education implicitly accepted this premise. Instead of popular sovereignty, they asked for more rights and privileges within the imperial hierarchy.¹³⁴ Their politics was, in their own words, 'constitutionalist'; that is, in both words and deeds, they did not question the imperial legal

order. The end of the First World War saw the emergence of mass anticolonial protests across the colonized world.¹³⁵ When M. K. Gandhi launched his first nationwide agitation in 1919, the accent shifted from the constitutional to the popular. The anticolonial cause was expressed through marches and sit-ins outside and against the legal order of the colonial regime. The prefiguration of an Indian 'people', through an organized movement, refuted the notion of the political incapacity of the colonized. It was an assertion of the self-making capacity of a politicized collective. Denied constitutional representation, the anticolonial people took shape through their extra-constitutional, but organized, presence. The density of that popular presence was what would eventually end the empire. Empires were 'inherently antidemocratic'.¹³⁶ By their own logic, they could not abide by popular sovereignty, only govern subjects.¹³⁷ Hence, people and democracy were concepts inherent to the logic of anticolonial articulations. Its most significant institutional legacy was universal adult suffrage, instituted immediately after independence – a monument to popular politics.¹³⁸

At the very same time, popular political activities – when the imagined people of India took concrete shape in the streets and squares – multiplied the meanings of freedom after empire. The masses could not be viewed as passive receptors of nationalist ideology. In persistent rebellious expressions of their political subjectivity, they painted pictures of liberation in terms of 'what was popularly regarded to be just, fair and possible'.¹³⁹ These terms were more often than not unsanctioned by the Congress, generating anxiety amongst its leadership.¹⁴⁰ A simultaneous dependence on and apprehension of popular mobilizations became the central tension of the anticolonial movement. Each pole of that tension exerted itself on the trajectory of the struggle: one demanding national liberation through intensification of the mass movement and no negotiations with the colonial rulers; the other calling for a retreat from mass mobilization and a transition of the Congress into a party of a government in waiting.¹⁴¹ The basis of any postcolonial regime had to be popular sovereignty,¹⁴² except now there was a contestation over two distinct meanings of this: the authoritative and the creative.¹⁴³ The first demanded a transfer of authority from the colonial government to a Congress government in the name of a juridically sovereign people, where power 'pass[ed] from a civil government into another kind of civil government'.¹⁴⁴ The second was the basis of constituting – creating – a new Indian polity through popular political participation, where 'the people' 'would themselves have the power to liquidate the poverty that consumed them', as an act of democratic

self-fashioning.¹⁴⁵ The latter, Nehru suggested, 'will not come into existence till at least a semi-revolutionary situation has been created in this country and the actual relationships of power ... are such that the people of India can make their will felt'.¹⁴⁶ These were the two political idioms of decolonization and, consequently, postcolonial futures. In the words of Fanon, the choice for the anticolonial party was to either be 'an administration responsible for the transmission of government orders' or to be the 'energetic spokesman and the incorruptible defender of the masses'.¹⁴⁷

The Congress, like most of its anticolonial peers, took the first path, becoming the presumptive party of government over the decade preceding independence. In the 'authority' sense, popular sovereignty was meant to be disciplining – where the abstractly sovereign people could be invoked to prevail over any concrete instances of popular political activity.¹⁴⁸ Yet the subterranean pressures of the latter could not be ignored, as still unsettled aspirations of freedom circulated outside the assembly. The years around independence were the times of the most intense and militant mass struggle in India's history, witnessing various creative syntheses of the language of anticolonialism with demands of socio-economic emancipation.¹⁴⁹ When, soon after independence, Nehru advised workers in Calcutta to withdraw their strike, they responded,

We have had enough of bullying and threats from Imperialist rulers. It was from Panditji that we learnt how to react to it. Panditji may change but his lessons are still clear and inspiring. We will rise a thousand times stronger against your threats Panditji! Till you meet our legitimate demands and let us live honourably in free India.¹⁵⁰

The anticolonial threatened to infiltrate the postcolonial. Consequently, the postcolonial order was born in 'fear and trembling'.¹⁵¹ The masses were absent in the assembly. But it was not an absence caused by their incapacity to act, but the fear of what their acts could be. Absences can threaten, absences can speak. The insurrectionary spectre of the absent masses haunted the constituent process and shaped the constitution.

Any critique of the 'absence' of the people from the constituent process must contend with apprehensions about the unmediated 'presence' of the same. The prominence of plebiscitarian figures across the world (including India) has only reinforced the suspicion that the invocation of a 'people' is inevitably a search for a deified subject outside and above institutional structures.¹⁵² a

‘people as one’ in Hannah Arendt’s words; a ‘bad metaphysics of the people’ as Franz Neumann called it.¹⁵³ However, for this book, the adjective (popular) concerns us more than the noun (people). It is not a deified subject that I seek to resurrect, but certain political forms that I hope to recover. These popular political forms were not ‘metaphysical’, nor were they predetermined. They were generated by and through the anticolonial struggle and were available to the Constituent Assembly (as they are to us) as historically concrete figurations. The constitution of the nascent democracy incorporated several curated practices for political participation. What remained outside, however, were the various forms of mass mobilization used during the anticolonial struggle, including the rallies, strikes, sit-ins, and *hartals* common during the Gandhian movement.¹⁵⁴ Under the new constitution the masses could vote, but there were no structures that enabled them to emerge as a collective agent outside of electoral aggregations¹⁵⁵ – that is, in Nehru’s words, create a ‘new free state [which] the people can make or unmake’.¹⁵⁶ This self-fashioning conception of democracy was inherent to the anticolonial struggle, even if unrealized. One could identify traces of ‘tentative, precarious attempts to freely and consciously organize the political form of a collective existence’ in how the movement against colonialism unfolded.¹⁵⁷ Postcolonial theorists often describe the masses as incommensurable externalities to all institutions, displaying a ‘structured inarticulacy’ at the level of institutional politics,¹⁵⁸ which might be why postcolonial scholars of the constitutional rarely speak of the popular, and the scholars of the popular rarely consider the constitutional worth investigating. The anticolonial ‘popular’ that we discuss was not a synonym for spontaneous and unorganized.¹⁵⁹ It did not stand for the ‘de-institutionalization of the political’.¹⁶⁰ The anticolonial struggle became generative precisely because it was mobilized and organized. The point was not the denial or incomprehension of institutions as such, but opposition to institutions imposed, undemocratically. Not the extra-institutional, but the self-institutive capacity of popular political activities was what was at stake. The postcolonial constitution makers sought the authority of popular sovereignty, but without popular politics. This was the third antinomy of the postcolonial transition.

The Postcolonial Present

Empires were regimes of differentiation and hierarchies. Such hierarchies were encoded through imperial decrees regarding the disparate political

capacities of various groups. The political subjectivity of the colonized was not self-determined; it was ascribed to them through categories fashioned by the colonial state, on the basis of religion, caste, kinship, or property. Anticolonial political expressions were a repudiation of that regime of imposed differentiation. What sort of postcolonial political subjects would they produce? There are times when due to the scale of the mobilization and the resulting crisis of the extant order, the people tentatively recognize themselves as collective agents of the 'radical project of a self-instituted society'.¹⁶¹ Through their political activities, they do not just constitute the polity but constitute themselves as a collectivity. The anticolonial struggle, in its scale and scope, was one such time. That recognition was articulated (incompletely) through certain forms of mobilized popular activity. The constituent process did not seek to foster or facilitate those activities. It was at best a deflation, at worst an expulsion, of the politics of anticolonial democracy from the constitution of the postcolony. That is the basis of this book's critique. Most critical appraisals of postcolonial institutions deem them falling short of certain metrics derived a priori – rights that are insufficiently liberal, democratic processes insufficiently competitive, judicial processes insufficiently fair, executives insufficiently honest, or voters insufficiently informed. The critique advanced in this book, however, is immanent to the specific history of the constituent process, its unique openings, and constraints, in terms of the potential, yet unrealized, infiltration of postcolonial institutional lives by anticolonial politics.

Anticolonial popular mobilization had once disrupted inherited categories and generated the conditions for new political subjects to emerge; not coherently, completely, or successfully – but *in potentia*.¹⁶² The images of the postcolonial people – what it meant to be Indian or Indians – were not predetermined; they were open to construction through politics. That was the democratic promise, however precarious, of the anticolonial movement. With that promise unrealized, the postcolonial masses would scarcely recognize themselves as self-fashioning agents.¹⁶³ Instead, the political subjectivity of a demobilized populace would be nourished by the ascribed, inherited, and predetermined categories of religion and ethnicity: materials for electoral arithmetic rather than subjects of collective self-making. This is the metaphysics of the people in Neumann's sense – a pre- or anti-political facticity.¹⁶⁴ In the militant years before independence, Aruna Asaf Ali, a young activist, wrote to Gandhi that the Congress should 'rather unite Hindus and Muslims at the barricade than on the constitutional front'.¹⁶⁵ But

the Congress, at a critical moment, turned away from the dialogic creativity of mass movements and chose the monologic discipline of the administrative apparatus for the construction of the postcolonial order and the postcolonial citizen. Unchallenged by alternatives, the ascribed categories of politics took hold. Popular politics collapsed into a logic of demography. The 'concrete utopias' of a mobilized anticolonial demos, unrealized, prepared the grounds for a demobilized postcolonial ethnos.¹⁶⁶ A preservative violence to maintain the boundaries of inherited identities substituted the constitutive disruptions of constructing new subjects. This was the legacy of the foundational non-correspondence of the popular and the institutional.¹⁶⁷ The life story of popular politics is not just a companion to the more celebrated biography of the constitution. The argument of this book is that one cannot give a full account of one without the other. An analytical separation between the outside and the inside of the assembly, I argue, is not tenable. The popular and the institutional are parts of the same story, perhaps anticipated, perhaps haunted, by the other. Through their entanglements, confrontations, and conjunctural connections, we find in the making of the postcolonial constitution the story of the postcolonial political present.

It is a present that announces only too clearly the passing of the age of decolonization and all that it promised. In talking about decolonization, one cannot avoid thinking about disappointments and exhaustions. There are two ways of thinking about disappointments that have been prevalent in assessments of decolonization's unrealized promise: melancholia and dismissal. Melancholia, Sigmund Freud writes in his famous essay on the subject, is a reaction to the loss of an object of love, but not because the object has ceased to be. Unlike mourning, melancholia occurs 'when the object has perhaps not actually died, but has been lost as an object of love'.¹⁶⁸ Instead, the melancholic shifts the criticism for that loss onto themselves, preserving the ideal form of the beloved. For our age without 'militant optimism', anticolonial revolutions have become such an object for many. Its loss is felt not because its historical conditions of possibilities have vanished completely, but because it no longer appears on our cartography of the possible. There remains no possibility of redemption, only sorrow.¹⁶⁹ The other path is that of dismissal. In this view, the misplaced hope invested in postcolonial futures never had a chance to be redeemed. One could be what Ernst Bloch called the 'ways-of-the-world philistine', who 'not only reject the anticipatory outright, but despise it'¹⁷⁰ – that is, renounce the revolutionary and emancipatory image of decolonization itself. Here, the

dialectic between our critical knowledge and hopeful desires – an ‘educated hope’ or the ‘education of desires’ – did not have an opportunity to even get off the ground.¹⁷¹ Melancholia holds us hostage to an idealized past, dismissal disavows the value of the past.

This book is a critical account of the postcolonial constituent project, while it recovers the ambitions that underwrote the project. Indeed, the narrative energy of such a critical account is generated by a dialectic of foreboding and hope. The foreboding acknowledges the very real limits and contradictions of the project; the hope insists upon its untold possibilities. The critique prevents the idealization of melancholia; the acknowledgement holds back the urge for dismissal. We care about failures or disappointments only for moments that had possibilities. In Reinhart Koselleck’s words, those possibilities never became a part of our ‘space of experience’, but they did once constitute our ‘horizon of expectation’ that remains worth recovering.¹⁷² The constitution of the postcolony deserves our critical labour because something, something else, was possible. In the fissures of that once imagined future, there remains something for our fractured present.

Organization of the Book

The book has three thematic and/or sequential parts. Thematically speaking, Part I concerns the context – political, social, ideational – for the constituent process; that is, it relates to *when* and *where* the postcolony was constituted. Part II focuses on the constitutive subjects, the contending authors of the postcolonial order; that is, it focuses on *who* did, and did not, constitute the postcolony. Part III turns to the institutional architecture as constituted; that is, *what* was the order that was constituted and *what* were its most significant elements and contradictions. To speak in terms of the architectural metaphor that appears often in the book, Part I concerns the grounds, Part II the architects and builders, and Part III the structure itself. The three parts could also be arranged sequentially. In that instance, the discussions of Part I correspond to the anticolonial moment (until formal independence), Part II to the moment of transition (the years around independence), and Part III to the postcolonial moment (since independence). The conclusion and the epilogue look back onto the constituent process from the hindsight of subsequent decades and try to knit together the various critical threads that have been developing through the book.

To critically analyse an event or a text, one needs to begin by challenging the autobiography it gives itself. In the case of the Indian constitution, such an autobiography is constructed through a series of colonial laws, commission reports, draft constitutions, and negotiated settlements. It is a juridical history of a halting yet inevitable progress to a constitutional denouement. This book questions such juridical immanence and political closures. Hence, it begins by relocating the birth story of the constitution to the unsettled political and ideational grounds of the anticolonial struggle. The anticolonial struggle created the historically available horizons of expectation for the choices and compulsions of the postcolonial constitution makers. A cartography of its various currents and contentions, therefore, is the first step in formulating an immanent, historicized critique of the how the postcolonial world was constituted and how it was not. This is the subject of Part I.

Chapter 1 is an account of the anticolonial political struggle. I recast India's struggle against British colonial rule as a contestation between three forms of anticolonial assertions and, hence, three distinct meanings of postcolonial freedom: constitutional liberal, mass mobilizational, and administrative. The constitutional liberals framed their demands, both substantively and formally, within the bounds of colonial legality. They solicited rights and status for Indians within the empire, not autonomy from it. In contrast, the mass mobilizational form of anticolonial politics demanded the end of empire in the name of popular sovereignty. Its form was popular and its language democratic. The final, administrative, current was a shift from the streets to the statehouse, whereby the Congress transformed itself into a party of a government in waiting. Instead of popular politics, it was the mechanisms of the state that supplied the grammar for negotiating freedom and constructing an independent India.

The chapter shows that the central political dynamic informing these currents was not a simple hostility between the colonizers and the colonized, but the tension between the elites and the masses amongst the colonized. That was the relationship that determined the trajectory of the anticolonial struggle and, as this book would argue, the constitution of the postcolony. Therefore, the passage between the three currents described could be summarized as follows: The constitutional liberal political current, led by urban professionals, arose out of the structural inability of liberal imperialism to fulfil its own promise. That politics lacked any popular support beyond those professional elites and hence proved ineffective. Success in overcoming that problem made the anticolonial struggle under the leadership of Gandhi a genuine mass

movement and hence politically powerful. Its capacity for mass mobilization made the Congress the presumptive inheritor of the postcolonial state, while the militant energy of that very same mobilization pushed anxious Congress leaders towards a different way of relating to the masses: administrative. The offices of the state became the new staging ground for not just anticolonial politics, but also the imaginative construction of the postcolonial future. To put it simply, the relationship between the Congress (and elites) and the masses through these three stages was that of distance, mobilization, and governance.

The various currents of anticolonial politics outlined in this chapter map the political field within which the constituent process played out. Mapping them helps identify the concrete possibilities that they made available, the paths explored and forsaken, and promises realized and abandoned. At the moment of transition, all three images of the postcolonial future – liberal, popular, administrative – were available as resources. During the decisive years around the postcolonial transition, the Congress opted for the administrative over (and against) the popular form as the basis of the new postcolonial order. The book explores the ways in which political forms generated by the anticolonial movement did and did not inform the constitution of the postcolony. The ambiguous relationship between the anticolonial and the postcolonial moments is the first thread of critique developed through the book.

Chapter 2 concerns the other dimension of the anticolonial struggle: the socio-economic. Colonialism was not just the fact of political subjugation. It was also a system of economic exploitation. Externally it imbricated India in relations of dependency within the global circuits of capital; internally colonial policies resulted in an immiserated, deindustrialized, and unequal society. Hence, economic critique of colonial rule was coeval with organized anticolonial politics, while social questions were inseparable from it. Aspirations for autonomy and apprehensions of unrest committed the postcolonial regime to a project of changing that landscape in a deliberate and controlled manner. Once again, the central dynamic was that of the tension between the elites and the masses. Early anticolonial economic thought proposed a clear line separating the British as oppressors and Indians as their victims. As the social base of the anticolonial movement expanded, maintaining this simplified binary became difficult. The oppressions and inequalities of Indian society generated credible threats of unrest, especially once the unifying effect of the anticolonial movement expired. So, the

Congress committed to an ambitious project of deliberate and directed social change. Transformation was the name of that social revolution without the disruptions and uncertainties associated with revolutions. This chapter is an account of how the nascent postcolonial rulers envisioned that project. Using the Constituent Assembly debates and contemporaneous writings on planning and development, I analyse five defining features of that concept: the national economy, centralization, planning, legitimation, and avoidance of conflict.

The spatial coordinate of development was the nation, which was articulated through a contrast with the 'free' economic space of the empire. The national was not just an enemy of the imperial; it was also an adversary of the local and the regional. Centralization was inherent to the structure of the anticolonial movement and, consequently, the postcolonial regime. Mirroring the colonial administrative structure that it was to inherit, the nation was the conceptual and organizational plane on which the Congress mobilized anticolonial politics. I argue that this was the fatal weakness of Gandhi's alternative to developmentalism: he hoped to establish a decentralized postcolonial polity on the basis of a centralized and centralizing anticolonial movement. The next element of the postcolonial transformative project was planning. The primary goal of planning was economic independence and industrialization, not equality. Hence it privileged growth over distribution. I argue that planned development suggested a particular sequence: aggregate production was to be increased before a programme of redistributing resources. In political terms, it meant that all distributional struggles – and more radical imaginaries of postcolonial freedom – had to be postponed until a certain stage of prosperity had been reached. Particularly undesirable were political expressions oriented around conflict. And this leads to the final element of the transformation: the avoidance of conflicts between different interests. The problem was framed in terms of underdevelopment, not exploitation. The solution was productivity, not strikes. Taken together these five features signalled a desire for a transformational project without transformational politics. This would be the basis for the second line of critique developed through the book.

Part II of the book turns to the two contending authors of the constitution: first, the 'people', who were formally designated as the postcolonial sovereign and, second, the administrators, the skilled technicians of government. I argue that it was the latter that served as the authors of the postcolony – that is, the agentive subject for its construction – while the former would shape the

constitution through their absence. This exploration of the authorial identity is in essence a consideration of the various political forms and arguments in circulation during the frenetic years of transition.

Chapter 3 concerns the first of the two contending authors, the people. The overarching argument is that there was a deliberate and acknowledged distance between the political spheres of the popular and the constitutional, which proved to be foundational for the postcolonial political world. In the chapter, I offer a political and social theory of that distance and its effects on the postcolonial order. I do so through four related claims: the centrality of popular politics to the anticolonial cause; its subsequent distance and absence from the constituent process; how that absence shaped the constitution; and how it shaped the people themselves.

The distance of popular political expressions from the constituent process was significant in its contrast to the anticolonial struggle that preceded it. The anticolonial cause, I argue, was inherently popular and democratic. The ideological premise of colonial rule was that the colonized lacked the capacity to act as self-governing agents. In response the anticolonial struggle asserted the political agency of the Indian masses. At the same time, the singular image of a 'people' that the Congress hoped to establish was challenged and destabilized by the insurrectionary self-portrayal of the masses. The dual figuration of the people-masses – the conceptual and the actual – is a well-worn theme in Western political thought. However, that duality had a distinctive manifestation in the peripheries. Against postcolonial theorists who designate the popular as an incommensurable other to elite politics, I outline a distinct social theory and political history of the anticolonial masses. The masses, I argue, were not a predetermined ontological or empirical category. They were contested remainders from the political construction of a collectivity on the uneven, asynchronous social terrain of the periphery.

Invigorated by the end of the empire, popular political expressions took their most radical form during the years around the Constituent Assembly. The rebelliousness of the masses, in their unsettled multiplicity, introduced irredeemable fissures on the juridified surface of the constitutional text. We tend to equate absence with silence and inaction. But the absence of the masses, I argue, was 'active'. The transformational commitment of the Indian constitution makers was not an act of benevolence. The militant spectre of the masses compelled it through their 'active absence'. In the final part of the chapter, I argue that the postcolonial majoritarian ethnos that inhabits

contemporary India is a legacy of that foundational absence. The colonial regime categorized Indians as a collection of unalterable ascribed identities – caste, religious, or linguistic – that defined the colonized subject's relationship to the state. The anticolonial movement, at its most expansive, generated an alternative conception of the people as a self-fashioning collectivity, constituted through a shared political struggle against the empire. The anticolonial people had to reclaim the administrative cartography of the colonial state as a self-determined polity. Through an analysis of the 'minority question' and the partition, I trace how at a critical point in history, the postcolonial elites abandoned that project of collective self-determination and implicitly accepted the colonial forms of classifications as a price for orderly transition. The boundaries of the nation were drawn by preserving the boundaries of identities. The unrealized promise of democratic self-fashioning prepared the field for pre-fabricated electoral demographics.

Chapter 4 establishes and analyses the claim that the constituent subject of the postcolony was the administrator. The administrative state in the colonies emerged concurrent or prior to the metropole. The colonial state assembled a formidable apparatus to comprehend, manage, and order the colonized society, which the Congress was both willing and able to inherit with little alteration. The continuity of the administrative apparatus was the cost of the non-revolutionary transition. I will argue that the apparently puzzling decision to become a dominion (rather than a republic) following independence can be explained by this desire for uninterrupted juridical and administrative temporalities. Even the new postcolonial territory was organized – whether the partition of the country or the integration of the 'Princely States' – through administrative processes uncorrupted by popular political participation.

I reconstruct two lines of argument from the assembly debates that justified the remarkable continuity in institutions, norms, and even personnel. The first was Patel's defence of continuity as a prerequisite for maintaining order. The state, he argued, could do what the party could not – manage the disorderly masses. The administrators compensated the Congress's inability to fully subsume and discipline popular political energy. The second line of argument stressed the creative rather than the repressive capacities of the state. The constituent moment appeared to some as a precious opening when, for a brief while, the nascent Indian state could enjoy a degree of autonomy from the dominant social forces around it and hence could be used to challenge entrenched hierarchies. I reconstruct Ambedkar's

argument why the technocratic legitimacy of the 'wisdom and knowledge' of experts trumped the democratic legitimacy of future parliamentarians, who would most likely be representing dominant social interests. Only the constituent administrator, liberated from the 'prejudices' of Indian society, could be truly transformative. Extending the arguments developed in the previous chapter, I conclude with a critique of the constituent administrator. What the postcolonial rulers inherited from their colonial predecessors was not just a set of instruments and personnel, but a certain relationship to the populace. I argue that it was not the continuity of the state form itself, but this specific relationality that precluded a truly transformative break. Efficiency and wisdom were something the colonial state could also promise. What it could not offer was a truly democratic foundation of a new order, a state populated by mass politics. But the administrator separated the constituent from the political, wisdom from power. Only with the masses at their side could the administrators have become creative agents. Without them, the transformational project lacked the necessary political subject that could realize it.

The institutional architecture constructed through this constituent process is the subject of Part III of the book. I discuss its four main components: parliamentary democracy, rights, property, and the judiciary. Each chapter has a similar four-part structure: the colonial genealogy of these concepts or institutions; their distinctive shapes generated by the anticolonial movement; the specificities of the constitutional formulations; and, finally, the tensions generated or left unresolved by the postcolonial incarnations.

The subject of chapter 5 is the institutions of postcolonial democracy: universal suffrage and parliamentary government. These were, I argue, the most significant institutional manifestations of the anticolonial cause. The defining feature of colonialism was not violation of rights or enforced underdevelopment, but the denial of democracy and political agency. Universal suffrage was the institutional refutation of the regime of hierarchy and differentiation that was the empire. In this sense, universal suffrage should not be understood through only the quantitative metric of inclusion, but the qualitative distinction between colonized and independent polities. The domicile of this nascent democracy was to be the parliament. I argue that rather than a mimicry of the colonial masters (as commonly held), the parliament was a considered a repudiation of the unfettered colonial executive. Hence, the legislature was a decisive departure from colonial institutional legacies.

By the turn of the century, parliamentarism was widely considered to be in decline in the metropole due to two related phenomena: first, mass parties and working-class enfranchisement and, second, the rise of the administrative state. I argue that parliamentarism, as envisioned by the Indian constitution makers, was a response to these two sources of crisis. Far from institutional mimesis, India offered a specifically postcolonial (even if unrealized) reconception of parliamentary politics for the age of mass democracy. The first issue was whether the parliament had the capacity to mediate the conflicts brought forth by mass enfranchisement. The Weimar Republic offered an example (studied by the Indian constitution makers) of how a fractured and fractious population could instead find their unity in the singular person of the plebiscitarian leader. The executive's control of the levers of the state would make them an obvious focal point of the transformational project and make a presidential election far more meaningful than a parliamentary one. In rejecting the provision for a directly elected president and giving them any meaningful power, the constitution makers sought to foreclose that path. The India represented by the executive was administratively unified, the India represented by the legislature was diverse in interests. Instead of longing for imagined unities, the parliament had to translate the 'social facts', in their multiplicity, into political terms. Postcolonial parliamentarism was a commitment to go through rather than above or around the divisions in society. The second issue was that the decisive, action-oriented, and functionally unified executive appeared more capable of responding to the urgent demands of development than the deliberative, norm-oriented, and functionally divided parliament. In contrast, the Indian constitution makers suggested that the parliamentary form was both 'effective' and 'necessary' for the developmental project. Parliamentary politics, in this model, functioned dialogically. It informed the developmentalist state of the disparate needs and concerns on the ground, and on the other hand it organized the forms in which the people expressed those needs and concerns. Consequently, a development project authored by the parliament – politically articulating social conflicts at the level of the state – was more democratic than one directed by the executive. This was the unique promise of postcolonial parliamentarism. However, instead of assuming the principal role afforded to it by the constitutional design, the parliament became an accomplice of experts, reviewing and complementing their work, which eventually undermined the unique democratic possibilities of postcolonial parliamentarism. As a result, citizens ceased to see their

material welfare as the product of social and political contestations and came to view it as a grant from an omnipotent executive. The process eventually transformed citizens into populations to be aggregated through elections. To populations, the state matters far more than democracy. The legislatures – and hence laws – gradually mislaid the democratic legitimacy that the postcolonial constituent moment promised.

Chapter 6 turns to the topic of rights. Since the Second World War, constitutions have come to be identified with charters of guaranteed rights. In India, this was called the fundamental rights. To talk of the Indian constitution, more often than not, is to talk of the fundamental rights. This chapter offers a critical response to the pervasive rights-centric accounts. The essence of colonized subjection was not a generalized condition of rightlessness, but the denial of political agency. The primary guiding principles of anticolonial movements were ‘self-determination’ and democracy, not rights redressal. Hence, editing undisciplined modes of popular politics into an ordered, institutionalized, democracy took precedence for the constitution makers over guaranteeing previously denied rights. Part III of the constitution consisted of not only a familiar list of rights, but also enumerations of various limits to those same rights (permissible limits), rights specific to certain groups, prohibition of certain kinds of private behaviours (horizontal rights), and, finally, the explicit continuation of the repressive powers exercised by the colonial state. The liberal interpretations of the constitution require us to understate these features, consigning them to the categories of contingencies and compromises. I will argue that all those different elements constituted a coherent disciplinary whole. Instead of thinking of rights in terms of limits or guarantees, we should consider them as instruments for the incorporation of the fractious masses into the lives of their newly acquired institutions and facilitating them to make their demands – even dissenting ones – to the state rather than against it. Rights were purposive and functional. Drawing upon the scholarship on the Progressive Era in the United States (and its influence on the Indian constitution makers), I argue that the fundamental rights corresponded more with freedom to (participate in government) rather than freedom from (state authority) – generative of new political actions rather than preservative of existing entitlements. This was even more evident with the so-called horizontal rights, devised by Ambedkar, that operated between private individuals. They prohibited certain practices through which dominant castes excluded the marginalized from services and resources, by invalidating the use of private rights (property or contract) as

an alibi for exclusion. Yet again, the concept of incorporation – of an excluded population into socio-economic life – rather than limits helps us understand the specificities of horizontal rights.

Finally, the chapter accounts for an ignominious feature of the postcolonial constitution: the preservation of colonial instruments of repression that were used against anticolonial activists. The persistence of these instruments contradicts the argument that rights were the grammar of postcolonial freedom. The justification for repression had precisely the inverse structure: independence made rights against the state redundant. Instead, the critical issue was an ‘editing’ of postcolonial political expressions. After independence, the diverse interests and ideologies that were once evidence of the vitality of the anticolonial movement became a signal of postcolonial instability. The multiplicity of anticolonial expressions had to be edited into permissible postcolonial expressions. Rights provided the administered pathway for sanctioned expression, repression was the sentry that threatened those who dared to stray from it. Rights and repression were not contradictory cohabitants of Part III, but complementary elements of the same institutional architecture. Extending the analysis developed in chapters 3 and 4, I argue that the constitutionalized mechanisms of repression were outgrowths of the absence of popular constitutive politics. Like police files that record the words and deeds of militants better than they themselves do, the debates on repression in the assembly serve as an archive for the subterranean reverberations of unresolved contestations.

Chapter 7 concerns property and labour. The debates on property rights in the assembly tell us what transformational constitutionalism could have become and what it would not. I situate those debates within the larger global debate on property that followed in the wake of decolonization, by using a schematized binary of sovereignty versus property derived from W. E. B. Du Bois and Morris Cohen. Colonial regimes privatized the resources of the peripheries and granted metropolitan corporations property rights over them. These entitlements were the most visible vectors of continued imperial domination after formal independence. Third World countries argued that their newly won sovereignty, to be substantive, had to have the capacity to invalidate such imperial regimes of property. The focus of this debate in international fora was the nationalization of natural resources. But distributions of land and forms of labour within the colonies were also a product of colonial rule and a part of the imperial economic order. Hence, land reforms were just another iteration of the

same problematic – concerned with an entire system of property relations rather than singular assets.

The colonial regime had created, sustained, and shaped the extant property rights in land. Hence, inherent to anticolonial politics was a delegitimization of landlords. The particular combination of being unproductive, oppressive, and collaborators of the colonial rulers made Indian landlords a prominent target of anticolonial ire to the extent that it inflected the institution of property itself with the history of colonial subjugation. This chapter records the various ways in which the entanglement between colonial domination and the institution of property was articulated in the assembly – both against and (paradoxically) in defence of property rights. Those against argued that to fulfil its promise of worldmaking, postcolonial sovereignty had to be able to change who owned and controlled the world. The most radical image of such an endeavour was offered by Ambedkar. In submissions to the assembly, he argued that if forced to choose, the worker would more often than not be compelled to submit to the rules of the private government of the landlord and the employer rather than the principles of political democracy generated by the anticolonial movement. Hence, the time has come, he urged, ‘to take a bold step and define both the economic structure as well as the political structure of society by the Law of the Constitution’.¹⁷³ That is, the constitution should not stop at the modality of the transformation, but definitively announce its substantive end; not just the ‘how’ but the ‘where to’. Autonomy from the empire of property could not be legislated or administered, it had to be constituted. The ‘pragmatic’ case for property was based on acknowledging the limits to postcolonial India’s autonomy and its continued dependence on metropolitan investments. They argued that the power of property internationally dictated an acquiescence to it domestically – using economic hierarchies globally as an alibi for social stratification at home. The final version of the property clause was the ‘non-political’ solution of an administrative mechanism borrowed from the colonial state. It was a curious position where a colonial-era legal instrument was to be used to transform the colonial regime of property. I will argue that instead of a ‘compromise’, as it is commonly misidentified, the administrative solution signalled a deflationary conception of postcolonial sovereignty. It was a recognition of and acquiescence to the periphery’s continuing subjugation to the empire of property, which persisted even after the end of formal imperialism.

Chapter 8 concerns the relationship between transformational constitutionalism and lawyers. Judges and lawyers are commonly considered to be the proper caretakers of constitutions. Most scholars argue that the courts of law are the fora where the life of the constitution unfolds. On the contrary, the Indian constitution makers viewed lawyers as a threat to the transformational constitutional project. Lawyers were representatives par excellence of dominant social interests during the colonial era, and hence one of the most influential groups in society. They would challenge the primacy of the administrators as the custodians of the developmental project. The project of legalizing the revolution, by definition, opened the door for lawyers to be involved in the project of social transformation; at the same time that involvement threatened the modality of the very project. Therefore, the discussions on judicial powers scattered across the Constituent Assembly debates were reflections, *in nuce*, on the limits and contradictions of the project of legalizing the revolution. Through an analysis of those debates, commentaries by contemporary jurists, landmark Supreme Court cases, and subsequent constitutional amendments, I reconstruct the various notes of dissonance between lawyers and transformational constitutionalism. The overarching argument is that lawyers posed a threat to the transformational constitutional project due to two main reasons: a peculiarly juridical understanding of decolonization proposed by the courts and the inherent discursive and practical forms of the common law.

Immediately following the constitution, the judiciary struck down several pieces of land reform legislation. I argue that the judges were motivated by a juridical concept of decolonization. Colonial constitutions were, in essence, administrative documents that made the judiciary subservient to the expediencies of the government. The Indian constitution makers drew from that administrative manual. The higher judiciary understood decolonization as reclaiming the lost dignity of the common law, over and against the functionalist, administrative stylings of the constitution. Unlike their English counterparts, there was no 'ancient constitution' that the Indian judges could turn to. Faced with this absence, they decided to import a legal history. Decolonization for the postcolonial judiciary meant the freedom to finally claim the immemorial traditions of the common law as its own. This was freedom understood not as autonomy from the metropole, but as the adoption of metropolitan legal traditions. The courts also turned to the annals of private law to compensate for the administrative deviances of transformational public law. Using the work of Evgeny Pashukanis, I argue

that in formal terms, the Supreme Court privatized the project of social transformation. Planning was oriented around coordination over a common endeavour. On the other hand, litigations centred conflicts of particular interests. Consequently, in their insistence to subject it to the juridical process, the Supreme Court individuated policies of land reforms into distinct exchanges between the landlords and the state. This was not an issue specific only to land reform. I argue that the kind of economic space that the juridical process engendered was un-administered, unplanned, and unregulated. The individuating, decontextualized, and rights-centred framings inherent to the judicial process corresponded to the nature of the individual merchant's grievances against regulations rather than the industrialist class' support for planning as necessary for capitalist growth. Lawyers being lawyers in itself was a dissent against development planning. The parliament tried to respond through a series of constitutional amendments, hoping to counter the traditions of the common law through the vocabulary of administrative functionalism. However, without a political base to animate it, functionalism became merely about arrangements of institutions, a theory of systems. 'Questions of form' became 'the substance of its activity.'¹⁷⁴ Constitutional disputes, in such a condition, could no longer be understood as politics, but as inter-institutional quarrels. Without a robust sphere of transformational politics to vivify it, transformational constitutionalism would wither into case laws.

The conclusion looks at the first decades of independent India and the evident failure of the social transformational project to achieve its objectives. This was not a failure unique to India, but part of a broader, global exhaustion of the revolutionary ambitions of decolonization over the second half of the twentieth century. Across the Third World, administrators and planners failed to significantly alter the cartography of social power at home or the hierarchies of the global order abroad. Through an account of those frustrations, I finalize the two main lines of critique that have been developed throughout the book. The first is that there could be no social transformation without popular politics. To be successful, transformational planning required a transformative politics, and that politics had to be mass mobilizational. The only creative agent with the capacity of truly refashioning the world that empire made was the one agent no empire could incorporate: an organized and mobilized people. In the postcolonial world, as constituted, that subject was missing. The popular political subject was not an abstraction. The anticolonial mass mobilization ensured that the idioms and forms

of popular politics were at hand. The postcolonial founders, fearful of its disruptive potentials, chose instead to demobilize and discipline popular politics. This brings me to the second line of critique: the considered separation between anticolonial politics and the postcolonial constitution. At critical moments, the postcolonial constitution makers deliberately abandoned the political forms and idioms generated by the anticolonial struggle. In the last instance, the postcolonial moment proved to be insufficiently anticolonial. An archaeology of the postcolonial present reveals the resonant legacies of that rupture.

The brief epilogue outlines how the arguments of the book relate to different perspectives on the Indian constitution over the last seven decades, corresponding to the different stages of postcolonial India's history. In their untimeliness, these perspectives, I argue, do not speak to the contemporary crisis of constitutionalism in India. In the terms of this book, the failure to realize the promise of a self-fashioning demos generated by the anticolonial movement meant that over time popular political subjectivity would come to be defined in terms of inherited demographic categories, to be aggregated electorally. The present is the fulfilment of the demographic metric of colonial rule rather than the democratic promise of the anticolonial struggle.

