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## Sovereignty Before Law

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## Sovereignty Before Law

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**Violent Fraternity: Indian Political Thought in the Global Age**, by Shruti Kapila, Princeton, Princeton University Press, 2021, 328 pp., \$37.00/£30.00, ISBN 9780691195223

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The Indian Constitution of 1950 was authored in the shadow of a bloody partition which left at least a million people dead and another fifteen million displaced in what was the largest mass migration in human history. Yet, it is hardly surprising that there is no reckoning with partition in this fundamental charter of rights and governance since all modern constitutions are grounded in sovereign violence which they then seek to repress and sublimate within some form of legal and national consensus. Constitutions, after all, are future-oriented in their scope and ambition. Regardless of whether these documents are revolutionary or constitutionalist in emphasis, they at least claim to inaugurate a new beginning by breaking away from the past. Constitution writing in India followed a long period of anti-colonial resistance, but distinct from concretising or curtailing a revolutionary success story, the postcolonial national ideology channelised it to usher in a social revolution.<sup>1</sup>

Taking the national ideology at its face value and completely eliding the question of founding violence, normative accounts celebrate the constitution for instituting India as a modern democracy in the most inhospitable conditions of poverty, illiteracy, and millennial histories of social injustice.<sup>2</sup> Less commonly, critical interpretations blame it for failing to recognise, let alone assuage, the irreparable loss of life, property and solidarity incurred in the wake of partition, thus resulting in the entrenchment of majoritarian rule, now co-opted by Hindu nationalism.<sup>3</sup> Yet, among law scholars and lawyers, there is a general expectation regarding the constitutional enterprise as a possible panacea for partition violence drawing inspiration from the post-Holocaust German and the post-apartheid South African models.

Entirely upending the primacy of law in constitutional readings of the founding moment, Shruti Kapila's field-defining new book posits sovereignty as the central driving force in modern Indian intellectual history and global political thought. In standard Western accounts of the concept, it is the state which is the primary locus of sovereignty defined as the absolute, perpetual and indivisible supreme power. Sharply departing from statist theorisations of sovereignty, Kapila discovers it as a

potent capacity deposited in the individual subject and dispersed in society. Unlike the Holocaust and apartheid which were managed and controlled by the ruling regime, the sovereignty that produced partition violence was displaced from the state and wielded by the people themselves.<sup>4</sup> This intimate nature of violence that turned neighbours into enemies beyond the mediation of the state is precisely what prevented the partition's memorialisation through the constitution. Not only was there no reckoning with the event of violence or acceptance of guilt on either side of the divide, but far from generating a consensus the discord has continued as a simmering tension till the present day between the two nations and internally among India's religious communities as well.

## 1. Fraternal Violence

In a fascinatingly original framing of the germinal questions of modern Indian political thought, Kapila presents the problematic of fraternal violence as pivotal to the reimagination of a new national sovereignty which could not be folded back into any juridical framework of normative liberalism. She construes partition as nothing less than a civil war which in turn foreclosed the possibility of inter-religious fraternity by laying the foundation of a strong unitary sovereignty with Pakistan as its constitutive outside. This insistence on the exceptional dimension of sovereignty irreducible to constitutional legality involves a striking reappropriation of the political thought of the controversial albeit immensely generative inter-war Weimar jurist Carl Schmitt.<sup>5</sup> Challenging the conflation of state and law in normative theory and its denial of the juridical significance of the question of sovereignty, Schmitt postulated that legal norms were guaranteed and legitimised by a pre-existing and autonomous domain of the political. If the essence of a juridical order was contained in the legal unity of norms, its very existence was determined by a prior coming together of the people as a political unity. Above all, Schmitt condensed the definition of the political to an intense relationship of friendship in mortal opposition to an external enemy.

This friend-enemy distinction in Schmitt is productively deployed by Kapila to explain the Hindu-Muslim antagonism in the Indian case but with a crucial twist. Unlike the public nature of political hostility in Schmitt's definition, fraternal violence mobilises and is indeed made possible by familial intimacy. As a result, in contrast to the archetypal modern European state which monopolises violence and pushes it to the border, the problem of intimate enmity being internal to India produces a highly militarised and fractious society. But despite working on India as the site of her theoretical enquiry, Kapila does not exceptionalise it in any way and rather makes broader claims about global political thought. As post-consensus societies today are marked by antagonism and hostility, the book tells the story of an Indian problem that has become global.

Refraining from the widely prevalent tendency to bracket political thinkers within specific ideologies such as liberalism, Marxism or conservatism, Kapila approaches each of these figures independently and weaves their intellectual output into her own narrative focussing on fraternity, violence and sovereignty. Taking as her cue the nationalist promotion of the Bhagavad Gita as the ur-text of political modernity, Kapila relates this formulation of intimate enmity to the existential dilemma faced by the epical warrior Arjuna whether to kill or not to kill his kinsmen in the battlefield of Kurukshetra.

Kapila's point is neither that India was primordially violent nor that it was excessively religious. Rather, violence was discovered as a sovereign capacity of the subject beyond the law and state not so much to overthrow the foreign coloniser but instead redirected to forge ethical and political relations with brothers and neighbours.

To be sure, the analytical category of intimate enmity was previously invoked by the social theorist Ashis Nandy to interpret the psychological impact of the colonial encounter on both the coloniser and the colonised.<sup>6</sup> Nandy's intervention marked a departure from the largely Manichean reading of colonialism in imperial and nationalist historiography. However, the figures that Kapila reconstructs had already moved past the empire to think about the making of the political subject with reference to the proximate and the fraternal. Last challenged in the revolt of 1857 which was the greatest anti-imperial rebellion of the nineteenth century, the white coloniser curiously ceased to be the chief enemy of the Indian people at the time of independence as violence was directed inwards against their own fraternal kinsmen.

Eschewing the cold instrumentality of rational self-interest, Kapila attributes the excessive capacity of violence to the potentially convertible relations of love and hate that occur only in the setting of familial proximity. She discards the typical liberal question of how to live with the 'other' and by creatively engaging Freudian and Lacanian psychoanalysis brings front and centre one of its most profound concepts of 'extimacy'. Distinct from the self/other dichotomy, extimacy coincides neither with exteriority nor with intimacy but rather alludes to the tight imbrication of the 'other' in the constitution of the 'self'.<sup>7</sup> Consequently, the close contact of the 'self' and the 'other' could either result in the violent annihilation of the latter or an ethical disengagement necessary for friendship and solidarity. While both these options were being worked out by different political actors, the founding moment produced a partition with erstwhile brothers turned into neighbours overnight. Yet, as we know, neither could this solution bring an end to neighbourly hostilities between the two new nation-states, nor could it prevent them from generating more internal enemies for the same problem of fraternal violence to unfold all over again.

This is not to suggest that Kapila portrays partition as the obvious outcome of a clash of civilisations in a deeply divided society. Rather, its reappraisal as civil war only forms the final chapter in what is a powerful attack on history-writing in the vein of nationalist ideology. By centre-staging conflict and antagonism, she sets aside the most dominant strand of historiography according to which the tension between parliamentary politics of the moderates and revolutionary terrorism of the extremists was synthesised and reconciled in Gandhian non-violence and civil resistance. But far from providing a genealogical account of partition, Kapila's most profound contribution to Indian political thought is her theorisation of violence through the category of the subject bearing the sacrificial capacity to kill or be killed in the event of war.

## 2. Sovereign Subject

In presenting the subject as the arch political actor, Kapila strikingly decentres the state which is otherwise presupposed to be the ultimate destiny of modern politics. The subject however has a distinct connotation in psychoanalytic theory and is neither reducible to the self-interested individual of liberalism nor a receptacle of socio-cultural identities of

communitarianism. Constituted by a rupture from the existing state of things, the subject defies conventional notions of autonomy and agency that presume the certitude of an indivisible and self-identical being. Refuting the whole spectrum of identity-based thinking, including its post-structuralist deconstruction as fluid rather than fixed, Alain Badiou and Slavoj Žižek have been foremost among psychoanalytic philosophers in embracing the subject as a category brimming with immense political possibilities. For both thinkers, the subject is purely an excessive figure disrupting the prevailing regime of normalcy and normativity. But while Badiou is the philosopher of an affirmative subject bearing fidelity to the truth of a new event, Žižek's subject does not have a positive basis and is instead underpinned by a radical negativity as it acts in a repeated pursuit of loss.<sup>8</sup> Put succinctly, if Badiou theorises the subject in terms of affirmation, event and truth, a pointedly different constellation of negation, act and loss form the impetus of the Žižekian subject.

Richly summoning the idea of the subject in political thought, Kapila dates its emergence in modern India to the opening decade of the twentieth century, particularly after the failure of the Swadeshi movement that followed the partition of Bengal in 1905. She aligns with Badiou in calling the century a Nietzschean one since it annihilated the past and ushered in a new futurity mainly on the back of a subject-oriented reimagining of the political. In Kapila's analysis, the subject is also sovereign formed in the event of fraternal violence. For the political thinkers studied by Kapila, what mediated the relationship between subject and sovereignty was the categorical imperative of *nishkama karma* or desireless action. Recovered and refashioned in modern politics from Hindu theology, desireless action supplanted quietist devotion with a robust theory of will and sacrifice. Modifying the other-worldly approach towards renunciation, only relinquishment of pleasure was required of the subject who was dutybound to perform action in the world without any attachment to its consequences.

In the nationalist leader Bal Gangadhar Tilak's philosophical reading of the Gita, the exceptional event of the epic civil war between the fraternal clans of Pandavas and Kauravas supplied the crucial backdrop for the enunciation of its theological message. Tilak, in Kapila's formulation, interpreted the precept of desireless action as mandating a political suspension of the ethical whereby everyday relations had to be disrupted by sacrificial violence on the battlefield even against one's own brothers. For sure, the occasion of a civil war enabled Tilak to expound the exceptionality of fraternal violence but are wars necessarily also eventual in Badiou's sense of the concept? Distinguishable from a revolutionary event, wars may well be merely restorative and status-quoist rather than signifying a new beginning. This question is especially salient as Tilak espoused a return to regular ethical relations after the war.

Mohandas Gandhi, who would emerge as the tallest leader on the political stage in India after Tilak's demise, bypassed this problem by treating war not as an event but a preeminent site for universalist ethical action. This elision of difference between the exceptional and the everyday and concomitant insistence on uncompromising and absolute ethics has led Žižek to provocatively describe Gandhi as more violent than Hitler.<sup>9</sup> In contrast to Hitler's reactionary conservative offensive in service of the capitalist order, Gandhi disrupted the basic functioning of the colonial economy through boycott and civil disobedience. Of all the figures covered by Kapila, Gandhi is certainly the most widely studied in global intellectual history, including the nascent field of Indian political

thought. In the philosophical interpretation of Gandhi's thought, there is a fruitful divide between Faisal Devji who casts him as a thinker of sovereignty for upholding the will to die in the face of violence above taking or defending life, and Ajay Skaria who emphasises his non-sovereign disavowal of mastery by offering unconditional equality to all sentient beings without differentiating the human from the non-human.<sup>10</sup>

Kapila absorbs this debate in her own thesis by establishing that Gandhi fashioned a sovereign subject who opposed the force of violence with the force of truth. Rather than depending on the contingency of the event, truth in Gandhi was revelatory in its quotidian insistence on visibilising the abstract nature of oppression and the subjective potentiality to overcome it. This ethical politics that centred on sacrifice created an openness to the 'other' thereby converting the intense feelings of fraternal intimacy into a psychically distanced albeit unconditional friendship.

While the subject was premised upon desireless action in Hindu thought, for the Muslim thinker Mohammad Iqbal its possibilities were hinged on the master category of the finality of the Prophet. In Iqbal's reconstruction of this Islamic precept, prophecy reached its perfection in Mohammad by abolishing itself after his death. Distinguishing him from traditional clerics and contemporary Islamists, Kapila recreates a modernist Iqbal for whom the death of the Prophet resulted in the dispersal of his sovereignty throughout a universal Muslim solidarity. Not identifiable with any theocratic enterprise of global Islam, Iqbal's thought was resolutely tied to *khudi* or selfhood finding its realisation in a republican sovereignty. Yet, as a markedly political project, the boundary question of inclusion and exclusion remained intransigent and was drawn not so much in respect of the external outsider but rather against the intimate other – that is, the Muslim Ahmadi community – for refusing to accept the Prophet's finality.

### 3. Nation and Its Outside

The subject of anti-statist political action first made its appearance in the writings of post-colonial and subaltern historians after the culturalist turn in the final decades of the previous century. Emblematic of this new subject was the peasant insurgent who not only resisted colonial rule but also operated autonomously from the nationalist elites. Explicated in the backdrop of the Maoist revolution in China and Naxalite movement in India, the ambition of this breakthrough historiographical intervention, first articulated by Ranajit Guha, was nothing short of making the subaltern figure the subject of its own history.<sup>11</sup> While adhering to the stance of anti-statism, Kapila dispenses with the legacy of the subalternist enterprise of capturing the small voices of history and instead chooses to work with and canonise the key mainstream protagonists of Indian political thought. Foregoing the elite/subaltern binary, her unprecedented redefinition of the subject is neither coterminous with autonomous agency nor reducible to ideas of sociological difference and cultural alterity. Rather than merely seeking the annihilation of order, Kapila's subject is attached both to rupture as well as a new beginning and in this sense is less anarchist and more theologico-political in its insistence on sovereignty.

Even while studying modern India through the intellectual framework of sovereignty, Kapila distances herself not only from the state but also the nation as the primary object of historical enquiry. Approaching the question of the subject from different theologico-

political entry-points, both Iqbal and Gandhi thought about solidarity and friendship in a non-nationalist register. Even Tilak's philosophical treatment of fraternal violence did not have the nation as a telos of sovereignty. It was only with partition that this preoccupation with fraternity, violent or non-violent, gave way to unitary sovereignty of the nation defined against the Muslim as its constitutive outside. However, for the political thinkers in the book whose concerns can squarely be called nationalist, interested as they were in questions of population, territory and government, the nation was not a pre-existing category simply realising its selfhood after a successful anti-colonial liberatory struggle, and was reimagined to cater to divergent intellectual and political projects.

A critical contribution of the book is to offer a sharply political take on the social movement of Hindutva or Hindu nationalism. Bucking the general trend of simply reducing Hindutva to a form of homogenous cultural nationalism threatening to subsume the rich heterogeneity of lived social reality, Kapila presents its chief ideologue VD Savarkar as a theorist of violence with an innovative view of history. Unlike its conservative use in resurrecting a romantic past, Savarkar deployed history as a narrative of perpetual warfare in order to occupy the future.

Although at variance with Hindutva's fantasy of permanent conflict, the exceptional moment of India's founding birthed a people in the crucible of partition thus dispersing violence and concretising unity at the same time. The man of the moment, Vallabhbhai Patel, who simultaneously oversaw this vivisection as well as the integration of princely states, is portrayed by Kapila in a Schmittian vein as a political actor who prized unity above all else and was pivotal to the forging of a new national sovereignty. Well known as Gandhi's protégé, Patel however is shown to have subverted his mentor's political ideas by transforming the courage of non-violent resistance into the fearlessness of violent self-defence.

Since the constitution was enacted in the background of partition violence, the Muslim question of minority safeguards was undermined and marginalised in national politics. But the Dalit jurist BR Ambedkar perceived in this territorial separation of Hindus and Muslims an opportunity to bring to surface the violence of caste that had hitherto defined social relations in an invisible although absolute way. In what is undoubtedly a novel reading of Ambedkar's thought, Kapila argues that the closure of inter-faith antagonism provided him an opening to inaugurate a republican constitution instituting agonistic politics around caste.

There is a general lament today in legal and political discourse that India's constitutional enterprise was a missed opportunity in setting up a federation to address the problems of a deeply divided society. But although the institutionalisation of the federal idea was a distinct possibility up until the failure of the Cabinet Mission Plan in 1946, Kapila's work can be read as providing a cogent explanation for how it lost out eventually to the strong undercurrent of sovereignty in the nationalist imagination. Apart from the situation of inevitability created by partition, the fiction of a constitution authored by the people as a singular collective entity was necessary for the abolition of other conflicting sources of sovereignty in the form of the caste system and the princely order commanding immense social and political power in India. Furthermore, globally speaking, the federation has proved to be a tenuous political form with an irresolvable antinomy between the existence of the federal union and the sovereign independent states constituting it. As a result, we have seen the dissolution of the federation either due to the secession of its



constituent units as in the erstwhile Soviet Union or its conversion into a federal state with a strong culture of national sovereignty as in the post-Civil War America. In recent times, the European Union is often cited as a proximate comparative model for India. Yet, even if recast as a federation, the EU has been unable to repress internal expressions of sovereignty and has also depended either on communism or Islam as its negative external other.<sup>12</sup> In this sense, if sovereignty is taken to be the most powerful language of the global age today, it is India which is instructive for Europe than the other way around.

#### 4. Law and Freedom

In a generative departure from hagiographic accounts of the constitution, this book seeks to establish that the political foundation of modern India in violence and sovereignty is ultimately uncontainable within the law. Kapila's point is well taken if pitched against the ideology of global constitutionalism committed to the rule of law and separation of powers. Rather than putting in place a limited government bound by the fundamental rights of the citizens, the constitution bolsters unitary sovereignty through its institutionalisation of a strong centralised state packed with the power to make exceptional decisions. But must a critique of constitutionalism be equated with that of the constitution itself?

There is more to the constitution than the mere imposition of legal limits on governmental authority on the one hand and their suspension during exceptional moments in the name of an illimitable sovereignty on the other. Both these dimensions of the constitution alluding to the tension between liberalism and political theology fail to grasp the fundamental sense in which law acts as an instituting idea by introducing a prohibition in the social order.<sup>13</sup> Be it the incest taboo that lies at the origins of societies which Freud investigates or the abolition of untouchability in the Indian Constitution, the prohibitive injunctions of law make political relations possible in the first place. Irrespective of the justice or injustice of its content, the form of law serves as a disruptive force by alienating individuals from their pre-given social settings and drawing them towards collective action.

Once law is rethought in its elementary aspect as a prohibition, the categories of subjectivity and sovereignty no longer seem equivalent. While the subject of law is constituted by the loss of its prohibited object of desire, the sovereign figure seeks to cover up this lack in an acquisitive quest of its own completion. Read in this light, Gandhi comes across as a thinker of subjectivity more than sovereignty, who with his arbitrary vows, celibacy and fasting offered himself in sacrifice by dying for the cause of Hindu-Muslim unity in India. Contrastively, his ideological antagonist Savarkar disavowed legal and ethical restraints to unleash an unmitigated sovereignty against the Muslim 'other' as Hindutva's constitutive enemy.

Today, when Savarkar's intellectual successors have acquired sovereign hegemony by instrumentalising if not suspending constitutional law, it is the prohibitive law of the constitution that has been invoked in political resistance against Hindutva's social authority. Responding to the controversial legislative and executive measures putting Muslim citizenship in peril, widespread popular protests invoked the constitution through public recitals of its preamble across the country and beyond. This was despite the constitution

itself having depoliticised the Muslim question after partition and thereby preparing the ground for the current moment. Yet, what the civil resisters resorted to were not the normative precepts of constitutionalism that are anyhow breached in politics, but rather the symbolic idea of law which is necessary for a collective life of political freedom.

## Notes

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## Disclosure Statement

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