

Kalpana Kannabiran

Constitution-As-Commons: Notes on Decolonizing Citizenship in India

This essay is dedicated to the memory of Adivasi leader Abhay Flavian Xaxa whose work has illuminated the elaboration of constitution-as-commons.

It will all be remembered (*sab yaad rakha jayega*)

. . . It will all be remembered
yea each bit will be remembered
while our hearts remain broken in the memory
of our friends killed by your batons and guns
we will remember each single thing, never forgetting
knowing while you write your lies in ink
but plainly in our blood perhaps
the truth will surely be written . . .
—excerpted from Aamir Aziz 2019¹

The question of citizenship and the Constitution has been on the boil in India since 2014, when the Bharatiya Janata Party took over the reins of national government, the political turmoil finally erupting in 2019 simultaneously in several locales. There are stark continuities in the methods of rule deployed by the muscular, masculinist state in a neoliberal right wing context that privileges carcerality and militaristic control of peoples—“anti-nationals,” “illegal infiltrators,” “encroachers,” and “untouchables.” The prerogative to “maim” (Puar 2017) has proliferated in the past five years, spreading from state actors to virtual and physical mobs self-identifying with the ruling Hindutva regime. The flip side of the politics of maiming is docility that congeals as the most desirable institutional attribute, especially in higher education,

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but also in the justice system. Bigotry emerges as the new, legitimate normal. This template, with vigilantism as the method, powered by lynch mobs armed with viral messaging platforms, is deployed in multiple contexts to desired effect. The politics of maiming fuels technologies of dispossession, colonization, occupation, and incitement to hate crime in the present juncture, under the watch of the Constitution and special statutory protections for communities vulnerable to discrimination and structural violence.

The rule by maiming injects discourses of contagion and methods of vigilantism honed to precision in violently exclusionary fields of caste, bigotry, hate, and terror into a pandemic context. Languages of war against “enemies of the state” morph into the call to arms against a virus in a volatile, Islamophobic social context seamlessly enfolding viralities of contagion within viralities of religious profiling and untouchability practices. The Constitution is silenced through practices of juridicalization that reinstate responsabilization as the sign of citizenship (Tella 2020).

I revisit my earlier arguments on nondiscrimination and liberty (Kannabiran 2012) at a time when intensely vindictive carcerality has become the defining trait of the state and equivocation/jurisprudential dissociation in matters of life and personal liberty has come to represent juridicalization *in the name of* the Constitution.

The collective Dalit-Muslim-Adivasi-Kashmiri experience of annihilation, occupation, carcerality, and crimes against humanity—and the multiplicity of their resistance to the rule by maiming, as also the archives of resistance they draw upon—provides the substance for the cursory exploration of the idea of constitution-as-commons and its ethnographies that follows. This is an insurgency to wrest citizenship from the jaws of enclosure, through a radical crafting of the contours of the constitution-as-commons. The following sections will provide a sketch of the constitution-as-commons and the resistance against its enclosure.

Signposting the Constitution-as-Commons

The well is the landlords (*kuan thakur ka*)

the oven is made of mud

the mud is from the lake

the lake is the landlords.

we hunger for bread

bread made from millets

the millets are from the field

the field is the landlords.

the bullock is the landlords
 and the plough
 but the hands on the plough are ours.
 the harvest is the landlords
 the well is the landlords
 the water too
 the crops and fields are his
 the lanes and streets are his.
 then what, pray, are ours?
 the village?
 the city?
 the country?
 Omprakash Valmiki (1950–2013), १980

The idea of the constitution-as-commons resurrects the moral economy of the constitution and its ethical foundations immersed in empathy (“fraternity”), most evident in the work of B. R. Ambedkar. In a situation of extreme repression and the near-total capitulation of constitutional courts on Article 21 (the right to life and personal liberty), the unfolding of a shared imagination for the present-future, the resurgence of collective action in hitherto unknown ways, and the crafting of social capital around the radical public reading of the Constitution (notably the preamble) defines constitutional communities in deeply insurgent ways. There is a shift in legitimacy from the formal holders of constitutional power to the multitudes that deliberate on the Constitution (on streets and campuses) and explore/interpret its meanings. The constitution-as-commons posits the Constitution (the text) as the irreducible ethical framework that must bind legislatures, courts, and governments alike, asserts the indivisibility of the Constitution, and claims free and unfettered access to the Constitution and its protections. In this scheme, the preamble (in letter and spirit) as the anthem of resistance, anchors the understanding of the Constitution.

Over the past couple of years (at least), we have been witness to recitations of *lyrical constitutionalism* in constitutional jurisprudence (Kannabiran 2019). There are older and more enduring traditions that predate the Constitution and anticipate a radical, just, insurgent constitutionalism as the ethical basis for independent India—the songs of Ambedkari Shahirs, or Ambedkari poets are an example (Maitreya 2018). We also have the stunning delineation of the constitution-as-commons by Dalit poet Omprakash Valmiki above, anticipating the performances of the present time.

The Constitution may be crafted around conversations on the commons, insurgent politics, and democracy. One possible way to do this could

be through an interreading of B. R. Ambedkar and Ambedkarite writing and performance and the vast traditions of resistance on the Indian subcontinent on the one hand, and the work of Elinor Ostrom and the commons scholars, Antonio Negri's and Michael Hardt's vast corpus on constituent power and resistance, Gloria Anzaldúa's (1987) work on borderlands, Walter Dignolo and Catherine Walsh's (2018) work on "*decolonial pluriversality and pluriversal decoloniality*," and Martha Jones' (2018) recent work on "*birthright citizenship*," on the other, for instance. While a detailed exploration is outside the scope of the present essay, my specific concern here is with exploring the Indian Constitution as vehicle and medium of resistance and retrieval, taking forward the work of Upendra Baxi and K. G. Kannabiran. Central to this endeavor is the redefinition of "constitutional communities" in a manner that engages with popular constitutionalism, and the meanings this collective wisdom brings anew to the constitution-as-commons.

The Constitution stands in opposition to the contraccommons (not the anticcommons)—dismantling through public action, the structural aporias that fuel the enclosure of the Constitution, indeed its capture. How may we discover the enclosure threats posed by the contraccommons and the travesties it engenders? How have contraccommons regimes been constituted, and how may we trace the source of their Power? In an inversion, we could perhaps plot the tragicomedies of the contraccommons that provide glimpses of hope and recovery to the constitution-as-commons, as for instance the resurrection of dissents in the celebrated decision upholding the right to privacy as a fundamental right under the Constitution in 2017.² This decision alone helps a calibrated reading of the constitution-in-courts, disentangling the articulation of the constitution-as-commons from the contraccommons therein. This is particularly relevant as we witness the emergence of a supremacist authoritarian regime that collapses legislative action, state repression, and judicial interpretation together, so that the first important distinction in modalities of action/acting is between *occupying* the constitution-as-commons (spatially and ideationally) and the juridicalization in the contraccommons.

Resisting the Travesties of the Contraccommons

Rohith Vemula (1989–2016) led the resistance against the siege of higher education by majoritarian government and the cascading movement of Dalit students around social justice and Ambedkarite philosophies on university campuses, especially after 2014. The quelling of resistance through criminalization and the securitized enclosure of campuses mark this moment. At

the present time, the Bhima Koregaon case that saw a spate of arrests of political dissenters, human rights defenders, and Dalit cultural activists and intellectuals, signals the now standard state response to Dalit assertion, and in a twist recognizes the enduring ways in which Dalit resistance shapes the politics of constitutional insurgency in India generally. The arrest of the widely respected Dalit scholar Anand Teltumbde on April 14, 2020, and the arrest of Dalit leader Chandrashekhar Azad, founder of the Bhim Army a few months earlier, are illustrative. Azad's reading of the preamble to the Constitution on the steps of one of the oldest mosques in Delhi was construed as inflammatory and an incitement to violence (Singh 2020).

The sounding of the bugle of anti-caste protest and Dalit assertion of the constitution-as-commons invites the most repressive state action enforced through its juridicalization. The targeted violence against Muslims in Delhi in February 2020, in the state of Uttar Pradesh in 2019 (Citizens Against Hate 2020), and the ongoing incarceration of dissenting Muslim students, youth, and journalists follows the widespread protests against the *Citizenship Amendment Act*, 2019, which introduced a religious basis for citizenship claims, specifically excluding Muslims. Just prior to this was the decision of the Supreme Court of India in the matter of Babri Masjid that handed over the site of the demolished mosque to Hindus who claimed to represent the deity. It must be recalled that the demolition of the mosque by Hindu mobs in 1992 triggered one of the worst episodes of mass violence against Muslims in the country. In challenging a law that undermines the fundamental basis of the Constitution of India, Muslims have led the resistance against the introduction of the denominational basis for citizenship. Poet Aamir Aziz's poignant poem (2019) "*sab yaad rakha jaayega*" (It will all be remembered), quoted in the epigraph, resonates through the protests and writing on citizenship and resistance.

There is a two-pronged strategy adopted by the majoritarian state to set this law of denominational dispossession in motion—the first is through a concerted armed assault on protestors (mostly women)—protests in the Shaheen Bagh (Shaheen Bagh Official 2020) suburb of Delhi are illustrative of this larger struggle; the second is through the mass incarcerations of poor people in the state of Assam, mostly Muslims who live on the edge of precarity now excluded from the National Register of Citizens and labelled *ghoos-pethiye* (a stigmatizing word that means "infiltrators"). The popular Muslim resistance against the Citizenship Amendment Act, 2019 recovers the constitution-as-commons by rejecting the use of religious faith as a ground of discrimination.

Article 370 of the Constitution of India guaranteed autonomy for the state of Jammu and Kashmir, and Article 35A protected the state from transfer of lands to non-residents. Both these provisions together were part of a constitutional compact of autonomy and self-determination for Kashmir. On August 5, 2019, the Indian parliament abrogated Article 370 and 35A of the Constitution of India and split of the state into two Union Territories—Jammu and Kashmir and Ladakh. This erasure of statehood has a long and troubled history of military occupation, struggles for self-determination, militancy, the suspension of the rule of law, grief, loss and everyday resistance, and tenacious noncooperation, especially by women and young people. Demands for justice and peace in Kashmir, and for the return of life untroubled by militarization, securitization, and its dark perils on an everyday level, have been silenced through state violence and impunity to the armed forces. The report of an all-women team that visited the valley in February 2020 details the spiraling effect of the post-abrogation lockdown on everyday life and socialities in Kashmir—arbitrary arrests and detentions of Kashmiri youth, aggravated surveillance, the suspension of media freedoms, the suspension of internet in the valley, the loss of jobs and incomes, sale of land and assets to meet living expenses and medical emergencies, the blocking of all routes to decent work for fair wages—the majority pushed to the edge of precarity by the state (Kannabiran et al. 2020). The call for *azaadi* (freedom) that we hear from Kashmir is a reinstatement of the constitution-as-commons—one that respects and guarantees the right to autonomy, dignity, and self-determination.

The final piece in this account of the contracommons speaks of adivasis/tribes in India, protected both by the nondiscrimination provision of the constitution, but also importantly by the guarantee of territorial autonomy and self-governance to tribal homelands under the fifth and sixth schedules of the Constitution. The figure of Abhay Xaxa, the forty-year-old Adivasi leader from Chhattisgarh who died unexpectedly on March 14, 2020, tells the story of Adivasi resistance and forest perspectives on the constitution-as-commons—“indigenocracy” as he called it. In 2015, the Modi government attempted to push through a bill to amend the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, a move that would have divested Adivasi communities of land and common resources. In a resistance led by Xaxa, around sixty Adivasi men gathered in front of a local government office and publicly defecated on copies of the proposed bill. In a response to the widespread reaction to this stunning protest, Xaxa asserted, “Poop protest is the most peaceful and democratic

protest against a black law which threatens the core of their life- Jal (water), Jangal (forest) aur Jameen (land), that is! Poop protest is not a new form of agitation, In fact throughout history, whenever oppressed masses have dropped their shit as arsenal, rulers have been shaken because it often marks the beginning of a social uprising.”

Despite a sustained focus by social movements, and the convergence of insurgent law-making and critical ethnography, it has still been possible for the Supreme Court in 2018 to follow the trail of wildlife conservationists in labelling indigenous forest dwellers “encroachers” and directing their eviction from forests, rolling the Constitution back through juridical moves. Stopped in its tracks by widespread protests from Adivasi and forest-dwelling communities across the country, the Supreme Court stayed the eviction during the pendency of the hearing (still ongoing). Xaxa attributed this juridical volte-face to the fact that “the supreme court was told that 2 million Adivasis are sharpening their bows and arrows before marching to Delhi . . . No benevolence” (Choudhury and Aga 2020).³ The deep entrenchment of dominant majoritarian claims in juridical habits that reinforce dominion over Adivasis—and “epistemicide”—surfaced yet again (this time in the middle of the COVID 19 lockdown, which rendered mass protest impossible) when, on April 22, 2020 the Supreme Court reversed the government order in the southern state of Andhra Pradesh, which mandated that only Adivasi school teachers would be appointed in publicly funded schools in Adivasi homelands (protected under Schedule 5 of the Constitution). Rolling back special protections, the court observed that they were put in place for tribes in the first instance because “their language and *their primitive way of life makes them unfit* to put up with the mainstream and to be governed by the ordinary laws.”⁴ This systematic distortion of the historical archive and of history fence in the constitution in each instance cited in this section.

Abhay Xaxa’s understanding that the Supreme Court’s juridicalization, and thereby its negation of the right of Adivasis to the constitution-as-commons, is based on perspectives from Brahmanical environmentalism is sharp and precise, mirroring in a sense the assertion of Winona LaDuke and Deborah Cowen (2020: 257): “We want to be at the table, not on the menu.”

Enclosure that shrouds the country remains securitized and deathly in the pandemic context—we see the refusal of the state to lift restrictions on internet in Kashmir despite its own COVID-19 advisory, and the auctioning of mines in Kashmir while the double lockdown is in place; we see the brazen profiling of Muslims as the carriers of contagion by state and media alike; we see the request of the National Investigation Agency to use handcuffs on

Anand Teltumbde, claiming the need to avoid physical contact in a viral context; we bear painful witness to the death from exhaustion of Jamalo Madakam, a twelve-year-old Adivasi girl, after walking 150 kilometers to her hometown during lockdown, from the chilly farms where she was put to work (her figure standing in for the exodus of displaced workers and their countless deaths from the lockdown—not from COVID 19 infection). Viralities, suffering and gruesome death are selective of social location. The dismantling of the contraccommons is in fact a matter of life, death, and freedom.

Clearing a Path to the Present-Future

Even while we witness a consolidation of ruthless state power and the normalization of impunity via the contraccommons, the borderlands come to symbolize the nation in the throes of disembowelment. The preamble to the Indian Constitution as the anthem of the anti-CAA protests soared to a crescendo at protest sites across the country in 2019. The return to songs of freedom and resistance against a vindictively carceral state—the Kashmiri *Bella Ciao* (Wanaan 2020), the multi-lingual performance of Urdu poet Faiz Ahmed Faiz’s poem *Hum Dekhenge* (We shall see) at protests against the CAA across the country, and the birth of a new genre of poetry—Miya poetry by Muslim poets in Assam that turned a stigmatizing label into self-assertion (Daniyal 2019)—present to us the visceral, enduring insurgent possibilities of contemporary resistance. For this carries echoes of generations of insurgencies that asserted “birthright citizenship.” Insurgent readings and B. R. Ambedkar’s sharp critique of Hindu religion—the inseparability of the annihilation of caste from the dismantling of the Hindu social order (its exclusions, segregations, violence, oppressions), and his infinite corpus on life and politics are constitutive of this ongoing insurgency. This moment presents to us an opportunity to map the fields of constitutionalism anew, eschewing languages of war and enemies (along with its attendant proxy fences and securitized borders), inscribing instead decolonial visions of the constitution-as-commons—dignity, autonomy, self-determination, birthright, and justice—drawing on a history of the present from the perspectives of the cascading resistance in the borderlands.

Notes

- 1 The translation of the poems by Aamir Aziz (Urdu) and Omprakash Valmiki (Hindi) by Vasanth Kannabiran, are published in this essay for the first time. I am grateful to her for doing this “on demand.” I am grateful to Aamir Aziz for permission to quote this translated excerpt.

- 2 I borrow the term ‘tragicomedy’ from Hess and Ostrom 2007. In *Puttaswamy v. Union of India* (AIR 2017 SC 4161) a nine-judge bench of the Supreme Court of India unanimously declared the right to privacy a fundamental right under the constitution, and reinstated 3 dissenting opinions between 1950 and 1975 that upheld the right against state surveillance, the indivisibility of fundamental rights and their non-derogability even in conditions of emergency.
- 3 All references to Abhay Xaxa are from this article.
- 4 *Chebrolu Leela Prasad Rao and Others vs State of Andhra Pradesh and Ors.* Civil Appeal No. 3609/2002, dated April 22, 2020. MANU/SCOR/24647/2020.

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