

Forgetting Partition

Constitutional Amnesia and Nationalism

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History's silence resonates in the textual silence of the Indian Constitution on the immense scale of violence and exodus accompanying the partition of the subcontinent, despite the contemporaneity of partition and constitution writing. Clearly discernible on a closer reading of the Constituent Assembly's debates are implicit influences of partition on key constitutional decisions, such as citizenship, political safeguards for religious minorities and provisions creating a strong central tendency in the union. The constitutional memory of partition, as a freak occurrence for which the "outsider" was to be blamed, resembles the understanding of official historiography. Behind these common registers of memory lie powerful nationalist narratives of identity and unity, which indicate a deep and abiding connection between constitutional amnesia and nationalism.

By the time its frenzied violence ebbed in 1948, partition of the Indian subcontinent had displaced between eight and 10 million persons, left between five and 10 million dead, and 75,000 women raped, abducted or widowed.¹ As refugees poured in from the newly drawn borders in the north-west and east, straining the new state's resources, the Constituent Assembly met in Parliament House in central Delhi from 9 December 1946 to 26 November 1949 to write a new constitution for independent India. For nearly three years, the framers would meet to draft a text heralded for its "transformative-ness"—the historic bridge built between the India of the past and the nation of the future (Baxi 2013: 9). The Assembly's debates provide fascinating insights into the framing exercise in India, including the chaos and mutual distrust engendered by partition. Embodying "historically inaugural inscriptions of 'original intention'" founding the nation, the debates are an integral part of Indian constitutionalism (Baxi 2000: 1188, 2008: 99).

Much like official historiography that, until recently, omitted any mention of partition's violence, the Constitution of 1950 did not evoke partition's memory. Its express silence sets it apart from other transformative constitutions, such as the German Basic Law (1948) that eternalises human dignity in Article 1 after the horrors of holocaust, and the South African Constitution (1996) that recognises both the "injustices" and "divisions" of the apartheid past in its preamble. The Constitution's silence is surprising given the Assembly's temporal and spatial proximity to partition, leading one to wonder "why the Indian constitutional development has even after six decades so thoroughly continued to organise the oblivion of the Holocaustian histories of the Partition" (Baxi 2013: 29). Notwithstanding the express silence, I will show that partition implicitly influenced the drafting of several constitutional provisions through a close reading of the Assembly's debates. It would seem that, despite express textual amnesia, the Constitution does not completely "forget" the partition, but reflects the registers through which the framers understood the foundational moment. For instance, soon after partition, the figure of the migrant entered the discussion on Indian citizenship, and once lodged, soured this discussion. Further, minorities' claim for political representation was viewed as a relic of the separatism that caused partition and thus, prompted acrimony in response. The third implicit memory of partition is in the Assembly's rejection of its commitment to federalism under the Cabinet Mission's plan, pushing instead for a strong central government.

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This move was justified in the context of partition, evoking the need to return peace and order to the fractured nation. In this essay, I discuss these three implicit constitutional memories of partition to show that original constitutionalism (as expressed in the text and Assembly debates) comprehends and remembers partition through the same registers as nationalist historiography due to the nexus between constitution framing and the nationalist project in India. Original constitutionalism, like nationalist historiography, holds the outsider responsible for partition violence, ignoring its own citizens' involvement in the same. In the light of recurrent episodes of communal violence in post-independence India, both incorrectly understand partition as a chance occurrence. The Indian example, I argue, shows that nationalist narratives—"enframing" the true citizen and empowering the state—wield a powerful influence over constitution writing at times of national (re)construction. It would appear that constitutional choices are guided not merely by passion and reason, but also by popular narratives of nationalism.

Memories of Original Constitutionalism

Gyanendra Pandey suggests two ways in which elite history understands and normalises partition violence. First, responsibility for both the political and actual violence is consigned to the "other," embodied by either the nation (Pakistan) or the individual (Muslim). The nation repudiates the historical memory of partition, thereby avoiding its memorialisation, by refusing to acknowledge the culpability of the Indian citizen in partition violence (Pandey 2004: 3). However, as the fact of partition cannot be altogether ignored, it must be depicted as inferior—the consequence of petty politics and personal ambition—in comparison to the "greater truth" of independence—the fruit of nationalism, borne of the blood and sacrifice of martyrs (Chandra 1989: 504). Partition as particularity is the second motif emerging from historical discourse. Outbreaks of violence are localised by terming them "riots," implying that these are local affairs of little significance to the grander national narrative, and therefore, aberrations or chance occurrences that would not occur in normal conditions (Pandey 2004: 49–51, 56–57).

Admittedly "sitting on a volcano,"² the Assembly consciously refrained from discussing the partition and the text that emerged on 26 January 1950 remained silent on the genocidal violence inaugurating the new nation. The Constitution does not contain provisions that foreclose the possibility or address the occurrence of violence between discrete, though syncretic, communities in pluralistic India post-independence, almost as if the founding fathers were convinced that communal violence of the nature or scale of partition would never occur in the new nation. This presumption has proved fallacious if one considers the regularity with which Partitionsque episodes of violence have occurred on an annual basis since 1961, as also the state's increasingly inadequate response to such conflict.

When partition was mentioned in the Assembly for necessity, it was in a veiled or emotional manner—"a very difficult and complicated situation that has arisen" that made it impossible

to draft perfect provisions,³ the "present peculiar unsettled conditions in the country" (CAD IV, 15 July 1947: 579), and an "artificial partition" that could not divide "blood-brothers" (CAD IX, 12 August 1949: 405). Oblique references like these reflect not only the Assembly's disinclination to discuss the episode but also the struggle to understand and define its violence as it unfolded around the Assembly. A few times, members unsuccessfully tried to break the collective silence, lest coming generations think that "just as Nero was playing on his flute while Rome was burning similarly we were absorbed in constitution making while Lahore and other places were burning and people were being killed" (CAD V, 25 August 1947: 136–37).

Delving deep into the debates, one becomes aware of the many ways in which partition influenced the Assembly's choice of provisions, notwithstanding the express constitutional silence. This influence is clearly seen on three issues—citizenship, political rights of minorities and the strong unitary features of the Indian federation—briefly discussed here, which echo the two registers of historical understanding of partition.

Citizenship

Initial discussions on the concept of citizenship in the Constituent Assembly took place before partition and were relatively uncontroversial. In April 1947, Vallabhbhai Patel, who introduced the report of the interim committee on fundamental rights, advocated a simple conception based on birth or domicile reflecting territorial belongingness (*jus soli*) to the nation; the large-scale exchange of populations had not yet begun. However, partition complicated the issue by the time the draft constitution was introduced in 1948. The draft provisions retained the territorial emphasis of birth and domicile, but also added draft Article 5A (Article 6 of the Constitution of 1950), which conferred citizenship on those who had migrated from Pakistan to India by a fixed date, and draft Article 5AA (Article 7 of the Constitution of 1950), which declined to consider as citizens those who migrated to Pakistan, but embraced the prodigal son/daughter who having migrated to Pakistan had now returned under the permit system. While members readily accepted draft Article 5A as an appropriate measure in respect of the (mostly Hindu) migrants from Pakistan, often referred in the debates as "our refugee brethren," draft Article 5AA was denounced by several as the "obnoxious clause" as those it was most likely to protect were Muslims.

Despite Ambedkar's reassurance of the provisions' flexibility, P S Deshmukh and S L Saksena expressed their dismay at this "cheap" citizenship, observing that it had been overruled in favour of that "specious, oft-repeated and nauseating principle of secularity of the State," Deshmukh even wondering if Hindus and Sikhs would be annihilated to prove India's secular commitment (CAD IX, 11 August 1949: 353–54, 376). In what captures a recurrent anxiety of nationalism, some felt that once a person migrated to Pakistan, they "transferred his loyalty from India to Pakistan ... (h)e has definitely made up his mind at that time to kick this country and let it go to its own fate, and he went away to the newly created Pakistan, where

he would put in his best efforts to make it a free progressive and prosperous state” (CAD IX, 11 August 1949: 366–67). Even those who left in a state of panic had “renounced their birthright” (CAD IX, 11 August 1949: 370); and “reasonable proof that they intend permanently to live here, and be part of this land, loyal and devoted to her; and not merely for taking advantage of our generosity or liberalism in this regard” (CAD IX, 11 August 1949: 371) would be necessary. As is often the case, economic considerations also fuelled distrust. Persons who had migrated to Pakistan continued to enjoy ownership of their property, legally termed “evacuee property.” After spending a short time in Pakistan, many evacuees were returning to India with “sinister motive(s)” of disposing of the same (CAD IX, 11 August 1949: 384). This was seen as disfavoured “our refugee brethren,” as showing “concession after concession to those people who least deserve it” (CAD, IX, 11 August 1949: 367).

The controversy generated by the citizenship articles compelled Nehru to admit that the provisions had received far more thought and consideration than any in the Constitution (CAD IX, 3 September 1949: 938). When the draft articles were finally adopted as the present Articles 6 and 7 of the Constitution, a member christened the citizenship provisions as the “redeeming feature” of the new Constitution (CAD XI, 17 November 1949: 623). Part II of the Constitution of 1950 retains the *jus soli* emphasis in Articles 5–11, but leaves it to future parliaments to determine the evolving conditions of citizenship. Thus, the Constitution only reflects the original inclination towards a *jus soli* conception but refrains from entrenching any concept of citizenship. This reflects the transitional nature of Part II as also a laudable rejection of the refugee/evacuee (or migrant) binary by the Assembly. However, partition had irrevocably unnaturalised the migrant, whose patriotism would be constantly questioned.

In post-independence India, one consequence of incorporating transitional provisions in Part II has been the lack of protection against majoritarian will for the *jus soli* conception of citizenship. Subsequent changes to the Citizenship Act, 1955 (“the act”) in 1986 and 2003 and the proposed amendments of 2015 return to the *jus sanguinis* idea, so that the additional precondition of descent must be proved to show belongingness to the nation. In 1986, amendments made to the act superimposed the criterion of descent on existing territorial requirements of birth and domicile. Additionally, a special framework was created for Assam, which had for long suffered illegal migration from Bangladesh. The Supreme Court shared the state’s suspicion of the (mostly Muslim) migrant, deeming their presence in Assam an “external aggression and internal disturbance,” causing insurgency in the state and posing a threat to national security.⁴ Contrast this manifest suspicion with the enthusiasm to embrace persons who, although citizens of a foreign country, can either trace their descent to Indian parents or grandparents, constituting a new category of Overseas Citizen of India Cardholder, or deeming “legal” the migration of those belonging to minority communities in Pakistan and Bangladesh, seeking refuge from religious persecution.⁵ As long as this flawed understanding remains, citizenship will be

epistemologically aligned with religious affinity, and the migrant will remain at the centre of official discourse.

Clearly discernible in the state’s restricted, politicised understanding of Indian descent is the shift—present in the founding moment itself—from constitutional stress on *jus soli* to legislative emphasis on *jus sanguinis* (Jayal 2013: 81). Partition is the “alephian moment” existing in past, present and future conceptions of citizenship, creating and sustaining our suspicion of the migrant (Roy 2010: 30–31). Aligning citizenship with religious affinity, partition’s flawed memory continues to maintain the difference the *real* Indian, the true citizen, and the *hyphenated*, non-natural citizen, comprising the Indian Muslim and others that are “never quite” part of the nation (Pandey 2004: 151–52).

Political Safeguards for Minorities

The question of the nature and extent of minority safeguards was highly contentious. The Assembly devoted several sessions to considering and reconsidering its position, trying to balance its secular aspirations and the expectations of anxious minorities with the mutual distrust spawned by partition. While initially agreeable to limited political rights for religious minorities, the declaration of partition changed the terms of the debate for the Assembly. From its fourth session, it abandoned earlier commitments to safeguard the democratic will of minorities through legislative reservation and proportional representation.

The distrust between the majority and minority was palpable on the first day of this session; as the newly inducted ex-Muslim League representatives signed the membership register, the president of the Assembly was asked whether these representatives, “who have been elected on the basis of the two nation theory,” had assured him of their cooperation. Rajendra Prasad informed the member that no assurance was sought or given, and that “(w)hat all of you do here will show the intentions of all” (CAD IV, 14 July 1947: 544). Although a minor instance, it is illustrative of the alternating animosity and unease with which the Muslim members were treated in subsequent sessions. All too often, they were heckled, booed, accused of harbouring separatist tendencies and repeatedly encouraged, even threatened, to forego communal politics for the sake of building the new nation (Nigam 2008: 135). At other times, pressure was subtly applied to make them concede their demand for political rights, for instance, Renuka Ray’s rejection of legislative representation for women in the fourth session.

Several in the Assembly thought that the proper realm of minority protection comprised only the freedom of worship, faith and customs and preservation of language, script and culture. Only in “this unfortunate land” had the minority problem been complicated, with the intervention of the colonial government, by mixing it with political matters. The reports of the Nehru Committee (1928) and Sapru Committee (1945), both convened to consider religious minorities’ claims, had also recommended joint electorates. Even this early into the constitutional project, the nationalist understanding was that separate electorates, brought in by the Morley–Minto

reforms of 1909, were responsible for the mess of partition, tantamount to “the injection of a deadly poison” (CAD v, 27 August 1947: 217). The only function these could perform in free India would be as a forum of “perpetual complaint” (CAD IV, 17 July 1947: 640). Thus, whether Muslim members sought separate electorates as their due in a Hindu-majority nation, in the form of a threat of further secession or to aid in the containment of partition violence, and voiced their demand repeatedly at different stages of drafting, the Assembly firmly rejected the plea each time. In each refusal, communal electorates were portrayed as the cause of partition, with Patel asking minorities to “‘(I)et us at least on this side show that everything is forgotten’ and if we want to forget then let us forget what has been done in the past and also what is responsible for all that is happening today” (CAD v, 27 August 1947: 226).

Another political right sought by the minorities was reservation of seats in the legislature. In the pre-partition sessions, the Constituent Assembly seemed agreeable to the idea of reserving seats proportional to minorities’ population, on an experimental basis for 10 years, after which the system would be reviewed.⁶ Perhaps the offer of a secure space for religious minorities (among others) to participate in legislative activity was intended to coax them into giving up separate electorates. As events unfolded, however, the Assembly wavered from its original promise. When the draft constitution was introduced, several Assembly members began to persuade minorities to give up the idea of reservation “voluntarily.” K S Karimuddin declared that separate electorates and reservation would do “positive disservice” to the Muslim community (CAD VII, 5 November 1948: 242–43). Renuka Ray, who had earlier rejected legislative representation for women, claimed that such reservation was “not fair to these minorities; it is not self-respecting for them” (CAD VII, 9 November 1948: 357).

Volte-face on Reservations for Minorities

These winds of change enabled the Advisory Committee to perform a complete volte-face on the issue of reservations for religious minorities by May 1949. While moving the fresh report on minority rights, Sardar Patel clarified the earlier stance, claiming that partition’s consequences were not known when the issue was discussed earlier in the fourth session. The safeguard would be withheld as

(t)he Committee considering the whole situation came to the conclusion that the time has come when the vast majority of the minority communities have themselves realized after great reflection the evil effects in the past of such reservation on the minorities themselves, and the reservations should be dropped. (CAD VIII, 25 May 1949: 269–70)

As expected, this caused much discomfort among the Muslim members, and some mildly wondered if the entire issue of minority safeguards ought to be reopened. In May 1949, the Advisory Committee decided that no reservation in the legislature would be made for religious minorities, but approved such reservation in respect of Scheduled Castes, Scheduled Tribes and Anglo-Indians, which was carried into the new constitution.⁷ Partition may have influenced this decision more

so than the decision to forego separate electorates. The Assembly appreciated this decision, but the absence of dissenting voices may alternatively be read as admission of defeat.

The third demand was for proportional representation, aimed at returning minority representatives to the central and provincial executive. It was first sought in the fourth session in July 1947, during discussion of the proposed principles for provincial constitutions, but was shot down as “destructive of democracy” and “contrary to the whole framework of this constitution” (CAD IV, 17 July 1947: 646). Unsuccessful at installing proportional representation in the provinces, the Muslim members endeavoured again during the discussion on the report of the Union Constitution Committee. They demanded election of union ministers by the legislature based on proportional representation, apparently motivated by the Congress’s majority at the centre. Nehru, the mover of the original clause, pithily razed the amendments: “I can think of nothing more conducive to creating a feeble ministry and a feeble government than this business of electing them by proportional representation...” (CAD, IV, 28 July 1947: 865). The Assembly accordingly rejected the amendments as attempts to weaken the central executive.

The introduction of the draft constitution saw renewed pleas to incorporate the method.⁸ Baig Sahib moved an amendment for elected council of ministers at the centre on the basis of proportional representation (CAD VII, 30 December 1948: 1141), which Mahavir Tyagi criticised:

The country had only recently the experience of a cabinet in which there were two parties working together. If the Cabinet were not so evilly composed by the British, we should not have partitioned India into two. We have given away the best and the most precious part of our land, and have separated willingly. We have obtained this unanimity in the Cabinet at a very great price indeed, and at a very great cost. Thousands of our friends and citizens of this country were killed and massacred on the other side, and thousands of equally good people, who were quite innocent, were killed on this side too. After all that has happened and after this bitter and bloody experience of ours, does my friend still insist on composing a cabinet in which there will be so many parties represented? (CAD VII, 30 December 1948: 1150)

Surprisingly, Ambedkar, widely acclaimed as the author of the draft constitution, sympathised with Baig’s amendment, opining that “(t)here is nothing wrong in proposing that the method of choosing the Cabinet should be such that it should permit members of the minority communities to be included in the Cabinet. I do not think that that aim is either unworthy or there is something in it to be ashamed of.” He reassured Baig that the essence of his amendment would be captured in the proposed Instrument of Instructions to the President. The Instructions would guide the President to appoint, on the advice of the Prime Minister, “those persons including so far as practicable, members of minority communities, who will best be in position collectively to command the confidence of Parliament” (CAD VII, 30 December 1948: 1157). Baig’s amendment was, consequently, rejected. However, as things turned out, these instructions were never prepared. A month later, in yet another reversal, the Assembly accepted proportional representation in the Council of States. Despite the motion-mover’s

own uncharitable remarks against the system,⁹ he now believed that minorities were the true representatives of the “normal mind of the masses,” immune to electoral propaganda (CAD VII, 3 January 1949: 1222–23) and Pandit Hirday Nath Kunzru added that the “unpopular” views of minorities would never be voiced unless proportional representation in the Council of States was introduced (CAD VII, 3 January 1949: 1225). The Assembly adopted the amendment.

Partition influenced the outright rejection of separate electorates and volte-face on proportional representation and legislative reservation for religious minorities. Minority members’ true intentions in demanding safeguards in a majority-dominated polity were always suspect. As with the discussion on citizenship, this suspicion is fuelled by narratives of one-sided guilt for partition. Arguably, drafters would be more circumspect in denying minorities of political safeguards had they acknowledged the culpability of the majority community in partition violence. In any case, the lack of foresight may have contributed to minorities’ vulnerability in post-independence India, where communal violence is usually wrought upon them by lumpen elements of the majority community.

Strong Centre

In line with the federal scheme of the Government of India Act, 1935, wherein un-enumerated or “residuary” powers vested in the provinces, the Cabinet Mission accommodated the League’s demands by granting only three core powers—defence, external affairs, and communication—and the necessary finances for these to the union. However, prominent national leaders and Assembly members like Nehru and Patel were keen on reversing this aspect of the plan, affirming their faith in a strong central government’s ability to protect individual life and liberty.¹⁰ However, this could not be done openly until the political fact of partition was announced. During this time, the question of India’s government was left indeterminate as the Assembly continued to work, at least ostensibly, under the Cabinet Mission’s plan, enunciating India as a “republic”—a relatively fluid expression—in the Objectives Resolution adopted in the first session in 1946, and appointing the Committee on Union Subjects in January 1947 to review the allocation of subjects to the union under the plan. Further, although the committee’s report—following the plan’s vision of federalism—was ready in April 1947, committee member Gopalaswami Ayyangar suggested postponing the discussion, in part because partition (“the present political conversations”) was becoming increasingly probable.

Discussion on the report of the Union Constitution Committee, declaring that a strong centre would head the proposed federal structure, was again postponed when presented to the Assembly in July 1947. Members nevertheless found a way to explore the relationship between the centre and the provinces via Clause 9 of the Provincial Powers Committee’s report, empowering the governor to report a grave threat posed to the state to the centre. When members objected to this clause as a needless invasion of provincial autonomy, Patel justified it in view of the “present peculiar unsettled conditions in the

country” (CAD IV, 15 July 1947: 579). K M Munshi defended him, alluding to the violence in Punjab, and to a lesser degree in Bengal, where the provincial ministries had collapsed, “This country has suffered immensely by the failure of the supreme authority in certain provinces to exercise their power in moments when public tranquility has not only been threatened, but has been destroyed” (CAD IV, 17 July 1947: 645).

Once partition was declared and the League irrevocably withdrew from the Assembly’s deliberations, the political situation was radically altered. The report of the Union Powers Committee, chaired by Nehru and submitted in August 1947, expresses this relief:

The severe limitation on the scope of central authority in the Cabinet mission’s plan was a compromise accepted by the Assembly much, we think, against its judgement of the administrative needs of the country, in order to accommodate the Muslim League. Now that partition is a settled fact, we are unanimously of the view that it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere ... We have accordingly come to the conclusion—a conclusion which was also reached by the Union Constitution Committee—that the soundest framework for our constitution is a federation, with a strong Centre. (CAD V, Appendix A: 58)

Freed from its obligation under the Cabinet Mission’s plan to a weak centre, the Assembly proceeded to tackle the issue. Introducing the second report to the Assembly, Gopalaswami Ayyangar explained that the decisions to grant wider powers to, and vesting of residuary powers in, the centre, was made unanimously by the committee in the presence of general agreement of provincial people and constitutional advisors. However, some were alarmed at the abrogation of provincial power. Hasrat Mohani, predicting continuity between the colonial government and the new state, remarked that the states’ powers had been truncated further than those in the Government of India Act, 1935 (CAD V, 21 August 1947: 42–44).¹¹ A majority of the members approved the decision for a strong centre at this time, as the Cabinet Mission scheme was a concession “for communal considerations,” “(b)ut now that there is partition, there is no reason why the homogeneous Indian State should not have a strong Centre” (CAD V, 21 August 1947: 77). Introducing the draft constitution in 1948, Ambedkar even termed centralisation as an inescapable consequence of modernity (CAD VII, 4 November 1948: 42).

However, members grew more circumspect as the principle began to inform concrete provisions in the draft constitution. Draft articles 227A and 278, providing for President’s rule in times of emergency in the states, were critically examined by Assembly members. To H V Kamath, granting the centre with wide, discretionary powers, when “public order” was a state subject, was the “subversion of provincial autonomy,” but would accept these as a transitional provision, in view of “the dangerous and critical times we are living in” (CAD IX, 3 August 1949: 138). S L Saksena, too, found that these articles reduced provincial autonomy to a farce (CAD IX, 3 August 1949: 143). Ayyar and B M Gupte made similar remarks about the “grave and difficult times,” such as “may be critical to our infant

democracy" (CAD CAD IX, 3 August 1949: 152) respectively. Truly, the new state was beset with several other pressing issues at the time: the reluctance of princely states to join the union, the Communist-Telangana uprising in the south, lawlessness in partitioned Bengal, food scarcity on account of the loss of fertile land in West Punjab (now in Pakistan), and worsening economic crisis. While one cannot deduce that the speakers referred only to partition violence as the "dangerous and critical times," it is likely that this was one of the factors that confirmed their opinion.

In addition to incursions on the states' authority, the strong powers of the centre also translated into considerable influence over the citizen. For instance, preventive detention, a much-despised colonial power, which in turn influenced the Assembly's disinclination towards "due process" (Articles 14 and 21), was incorporated in the Constitution on account of the "increasing conviction that preventive detention provided the best weapon against the communal violence that had racked North India" (Austin 1999: 131) notwithstanding voices of protest.¹²

In sum, the political fact of partition—the League's withdrawal from the drafting exercise, and the secession of Pakistan—gave to the Congress-dominated Assembly the opportunity to abandon its Mission Plan commitment to weak federalism. In the absence of oppositional dynamics in the Assembly (in the form of regional/provincial political parties and the League) and the pan-India presence of the Congress, the latter's decision for a strong centre successfully materialised in the Constitution (Kumar 2005: 95). In a sense, partition opened the doors for, and removed obstacles in the way of, a strong centre in India. On the other hand, there was also a keen perception that only a strong centre could control the consequences of partition-as-violence, both immediate and future. In its aftermath, the state found itself charged with a number of diverse, extraordinary duties. These included securing the welfare and resettlement of refugees, repatriation of abducted women and children, dealing with evacuee property, deploying paramilitary forces to restore peace in conflict-torn areas, etc. Perhaps, the framers may have thought that a strong central state alone could help clear the mess of partition. Thus, the strong unitary nature of the Constitution is both the product of, as well as the remedy for, the partition. Underlying this original intention to entrench a strong centre is the assumption that the outbreaks of violence accompanying independence were limit cases, to be controlled by police powers of the state. Thus, instead of framing a constitutional offence of communal violence, as it did for untouchability in Article 24, the Assembly contented itself with installing a unitary tendency in the Constitution to curb the immediate problems created by partition.

Nexus

The preceding discussion indicates that partition shaped original constitutionalism on the issues of citizenship, political rights of religious minorities and strong central tendencies of the federal structure. In this sense, the amnesia of original

constitutionalism on partition is not complete, but selective. Through these implicit memories, notwithstanding the express textual silence of the Constitution of 1950, neither completely "forgets" the partition, although the absence of provisions forbidding communal violence may lead one to the opposite conclusion. Contrarily, through secularised textual provisions on citizenship and minority rights, original constitutionalism memorialises a certain understanding of the partition that is shared by official historiography. In true secular spirit, the constitutional text recognises the importance of religion to moral and spiritual well being, granting individual rights of religious conscience and worship and group rights of education and cultural preservation, and cleanses the political realm of religion- or community-based participation. In its creation of the scientific, rational Indian citizen, unmarked by non-national markers of identity—albeit producing the migrant's "non-belongingness as a quasi-permanent state" (Butler and Spivak 2007: 3–4)—and erasure of religious communities' involvement in political life, the Constitution expels partition's mischief monger. Perhaps constitutional benevolence itself is a repudiation of the pre-partition self—of intertwined, syncretic community life. Undeniably, however unintentionally, this benevolence has had the effect of repudiating responsibility for partition, its history as "not ours," not-Indian, and in the ultimate analysis, "forgetting" partition entirely.

On the other hand, original constitutionalism on the powers of the centre reflects the perception of partition as a chance occurrence. Armed with powers of preventive detention vis-à-vis the individual (as also a plethora of colonial "public order" legislations saved by Article 13(1)) and overthrowing democratically elected governments in the states, the centre is expected to exert a unifying influence over the nation and to control future outbreaks of violence. These provisions, however, have neither succeeded in preventing post-independence recurrences of partitionesque violence nor controlling and ameliorating the effects of the same. Far from the eagerness with which the new state tackled partition (resettling refugees, recovering and rehabilitating abducted women), today the state is often accused of politicising and encouraging communal violence for electoral and ideological gains and treating sufferers with apathy.

Common to, and perhaps the reason for, both memories of partition as the other's fault and as a chance occurrence, in my opinion, is the nationalist narrative of unity. After partition violently bisected pre-partition community, the desire to build a unified, yet diverse, Indian society took something of the nature of an ideology (Anderson 2012). For Nehru, aided in this mission by Patel, the project of unity entailed the creation of a rational, scientific citizen, unmarked by "narrowness and intolerance, credulity and superstition, emotionalism and irrationalism," and "(religious) temper of a dependent, unfree person" (Nehru 1946: 512), as well as the "need to forget in the interests of (this) unity" (Pandey 2004: 60) This was the path to achieving the promise of an India that was a "Union of States"; an objective entrenched in the very first article of the Constitution.

Upendra Baxi suggests that constitutions necessarily “forget” the inaugural violence that brought them into existence. Governmentality, or the need to translate all future revolution as “constitutional” or “extra-constitutional,” and self-preservation drives this amnesiac tendency of constitutionalism as a state-formative practice. Simply, a revolution is either translatable, as constitutional, or non-translatable, as “armed resistance” or “internal disturbance” so as to preserve themselves (Baxi 2002). He subsequently argues that transformative constitutions “affirm the disinvention of the collective past” to remain true to their transformative project (Baxi 2013).

I would add that constitutionalism “forgets” episodes that do not fit within nationalist narratives, in view of the nexus between constitution writing and the nationalist project. This nexus, in the Indian case, is deep; for instance, 17 of 21 ministers in Nehru’s first cabinet, serving between the crucial years of 1947–52, were also members of the Constituent Assembly.

The agents of forgetting, therefore, were the members of the Constituent Assembly, who were simultaneously also national leaders and holders of political office. Further, as mentioned earlier, the Congress’s domination over the Constituent Assembly was near complete, enjoying a sound majority on the floor of the House as well as steering command of all the important committees and subcommittees, so that it was not unusual to hear non-Congress members accuse the Working Committee of the party of informally making all major decisions outside the Assembly. Therefore, to Baxi’s, I add the proposition that constitutional amnesia on partition, as violence accompanying (and not merely creating) the founding moment, was ordained because the episode does not fit with the nationalist project of “unity in diversity.” And so, partition, as the antithesis of the national project as well as a contemporaneous negation of the Nehruvian imagination of pre-independence India, had to be “forgotten.”

NOTES

- 1 In the absence of official statistics, these figures are approximate estimations of scholars, based on newspaper reportage, eyewitness accounts and other sources. Finding the above estimates on the conservative side, some scholars peg the estimate of those killed as a result of partition violence at 20 lakh.
- 2 Patel, CAD, V, 27 August 1947, p 225.
- 3 Jawaharlal Nehru in the context of citizenship articles, CAD, IX, 12 August 1949, p 398.
- 4 *Sarbananda Sonowal v Union of India*, (2005) 5 SCC 665, at para 62–63.
- 5 Proposed proviso to S 2(1)(b) of the Citizenship Act.
- 6 “Provided that as a general rule, there shall be reservation of seats for the minorities shown in the schedule in the various legislatures on the basis of their population:
Provided further that such reservation shall be for 10 years, the position to be reconsidered at the end of the period.” Proviso to item 1, Appendix to the Advisory Committee’s Interim Report on Minority Rights.
- 7 Articles 330–333 of the Constitution of 1950.
- 8 See the speeches of Mahboob Ali Baig Sahib, Husain Imam and Z H Lari in CAD, VII, 8 November 1948, pp 295–97, 300, 303–04.
- 9 CAD, VII, 3 January 1949, p 1216. “(N)ow he finds that the method of election by a system of proportional representation by means of the single transferable vote is not injurious to the solidarity of the country.” CAD, VII, 3 January 1949, p 1217.
- 10 Nehru’s remarks on the Working Committee’s resolution accepting partition, addressed to the All India Congress Committee on 15 June 1947, reflect his faith in the state’s ability to prevent and control partition violence: “The most urgent task at present is to arrest the swift drift towards anarchy and chaos. Disruptive forces are at work and the most important disruptive force is that of the Muslim League. Our first task should be the establishment of a strong central government to rule the country firmly and to assure the individual’s liberty and life. All other questions are of secondary importance.” In the same speech, he repeats: “Today we have to shoulder responsibility. The first thing we have to do is establish the independence of India firmly and set up a strong central government. Having established a strong and stable government, all other programmes will not create much difficulty.” Uma Iyengar, *The Oxford India Nehru*, pp 199–202 (2007).

See also speech on 9 September 1947, in the wake of the riots in Delhi, at p 303: “So the first thing to decide is that we must put an end to this bad business that is going on. We must have peace and law and order established ... If this kind of thing continues, and if you are convinced, as I am, that this and phase must be ended, then we must set about it with all the firmness at our command. There can be no softness about it. No gentleness is possible in dealing with evil. We have to grapple with it with strength and firmness, and even occasionally, if I may say so, with bad consequences to the people. I did not wish to use the word cruelty; but even cruelty, if I may say so, an occasional cruelty may be the gentlest option in the long run. There has been cruelty enough and callousness and if we allow them to continue, they will spread and destroy our people and our hopes.”

- 11 “(T)o my mind you have curtailed their rights and freedoms which they had gotten even before independence. You have not increased them even by an iota.”
- 12 S K Saksena said, “The power which the British Government in India, was not prepared to take in its hands by the Government of India Act we would be giving to the Union, which is absolutely unnecessary if not dangerous also,” Vol IX, 29 August 1949, p 729; H V Kamath said, “I am not aware of any Constitution in the world which provided in the body of the Constitution either as an article, or as a Schedule to the Constitution such sweeping powers for the units or the Centre,” Vol IX, 2 September 1949, p 927.

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