India: Does the Constitution keep its promises?

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What makes India so distinct? Clearly no other country matches the scale of its religious, linguistic and ethnic diversity. India's racial heterogeneity is exceeded by only a handful of West European and New World countries—the result of, among other factors, colonial-era experiences of conquest, the slave trade and resettlements, as well as post-colonial migrations from the south to the north. But while systems of exclusions predicated on notions of purity and impurity have been widespread across societies—solidified through kinship networks, status hierarchy and endogamy—nowhere else in the world does there exist a system of such extreme gradations of human worth as the caste system.

India was not the only former colonial country that opted for a liberal-democratic political set-up following independence. Even so, the enormity of its territorial expanse, population, social diversity and economic backwardness made it unique among democratic states. In the West, universal suffrage was extended to women and all races long after large-scale industrial and economic advancement had taken place. India, under vastly different circumstances, erected a political framework based on democratic principles—and barring the 21-month Emergency, it has sustained this framework so far. It is part of the reason why the Constitution, since its promulgation in 1950, commands such widespread admiration.

But now, almost seventy years later, the country is in the midst of a general election that threatens to return to power an organ of the Sangh Parivar—a group that has, in word and deed, demonstrated its antipathy to the progressive elements that exist in the Constitution. In light of this, it is time to open a more critical debate on the foundational charter of the republic.

Any evaluation of the Constitution cannot but be influenced by the political beliefs of the evaluator. Unlike liberals or social democrats, I believe that a more just, free, humane, egalitarian, democratic and ecologically sustainable country and world can only come about through the transcendence of capitalism and its associated political forms. I would contend that even a liberal democracy, in the pursuit of such a country and world, soon runs up against insurmountable limits. The belief that today's neoliberal capitalist order and the restricted freedoms and social benefits it allows can be substantially extended, or that its great inequalities of wealth and power can be dramatically reduced, is wishful thinking. The guiding vision for judging the Constitution should be one of a highly democratic and anti-bureaucratic socialism. But even those who do not share my vantage point, may be persuaded to find that even by the best standards said to be contained in the document—social justice and welfarism, liberal democratic freedoms, secularism—the Constitution is wanting.

How well the Constitution measures up to its stated aspirations depends in large part on an

evaluation of what it does to protect cultural and minority rights. This is a familiar standard for those of a liberal democratic worldview. But there is another criterion by which the Indian Constitution must also be judged: its commitment to the promotion and pursuit of social justice in a much wider sense, beyond just affirmative action for select groups. We need, then, to look at three things—the democratic content of the Constitution, its social-justice thrust, and its particular ways in which it addresses India's distinctiveness.

Many claim that the Constitution is basically very good, but that its implementation has been flawed because of the ineptitude of politicians, bureaucrats and judges. The scholar Madhav Khosla, in his book *The Indian Constitution*, quotes Ambedkar saying "however good a constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out to be good if those called to work it, happen to be a good lot." But even while recognising the value of this admonition Khosla would not place so much emphasis on the power of individuals.

The political scientist Samir K Das in *The Founding Moment: Social Justice in the Constitutional Mirror* points to weaknesses in the document, mainly of omission. He cites the constitutional doyen, Granville Austin's famous 1966 text *The Indian Constitution: Cornerstone of a Nation* to argue that the document's makers understandably could not foresee or account for future complexities and developments. But Das also sees the Constitution as having "multifarious concepts of justice" circulating within it, and argues that despite its weaknesses, proper interpretation and implementation of the Constitution would nonetheless constitute a bulwark against democratic degeneration.

This view flies in the face of how the Indian polity looks today. One cannot take refuge behind the argument that the Constitution—meant explicitly to shape all spheres of society—is blameless for the chasm between its good intentions and eventual societal outcomes. Around thirty percent of the population is in absolute poverty. If we account for the costs of basic needs such as education, health care and housing, another forty percent or so fall under the category of what the late economist and former chairman of the National Commission for Enterprises in the Unorganised Sector, Arjun Sengupta called the "vulnerable poor," for whom the shock of a bad harvest, high inflation or an illness in the family can wreak havoc. Inequalities of income and wealth, and therefore of political power, are soaring. Hindu chauvinism, championed by the Sangh, has grown to be the single most dominant political ideal across the republic, and the Bharatiya Janata Party, the Sangh's electoral arm, has achieved a truly national presence. Communal violence, previously episodic, in the last five years has become banal, with the police and courts doing little or nothing to stop or punish it. The one consistent bright spot in India's trajectory over the last three decades is the political assertion of the oppressed castes, but even that is under constant assault.

The Constitution is widely said to be a "living document"—one that not only shapes the evolution of Indian society, but is itself influenced by evolving societal trends and patterns. If some countries replace old constitutions with new ones to keep them relevant, in India keeping the Constitution "alive" has required a steady accumulation of amendments. (The country has had 103 constitutional amendments in 69 years, where Australia has had eight in a hundred years, and the United States 27 in over two hundred.) It is then necessary to ask whether these changes, meant to address earlier flaws, have guided the Constitution in a more progressive direction, and by this helped to move society in the same way. Going by the current state of the polity, the answer is no.

A chronological study of the complex interplay between the respective trajectories of the Constitution and Indian society is a worthy enterprise. I do not propose to take that ambitious course here, but this two-way interaction underlies all the questions I ask of the document. How much concern, past or present, is there in the Constitution for issues of social justice, or for generating

stronger movement in that direction? What kind of democracy has the Constitution sought to promote? How much responsibility, if any, does it bear for sanctioning the undeniable authoritarian drift of the polity over time?

The asymmetries of class power are obscured in the Constitution by propping up a notion of the "people's will," as expressed through electoral democracy. The Constitution is testament to the fact that the members of the original Constituent Assembly, incidentally not elected by universal suffrage, were overwhelmingly members of the Congress party—an organisation that headed an independence movement that sought not so much to overthrow colonial power, but to transfer it from British to Indian hands. It retains to this day, copious and detailed provisions for protecting the machinery of administration and governance. These were adopted almost intact from the Government of India Act of 1935, the colonial legislative instrument that preceded the Constitution.The senior advocate Rajeev Dhavan, in his book *The Constitution of India: Miracle, Surrender, Hope*, gives a somewhat cynical but not inaccurate portrayal of how the Constitution acquired its shape. "We the People of India," Dhavan writes, "who had little say in the making" of the document, "have been informed to accept this Constitution … part of which is a British India clone," and which "makes unreal promises." Indians "have no choice but to accept this arrangement … which our leaders have given to themselves to rule over us."

From the beginning, the constitution has carried Hindu, upper-caste, patriarchal biases. (Not by coincidence—the members of the Constituent Assembly were overwhelmingly Hindu, upper-caste men.) For instance, in Article 1, the name given to the Union is "India, that is Bharat," invoking a pre-Islamic past of presumed glory—a *Bharat Varsha* when a legendary Hindu king is said to have ruled. Many of the Constitution's admirers—including such figures as the jurists Fali Nariman and HM Seervai, and Justice VR Krishna Iyer—do not appear to have drawn serious, let alone repeated, attention to these biases. Very few have dared to argue that the text exhibits any bias at allthem, thereby weakening its claim to secularity. One of those few is the scholar Pritam Singh, and I am indebted to his writings, particularly his paper "Hindu Bias in India's 'Secular' Constitution: probing flaws in the instruments of governance."

Consider also the kinds of nationalism that is enabled by the Constitution. Successive governments have misused constitutional powers to erode the autonomy of Jammu and Kashmir, promised to the state under the terms of its accession to India. Even among those who are critical of this trend, no one has gone as far as to state that a truly democratic approach to nationalism demands that the right to self-determination, even up to secession, should be a constitutional clause. The territorial "unity and integrity" of the country is paramount, regardless of what the public in the predominantly Muslim Kashmir Valley, or anywhere else, may want. The land is more important than the people.

These concerns are heightened today, as Indian progressives fear attempts by right-wing groups to expand its control over state apparatuses and civil society. The Sangh, as Hindutva's fountainhead, is pushing a truly transformative project—the creation of a Hindu state in all but name—and has been unabashed about its desire to muster a two-thirds majority in both houses of parliament so as to amend the Constitution in line with its ambitions.

A number of liberal and even left voices have, in resistance, raised the slogan: Defend the Constitution. I suggest that this, as it stands, is inadequate, and propose a more nuanced, admittedly more wordy, slogan: Defend and deepen the progressive values and principles of the Constitution. This recognises the deficiencies in parts of the Constitution, but should still be a fitting rallying cry even for those liberals and social democrats whose admiration of the document is much less qualified than mine. And, should the Sangh ever succeed in amending the Constitution to further its anti-democratic aspirations, this slogan will retain its validity in the long term.

The underestimation of the communal and undemocratic features of Indian society has its parallel in the overestimation of the virtues of the Constitution. Given where India has come to stand, and as we look ahead, we must be clear-eyed about both.

CONCEPTIONS OF JUSTICE AND DEMOCRACY are contested, and there exists disagreements even about the value and scope of notions such as social justice. In the past, religions provided the moral framework that regulated everyday life. This generally involved the subordination of women and the justification of existing social inequalities. A more universal sense of the common good and of justice emerged with modernity. This owed to the Enlightenment, whose main ideological legacies are Liberalism and Socialism—the most egalitarian version of which is Marxism.

The philosopher Brian Barry, in his book *Why Social Justice Matters*, argues that until the Industrial Revolution, notions of justice pertained to individuals, not to society. It involved giving each individual what was their "due": not being cheated; getting a "fair" price in trade; getting ones' deserts under prevailing ideas of merit; receiving punishment fitting the crime. This view encompassed a corrective, but not a seriously distributive, conception of justice. It has been superseded by the newer notion that inequality among humans is wrong—that all people equally are of worth. This is not the same as saying all people are of equal worth, but recognising a dignity in all individuals simply by virtue of their being humans. It follows that society must somehow be built on this new ideal which constitutes a very significant moral advance, and which requires reforming the basic institutions that shape the provision and distribution of rights, opportunities and resources—be they the factory, market or state, going right down to families, schools, political parties and other civil associations. The question that remains is how inequalities of power, wealth and opportunity should be tackled. The answer has divided Liberals and Socialists.

An undisputed starting point is the need to ensure that all people have an equal opportunity to prosper. This does not, however, mean that a uniformity of outcomes is necessarily desirable. That is to say, there should be equal opportunities to become unequal. But then should greatly unequal outcomes be allowed to emerge? What limits, if any, should there be on inequality? The much-admired American liberal theorist John Rawls provides no real guide on what should be done. He holds that only those inequalities should be allowed that benefit the "least advantaged". This leads to the argument that many make, in all good conscience, that the wealthy should be allowed to grow richer as a way to promote more investment and hence economic growth, so that some wealth can trickle down to the poorest making them better off than they otherwise would be.

For liberals and even for social democrats, the "right to property" even in the basic means of production is crucial for the pursuit of the common good. For Marxists, with their socialist vision of the common good, this is not the case. Having a right is one thing. Being able to exercise it is another. Having the opportunity to successfully exercise a right requires resources. Where liberals, in talking of justice, engage in a rights discourse, socialists, because they give greater importance to opportunities and resources, advocate a more substantial change of the sociopolitical status quo.

Unlike liberals, socialists see a strong connection between the individual and larger groups. This is not the same as in the case of multi-cultural enthusiasts, who are preoccupied with the link between the individual and groups that are defined by, and differentiated from others, predominantly by their cultural attributes. The communities of belonging or association prioritised by serious socialists are perceived more in social than cultural terms, and are numerically much broader—for instance, class. Individual flourishing is inseparable from having a society where all can flourish, and the measure of this flourishing is not "happiness," but that each individual is able to fulfil their distinctive potentials.

Must justice, to some extent, be trans-historical? Must we take responsibility for social injustices

before our time? To a large extent, the answer is yes. We are born into unequal positions of power, wealth and status. For most people, what determines their social position in life is—in order of importance—inheritance, luck of birth, and merit (understood as the distance between one's starting and end point). Some groups such as lower castes have been so historically oppressed as to deserve special social, economic, political and educational support. Minority rights are not enough—opportunities and resources must come into the reckoning.

From its beginning, the document betrayed its elitist character by placing some principles concerning socio-economic justice in the non-justiciable section of the Directive Principles, not in the binding Fundamental Rights. The Constitution's claim to a progressive social vision resides in these principles, yet the Directive Principles as a whole are best described as a basket of mostly worthy sentiments that our rulers have had very little stimulus to put into practice. Under the constitution, the state has no obligation to fulfil social rights that are not included in the Fundamental Rights. Indian law and Supreme Court rulings only recognise a violation of such rights if the state announces a specific scheme to further them but fails to deliver the promised boon to identified beneficiaries.

This Constitution has often been an instrument for rationalising the status quo more than one for progressive change. Consider, for instance, the unfulfilled promise of universal education. Article 45 of the Directive Principles had called for free and compulsory education for all children up to the age of 14 within ten years of the Constitution's promulgation. It was only six decades later, with the Right To Education Act coming into force in 2010, that this promise was translated into a fundamental right, and the Centre and states were obliged to fulfil it. But even this has not meant that such education has become universal, let alone that it is everywhere of decent quality.

Nehru's version of socialism called for a welfare state, albeit a capitalist one. The fact that the term "socialism" did not feature in the original preamble to the Constitution is indication enough that the consensus in the Constituent Assembly was against a serious commitment to socialist ideals. Indira Gandhi introduced the term into the preamble during the Emergency, but the less said about the sincerity of her commitment to socialism the better.

Bourgeois liberal democratic constitutions—and the Indian Constitution is certainly one—are always tolerant of serious class inequalities, usually defended as part and parcel of "basic liberties" that entail the right to private property and to accumulation in productive assets. In India, in the immediate aftermath of independence, given the widespread concern for social justice and therefore for land reform, an uneasy compromise took place. The right to "acquire, hold and dispose of property" was put into the fundamental rights but made subject to reasonable restrictions in the public interest. What pro-poor land reform measures took place was unevenly spread, limited and half-hearted. An Amendment in 1978 removed this right from Article 19 and made it a legal right only. Overall, there has been no real hindrance subsequently to the steady accumulation of private wealth. The expansion of the public sector and even the nationalisation of banks in earlier years has proven to be much more an aid to the growth of the capitalist class than a hindrance. Indeed, over the last three decades, the trend has been to de-nationalise and de-regulate productive assets. With respect to reducing class inequality, India has performed no better than other liberal democracies with explicit constitutional protections of private-property rights.

What does the Constitution have to say on caste inequality? Article 15 declares prohibition of discrimination on grounds that include caste. But this is with respect to state services and the domains of public control and administration. It does not extend to the sphere of ordinary and everyday social relations in Indian society as a whole. The Protection of Civil Rights Act focusses on untouchability. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been in existence for over two decades, and was set up to check crimes against oppressed castes. These

Acts are worthy measures but banning untouchability and merely condemning caste discrimination does not go far enough. There should, at the very least, be an unequivocal and comprehensive ban on caste discrimination, and the document should take a stand on eradicating the caste system itself, an imperative that should be included in the directive principles.

The fact that there has been no move to do this is revealing. It speaks of the nature of Indian secularism as it prevails in the Indian Constitution and is practised on the ground. Originally sanctioned by the predominantly dominant-caste Constituent Assembly, the current framework suggests that untouchability and even discrimination may disappear, but the caste system will remain intact. We must begin the debate on what steps should be taken to legislate against the caste system within the bounds of a democratic framework.

The Constitution itself affirms positive discrimination, in the form of caste-based affirmative action—through reservations for Scheduled Castes, Scheduled Tribes and Other Backward Classes.. With the entrenched character of the caste system, this will remain a necessary means to counteract the caste system for many generations to come. Given this framework, it might be argued that a total ban on caste discrimination may not make total sense. But that does not hold water. A simple comparison with liberal constitutions in other countries indicates that it is possible to outlaw racial and gender discrimination even while governments pursue affirmative action along racial or gender lines as a means to ultimately ending such discrimination. India could very well do the same on caste.

On the issue of gender discrimination, the makers of the Constitution should have established a progressive Uniform Civil Code rather than the current mishmash of personal laws specific to—and conceding to—the traditional customs of each major religion. This would have been difficult given that the Congress's political mobilisation during colonial times rested on inter-religious collation, mediated in the Muslim case via Islamic clerics. But the party's immense prestige and authority as the undisputed leader of the freedom movement could have allowed it to impose uniform personal laws during negotiations in the Constitutional Assembly if its leadership really desired them. Of course, the non-secular and pro-Hindu character of much of this leadership at Independence also had its part in determining the party's course. A few years later, Hindu Personal Law was substantially reformed to give women greater freedom and equality, but it is still a long way from granting women their rights in full. The directive principles includes a call for a UCC, but this is another worthy sentiment which has never been seriously pursued. A gender-just UCC would require the abandonment of many current Hindu laws and practices regarding marriage, divorce, succession and matrimonial property, but India's political leaders have never had much appetite to challenge the prejudices of the country's dominant religious constituency.

AS WITH THE MEANING OF SOCIAL JUSTICE, the meaning of democracy is also contested terrain. In the conventional and dominant discourse on liberal democracy, the liberalism is given greater importance than the democracy. Liberalism is about the restriction of state power for the presumed benefit of the individual, where human fulfilment is essentially understood as the freedom to live as one desires as long as it does not impinge unfairly on the ability of others to do likewise. For liberals, the key attributes of a democratic order include free and fair elections with universal adult suffrage, as well as protections against arbitrary arrest, with a presumption of innocence upheld by an independent judiciary. There must be basic civil liberties—such as those of speech, assembly, association, occupation and trade—subject only to reasonable restrictions as determined by the judiciary. A liberal democratic order must also allow minority rights of varying scope. In addition, there should be checks and balances on state authority through a division of powers and responsibilities between the three main arms of the state—the executive, the legislature and the judiciary.

The liberal conception of democracy focusses on the proceduralist domain of legal and political rights. The legal commitments it insists on are all indeed important. But it can nevertheless be contrasted with the more substantive conception of democracy upheld by socialists. Democracy, in the classical understanding, entails popular empowerment in an ever-widening and deepening sense, making it always an unfinished business. This empowerment must go beyond the realms of political representation and civil liberty to encompass the social, economic and cultural domains of human existence. The political representation of the citizenry by some select group is unavoidable in any democratic set-up, but this should be seen as much as a problem as a solution. Democracy should be about the dis-alienation of state power, or the progressively greater capacity of people to influence the decisions that most affect one's life within a collective framework of the pursuit of the common good. Here, human fulfilment or flourishing is not seen as a privatised affair. The aim is a levelling of power equations, and far more decentralised, participatory and direct forms of decision-making that can exist alongside the indirect structures and mechanisms of representative authority.

But hewing to the standards of liberal democracy, where do the Constitution's democratic credentials stand? First, we must ask how effective its system of checks and balances between the legislature, the executive and the judiciary has been.

The Indian parliament does not exercise sufficient democratic control over the executive. This is due to powers constitutionally afforded to the latter—particularly the provisions for the executive to proclaim a state of emergency over the whole or part of the country, and thereby suspend fundamental rights.

The imbalance is further abetted by a host of laws in the Indian Penal Code and elsewhere, that were inspired by colonial forms of rule. Measures for preventive detention, like the Unlawful Activities Prevention Act, are used to restrict dissent, target political opponents and undermine progressive movements. So are laws against sedition. The central government, with the assent of the governor of a state—appointed by the central government—can declare President's Rule and dismiss the state's elected government. Laws such as these should simply be abolished.

Rather than function as a check on each other, the executive and parliament have all too often acted in cahoots. The task of making both organs accountable has fallen to the courts. The lower judiciary—magistrates and sessions' courts—is mostly suborned by local or provincial powers. Even at higher levels—High Courts and the Supreme Court—justice is all too often greatly delayed, and therefore denied. The higher courts can hold the executive accountable by supervising its work as well as setting up investigations into its behaviour. Despite this, the higher judiciary has been very lax when it comes to curtailing repressive laws and state actions.

There has been an ongoing tussle between the legislature and the judiciary as to which is the final arbiter of the Constitution. The Supreme Court's interpretation of the document has not been based solely on the text itself. Sometimes, it has aimed to give effect to the "intent" of the document's framers. Other times, the court has leaned towards "creative adaptation" of the document in the light of what it understands to be "Constitutional morality." The doctrine of the basic structure of the Constitution, formulated by the Supreme Court in 1973, has given the court decisive and often controversial powers. The elected legislature, presumably representing the people, has the power to amend the Constitution, but the unelected Supreme Court, under the doctrine, has the power to annul any amendments that it deems to be violating the document's basic features.

The court has used its powers of interpretation to uphold progressive causes—as with the Right to Information Act, or its judgment on privacy being a part of Fundamental Rights. But should benches of the apex court act as guardians of the Constitution with only the court's own higher benches able to check them? And what is to discipline and direct their power if there has never been judicial

consensus on what all the basic features of Constitution are, beyond certain generalities such as secularism, democracy, federalism, human rights, republicanism, rule of law and so on? It is also alarming that there is neither sufficient transparency in appointments to the highest levels of the judiciary, nor any public accountability in how they reach their decisions.

Supreme Court judges, including chief justices, have played a part in legitimising the political behaviour and ideology of the Hindu right. The court never demanded the removal of the Ram idols illegally installed in the Babri Masjid in 1949, and refused to authorise the use of security personnel under the central government to prevent the demolition of the mosque when petitioned to do so. In 1995, it ruled that Hindutva, far from being an anti-democratic ideology, was a religious "way of life." The most that can be said of the judiciary on this count is that it has sometimes acted to slow Hindutva's forward momentum—for matters would have been even worse in the absence of the basic-structure doctrine and the Supreme Court's use of it to defend the Constitution..

Next, we must consider whether the parliamentary and party system defined by the Constitution fairly represent the popular will. Here too, there are weaknesses. Members of the Rajya Sabha do not need to be domiciled in the state they are supposed to represent. In parliament and state assemblies, members are not free to vote against their own party on any matter that the leadership claims is central to the party programme. It makes obvious sense to prohibit voting against one's own party in the case of a motion of no confidence, but beyond that the practice belittles rationality and quality in legislative argument and debate. What need for them if legislators cannot be persuaded to change sides?

However, what shines the harshest light on the Constitution's claim to democratic representation is the first-past-the-post electoral system. The justification so often peddled for it is that, in contrast to a system of proportional representation whether partial, mixed or full-blown, the first-past-the-post arrangement ensures a certain stability. The argument goes that it encourages a competitive two- or three-party system that lends itself to sturdy governments, rather than one with multiple contenders creating unstable coalitions that all too often do not last a full term in office. But stability is not a virtue in itself, and should not be allowed to trump proper representation of and fidelity to electoral choices. Moreover, ruling coalitions have lasted full terms both in individual states and at the Centre—in the case of the latter, on three consecutive occasions between 1999 and 2014.

Some kind of proportional representation would today provide an institutional bulwark against the undemocratic thrust of Hindutva. From independence up to the 2014 general election, whenever the country came under single-party majority rule, the winning side never had a majority support. Always, its share of the popular vote remained within the band of 40 to 49 percent. In 2014, the concentrated support in the Hindi-speaking states for the Bharatiya Janata Party saw it secure a majority in the LokSabha with only 31 percent of the vote. This made a huge mockery of any claim that the government represented the popular mandate.

The Indian public's sheer political and social diversity is better reflected by the country's cornucopia of smaller regional parties, along with ones such as the Nishad Party, the Shiromani Akali Dal and the Maharashtrawadi Gomantak Party that have their bases in very particular social groups. These parties might be expected, in their own interest, to call for proportional representation in the Lok Sabha, but the problem is that a similar system would then also have to be put in place for the state assemblies. This the stronger regional parties would not want, because it would dent their own hopes of securing state-level power—which rest, more often than not, on acquiring a disproportionately high number of seats in state assemblies vis-à-vis their actual vote share.

THE CONSTITUTION'S DEFICIENCIES when it comes to social justice and democratic governance have enabled Hindutva's ascension within the republic. But the document also has two

other defects that have been wind in the sails of Hindu nationalism.

One defect is shared with almost all constitutions everywhere. It is based on a flawed and self-serving understanding of the nation and nationalism. Like the Indian Constitution—which, as the legal scholar Upendra Baxi has observed, helps to "uphold the belief that almost all practices of power directed to maintaining the unity and integrity of the nation are inherently justice enhancing"—they allow for territorial *expansion* from the original national boundaries prevailing at their birth, but disallow any secession of territory.

Constitutions do this partly on the assumption that all secessionism stems from some external attack or influence. They are generally blind to the notion that territorial unity is not an incontestable virtue in itself, but that its virtue is always subordinate to the voluntary and continuous assent to membership of a territorial unit from all of its constituent parts. That assent is never to be taken for granted. When substantial sections of people in a given province or region do not wish to be part of the Union—because of a pre-colonial history of separateness from the constituents of the new country, or because they suffer from disregard or even repression by the country's rulers—then the call for respecting their right to self-determination, even up to secession, can arise. There are only a few governments that are prepared to consider or accept such a call by a section of their citizenry, even as their constitutions do not inscribe this highly democratic principle.

India practices an asymmetrical federalism, one where all the states in a Union do not have the same legislative powers. Put another way, some states have special ad hoc powers denied to the others. This kind of federalism often emerges from the dissolution of colonial empires whose masters did not administer their territorial units through uniform rules and procedures. In both Nagaland and Kashmir, the Indian government after independence has behaved atrociously in denying the aspirations of their respective populations. Longstanding repression has succeeded in ending the Naga quest for independence, now replaced by a search for some degree of autonomy. Kashmir is another story.

The exact circumstances under which the princely state of Jammu and Kashmir acceded to the Indian union, and whether the Indian state was involved in duplicity, are a matter of dispute. Not under dispute are the legal and formal commitments India made for the accession to take place. Jammu and Kashmir would have its own flag and premier, and its own constituent assembly to draw up its own constitution. The original arrangement was much more a "confederal" than a federal one—only the territory's foreign affairs, defence and communications came under the control of the Centre. Jammu and Kashmir was not to be bound by any future Indian Constitution since it could have its own. But since Presidential orders can be used to bring in terms set by the Indian Constitution through "consultation" or "concurrence" with the state government, the key path for central efforts to undermine the original intent and spirit supposedly embodied in Article 370 lies in having obedient state governments in J&K.

What followed is a sorry tale of repression. In 1953, Sheikh Abdullah, the territory's popular leader, was arrested and replaced as premier by the Centre's toady, Bakshi Ghulam Mohammed. Manipulation of the Jammu and Kashmir constituent assembly diluted earlier commitments to maximum autonomy, and instead allowed the imposition of Union powers. Those articles of the Constitution were made applicable to Jammu and Kashmir that allowed the central government to dismiss an elected state government as well as assume its legislative functions. Both in the time of Jawaharlal Nehru and afterwards, Jammu and Kashmir's autonomy was systematically eroded as the region came under the jurisdictions of the Indian Administrative Service, the Indian Police Service, the Election Commission and the Supreme Court.

Jammu and Kashmir has suffered repeatedly from president's rule and governor's rule, approaching

a total number of of 3,500 days in all, as it is still under such rule. Punjab, where the Khalistan agitation has long ended, was under president's rule for 3,510 days. But even here, the single longest continuous stretch of this rule, well over six years, has happened in Jammu and Kashmir.

Between 1947 and 1964, all barring three of the 97 subjects in the Union list which allows the Parliament to make laws, 26 of the 47 in the Concurrent list which includes subjects that give power to both the state and central government, and 260 out of 395 articles from the Indian Constitution were extended to Jammu and Kashmir. Then and subsequently, repressive acts such as the Armed Forces (Special Powers) Act, Public Safety Act and Terrorist and Disruptive Activities (Prevention) Act were brought into play. It has come to the point where, today, many leaders of the BJP and the Sangh openly declare their desire to finish off even the limited autonomy available to the state, under the much-diluted provisions of Article 370. No arm of the democratic Indian polity—whether the legislature, executive or judiciary—has seen fit to seek a reversal of this systematic erosion, let alone a restoration of earlier commitments.

ANOTHER AREA THAT WARRANTS DEEPER ANALYSIS is the Constitution's claim to secularism and therefore to democracy. There are political scientists who argue that a democratic state need not be secular—a view that allows for Israel, an explicitly Jewish state with formally constituted second-class citizenship for non-Jews, to be called a democracy. But most others, including those of a liberal democratic persuasion, see a fundamental overlap between secularism and democracy.

There are some key principles then that make a state secular. First, it should not be the job or goal of the state to help promote or secure spiritual or religious salvation for anyone. Second, its institutions are free from the control of religious personnel and institutions. Third, there should be equality of citizenship rights irrespective of religious affiliation though these rights may not be democratic. This points to the fact that a state can be secular but not democratic, such as Kemalist Turkey, Mao's China or Stalin's USSR.

How far should the state intervene in religious practices that many would consider morally offensive? Some general principles can help guide us at least. There are certain basic individual rights of equality across caste, gender and racial lines that must take priority over group rights. There must also be the "right of exit" for individuals from groups or religious injunctions felt as demeaning or imposed. None of this is to be taken as meaning that the principle of minority rights is to be rejected. The principle remains fundamental to any democratic set-up. So the attack on "minorityism" by Sangh spokespersons is to be completely rejected even as we can of course oppose specific abuses by those enjoying such rights. Religious bodies must also be pushed to change older injunctions in the light of modern democratic and humane values.

But states believing themselves to be secular must also be careful in how they address the issues of religious freedoms and personal choices even when these are to some extent the result of socialisation processes. For example, India sensibly enough and unlike certain European democracies has not, in the name of upholding secular principles, gone to the absurd extent of outlawing certain forms of dress by Muslim women such as the hijab, burqa or niqab when worn in public. Apart from certain professions as in medicine or teaching where full face-to-face interaction with patients and students may be required, there is no justification for such bans. Rather, there should be a ban on the forcible imposition of such apparel. The basic and innocuous freedom to dress as one wishes should be respected.

Many a progressive has pointed out that there is a disturbing gap between the secular principles laid down in the Constitution and their practice on the ground. This serves as an exculpation of sorts for the Constitution, but an unconvincing one. The fact is that the text of the document is itself

religiously biased.

The Constitution makes concessions to clerical Islam, such as the lack of a uniform civil code, as well as to Sikhism, with provisions for the public possession of a kirpan. Furthermore, in the name of freedom of religion, the Constitution allows educational institutions set up by any particular religious denomination, sect or body to provide religious instruction to students, even if the institution is partially—though not fully—funded by the state. Moreover, it says that if an educational institution set up by an endowment or trust that insists on imparting religious instruction is taken over by the state, such instruction can continue at the institution. A forthright secular stand would be for the state to refuse both these things: to not provide any funding to such institutions; and to refrain from taking over institutions that insist on specific religiou instructions.

The most prodigious biases are those in favour of Brahminical Hinduism.

I have already mentioned the Constitution's effective sanction for the persistence of the caste system, with its untenable position that this is quite compatible with ending untouchability and caste discrimination. I have also mentioned its controversial choice of the name "Bharat." There is more to add to this set of faults.

In the Constitutional Assembly debates, BR Ambedkar defined religious freedom as entailing only the freedom to worship, and excluding all practices outside of that act. Such a definition would have created grounds to oppose Hindu practices such as sati and child marriage. The final definition of religious freedom in Article 25 of the Constitution reflected a compromise. It enshrined the freedom to practice and propagate religion, "Subject to public order, morality and health." Given the wide latitude in how this clause can be interpreted, it is no surprise that many an unsavoury religious practice persists without state intervention.

Brahminical diehards in the Constitutional Assembly could not get a complete ban on cow slaughter, but smuggled an emphasis on the need to protect cows into the Directive Principles under the cover of animal husbandry. The overwhelming majority of states have since banned cow slaughter, and a few have even banned the killing of bulls and bullocks.

Many states have banned conversions if done by force, fraud or allurement. These bans are aimed at Islam and Christianity, since there is much eye winking at Hindu conversions passed off dishonestly as "reconversions" to the ostensibly "original" faith. The ban on forcible conversion is justifiable, but the two other grounds for prohibition allow for unwarranted state interference on flimsy grounds. Many a Hindutva stalwart has said that Christian beliefs in heaven and hell constitute fraud. The prohibition on conversion via allurement is particularly directed at progressive missionary groups setting up civic institutions such as schools and hospitals in tribal and other underserved areas. This as a criterion for preventing conversions should simply be dismissed. There are numerous religious sects worldwide—including many Hindu ones—that win converts by providing for their material as much as mental and spiritual welfare.

Article 25, while establishing the freedom of religion, also states in a sub-clause that this freedom shall not prevent the state from making any law for "the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus." The document notes that, in the sub-clause, "the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion." Here, the Constitution can almost be seen in line with Hindutva's assimiliationist project, which sees these faiths as having a lineage that goes back to ancient India, and being given shape by Hinduism, which preceded it. Unlike Christianity, Zoroastrianism, Islam and Judaism these faiths are indigenous, not "foreign" and therefore acceptable, in the Hindutva view. Within the Sangh Parivar it is common to find references to Sikhs

as protectors of Hindus against Mughal/Muslim oppression. Jains have been seen as a part of the wider Hindu fold. As Sikh and Jain identity has crystallized, this assimilationist attitude has caused some degree of resentment but this Hindutva position also ensures that Sikhs and Jains need have no or much less fear of a rising Hindutva. Ambedkar's counter positioning of Buddhism to Hinduism has made little ground even as Dalit assertion has strengthened.

Article 26 allows every religious denomination to "establish and maintain institutions for religious and charitable purposes, but clause 2(a) of Article 25 saves the power of the state to regulate or restrict "any economic, financial, political or other secular activities which may be associated with religious practice." It can oversee the construction of facilities and look into the spending of monies given by devotees, and even ratify the qualifications of priestly candidates. Article 26 is seemingly impartial towards all religious institutions, but in reality a huge and powerful nexus has emerged between the state, the corporate sector and the Hindu religious establishment. The writer Meera Nanda, in her book *The God Market: How Globalization is Making India More Hindu*, provides a devastating exposé of this nexus.

Sikh affairs are governed by the 1925 Sikh Gurudwaras Act, Muslim mosques and charities are largely unified under the 1954 Wakf Act, and Christian churches obey the National Council of Churches, set up in 1914. But the thousands of Hindu sects lack any single authority to watch over them. State governments have set up various regulatory bodies to oversee the affairs of Hindu, Jain and Buddhist temples.

The Constitution designates Hindi the "official language of the Union," to be used along with English in Centre-state exchanges. Though Hindi is spoken by more people than any other Indian language—even as we ignore that a Hindi nationalism has been at work, wherein other north Indian languages have been subsumed by Hindi and rendered as dialects—it is still spoken by a minority of the country's entire population. Achieving this status had not a little to do with north Indian and upper caste dominance of the Constituent Assembly. The Constitution also grants official status to Sanskrit, spoken by a perhaps few hundred people, by including it in the Eighth Schedule. The tribal languages of Bhili and Lammi, each spoken by over a million people, are denied that honour. Article 351 promotes a Sanskritised Hindi that relies for its vocabulary "primarily on Sanskrit and secondarily on other languages." The promotion of Hindi comes at the expense of Hindustani, which affords greater importance to Urdu with its stronger Persian and Arabic borrowings.

The Indian state, at the central and state levels, promotes the propagation of Hindu priestcraft through *gurukuls*, *rishikuls* and *pathshalas*, and "vedic sciences" through astrology courses at the college level. Governments sell lands at throwaway prices, or outright gift them, to Hindu religious bodies, for the construction of schools, hospitals and other institutions, to which the state also provides patronage and accreditation. These are then built and maintained by private and corporate donations. The end result has been a growing trespass of Hindu institutions into such supposedly secular areas as public education and health.

AT ITS VERY CREATION, the Indian Constitution was never the remarkable document many have claimed it to be. Its commitment to secularism, liberal freedoms and social justice was never whole-hearted, and was more restricted than it needed to be. The end goal of its "transformative vision" was the establishment of a welfarist, capitalist democracy, and the society that has emerged over time under its aegis in no way repudiates this. And so we have arrived at a neoliberal capitalism, averse to serious welfare provisions for the general public, that allows large-scale poverty to persist and inequalities of wealth and power to reach obscene levels.

Indian democracy, though it long enjoyed a relative stability in its macro-level structures and institutions, has forever tolerated violence and a lack of democratic practices at its meso and micro

levels. Over the last three decades, things have turned for the worse. The legislature, executive and judiciary and the media have been gradually hollowed out through partisan appointments and corruption, including by the government itself.

Worst of all, the country's single most dominant political force is now the Sangh Parivar, a far-right force with undeniable fascist characteristics. Other such forces are resurgent across the world, but, unlike them, in the RSS, the Sangh has a wellspring with an unbroken life of almost a century. The Sangh's hegemonising drive will continue as it always has, with greater or lesser success, irrespective of the ups and downs of electoral verdicts. Its cadres and institutions have implanted themselves in Indian society at a depth unmatched by any rival, and key components of the Sangh's own transformative vision for the country have found resonance among a wide public—even among many opposition parties that otherwise oppose the idea of a Hindu India.

What are some of the key themes of this growing public 'common sense'? One, that there is no alternative to a neoliberal economic order, and that the only question for economic debate is whether this should take a more disciplinary or compensatory direction depending on the prevailing balance of social forces. Another, more directly spawned by Sangh success, is that any party aspiring to electoral success must pander to the Hindu majority, distancing itself from even the suggestion that it appeases religious minorities and adopt to a greater or lesser extent various aspects of the Hindutva worldview. Furthermore, that there is no escape from playing on the same ground as the BJP and Sangh—we are all for a more belligerent and militaristic nationalism and for asserting our regional dominance as the path to achieving the status of a rising global power.

There are enough positive aspects of the Constitution for us to take selective recourse to it in the struggle against the Sangh. But, we must ask, how well does the document stand against the new common sense seeping into ever more sections of the public?

The centre of gravity of Indian politics has moved very much to the right. The Congress is not a far-right force, but long ago transmogrified into a rightwing force. It has no inspiring transformative vision of its own. Constructing a counter to the Sangh will require a search for new ways on all fronts—economic, political, social, cultural and ideological. That must precede the emergence of a Constitution that can deliver more to the people of India than it yet has.

AchinVanaik

P.S.

• *Caravan Magazine*, May 2019:
https://caravanmagazine.in/reportage/does-constitution-keep-promises