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LEGAL LIVES IN THE POST-COLONY: SOVEREIGNTY, ABSOLUTISM AND THE RULE OF LAW IN INDIA

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ABSTRACT

Legal Lives in the Postcolony:

Sovereignty, Absolutism and the Rule of Law in India

This dissertation is an ethnographic, historical and conceptual account of a crucial category in postcolonial Indian politics and law- the right to life. This category, derived from a contentious article of the Indian constitution became a touchstone for activists, lawyers, lawmakers and judges as they confronted and tackled a whole range of sociopolitical and economic issues. Especially in the last forty years the right to life has been repeatedly invoked in multiple situations as an authorizing conception for a range of arguments. The latest instance being the judgement by the Indian Supreme Court in 2018 declaring that the continued criminalization of homosexuality in India was a violation of the right to life of India's LGBTQ community and thus unconstitutional.

Given its widespread efficacy for a range of actors, its capacity to structure crucial arguments and its role as a critical mediator between the state and its subjects, this dissertation seeks to understand the following. How did the concept become a thinkable proposition in Indian law, given its absence in the constitution? What kinds of authorizations does it enable and what are its inherent potentialities, ambiguities and contradictions? Why has it acquired such a crucial significance in the Indian legal discourse? To answer these questions, I focused on three key situations where the intersection of life and law has acquired great significance in India and interrogated them ethnographically and historically. These are: the foundational situation of framing a constitution, founding a republic and the emergence of right to life as an authorizing category. Next is the overdetermined situation of environmental degradation and crisis which in India has been legally framed as a violation of the right to life. Here I provide an account of a year long ethnography in the National Green Tribunal, India's exclusive environmental courts. Lastly, the exceptional situation of the suspension of right to life under the Armed Forces Special Powers Act in the Indian state of Manipur. Here I provide an

ethnographic account of Irom Sharmila's sixteen year-long hunger strike which sought to abolish the law and restore the right to life.

I argue that the primary achievement of the Indian constitution was that it inaugurated a new field of argumentation. This is because it posed a set of questions which could only be asked in the new situation of India's decolonization. At the heart of these problems was the question of mass destitution- the colonial state was gone but it left behind a hungry mass of people, people who were now the sovereign. India's constitution and its underlying concepts of rights and obligations were framed and determined by this pressing concern of mass destitution and the challenges that it posed. Indian statehood was based on what I call a sovereignty through destitution marked by an underlying sense of immediacy and absolutism. Right to life was not a principle of liberal expansion of rights as has been conventionally argued, rather it was an expression of this principle of sovereignty through destitution and a reproduction of its grounding impulses emerging after a grave moment legitimation crisis in the form of the Emergency. Through an ethnographic account of the invocation of right to life, I show how it gets folded and molded to enable a whole host authorizations, capacities and intensities. For example, its invocation enables the state to expand its powers even in the face of its inability to contain widespread environmental degradation, but this very expansion of its capacities further impedes its ability to protect natural resources. The project shows that constitutional questions in postcolonial states are not abstract, marginal or merely expressive of elitist concerns, but rather constitutive of the project of postcolonial nation-making.

Keywords: right to life, postcolonial, sovereignty, law, India, Manipur, environment, state.

INTRODUCTION

This dissertation is an ethnographic, historical and conceptual account of a crucial category in postcolonial Indian politics and law- the right to life. This category, derived from one of the most contentious articles of the Indian constitution has become a touchstone for activists, lawyers, and the judiciary as they confronted and sought to tackle a whole range of contentious, social, political and economic issues. In the last forty years of the republic, the right to life has been repeatedly invoked in an array of situations as an authorizing conception for whole host of arguments. The latest instantiation being the recent judgement by the Indian Supreme Court in 2018 declaring that the continued criminalization of homosexuality in India was a violation of the right to life and thus unconstitutional. This dissertation seeks to understand how the concept became a thinkable proposition, the work that it does and its inherent ambiguities and contradictions. This project claims that the primary achievement of the Indian constitution was that it inaugurated a new field of argumentation and posed a set of questions which could only be asked in the new situation of India's decolonization. At the heart of these problems was the question of mass destitution- the colonial state was gone but it left behind a hungry mass of people, people who were now the sovereign. I argue that India's constitution and its underlying concepts of rights and obligations were framed and determined by this pressing concern of mass destitution and the challenges that it posed. Indian statehood was based on what I call a *sovereignty through destitution* marked by an underlying sense of immediacy and absolutism. Right to life was not a principle of liberal expansion of rights in India as it is conventionally thought, but was an expression of this principle of sovereignty through destitution and a reproduction of its grounding impulses by the Indian judiciary emerging after a grave moment of state crisis of legitimation in the form of the Emergency. Through an

ethnographic account of the invocation of the conception in competing situations I show how the concept gets folded and molded to enable a whole host authorizations, capacities and intensities. It enables the state to expand its powers even in the face of its inability to contain widespread environmental destruction in India. In an exceptional space in spite its suspension, an affective politics around the body of hunger striker necessitates a ritualized response which seeks to undermine the potentiality of the suffering body.

Let me elaborate.

I. Statement of the Problem

The lawyer had been angry as long as I had been known him. I was six months into my ethnographic study at The National Green Tribunal (NGT) at its Eastern Zone Branch located in Kolkata and the lawyer was one of the busiest in court, this was because he was the principle lawyer for the government of West Bengal. The tribunal had been started in Kolkata in 2014 and had been charged with adjudicating legal cases relating to environmental laws in India.[1] Within one and a half years the court had grown fairly busy. But the lawyer was unhappy in his own way. The lawyer's discontent lay in the daily slight, insults and humiliations that he had to face from the bench- especially the Judicial member- a former acting Chief Justice of the Calcutta High Court. The judge had questioned his competence, his integrity and had also insinuated that he might not be upholding the interests of his client, the state of West Bengal. There was the occasional better calmer, happier days but those were the exceptions. The lawyers work was made harder at times by the slow-moving bureaucracy which was either slow to respond or inclined to take the newly formed tribunal less seriously. The lawyer had remained deferential and maintained decorum in the court. However,

[1] The National Green Tribunal had been established by an act of the Indian Parliament in 2010. The Tribunal presently has Principal branch in New Delhi and four regional branches spread across the country.

around April of 2016 an unexpected transfer notice was issued shifting the judicial member- his nemesis to the Central Zone. On the last day of his tenure there was a subdued tension in the court room as lawyers waited in anticipation as to what might transpire during the proceedings. The judge could be mercurial at times and there were rumors that he was unhappy about his sudden transfer from his home base. In one of the longer running and contentious cases the judge had instructed the Government of West Bengal to demolish a building, a tourist lodge in the Sundarbans. The order was long standing and the government had been trying to fend off the demolition. When the judge asked whether the order had been carried out, the lawyer noted that the government was thinking of a different course of action and had filed affidavit seeking directions from the bench seeking an order in that direction. Not only did the government not carry out the order they were seeking a fresh and completely contradictory direction on the matter which would preserve the building. The judge was furious and gave the lawyer a dressing down- did his clients think that the tribunal was a joke, was he not aware of the basic processes of the tribunal? This being the last day of the judge in the court, the lawyer chose to be less accommodating this time. He objected angrily to the language of the judge, 'Lordship, I have been repeatedly humiliated by your Lordship. My integrity has been questioned. My dignity, my *right to life* has been repeatedly violated by the bench- I strongly object to this behavior. My right to life has been repeatedly violated by the bench' (emphasis mine). The judge was taken aback at the retort and tried to diffuse the situation.

With his angry retort the lawyer was not seeking a legal administrative resolution to his perceived slights, rather he was expressing his anger at the daily humiliations that he had faced. His invocation of this precise category – the right to life- seemed to communicate the baseness of his experiences and the immediacy of his feelings. Could he have invoked any other right to express his discontent- liberty, or freedom? Maybe, but at the heat of that moment right to life seemed to encompass his

grievances and his throbbing anger. Why did he of all the rights available to him claim this particular right?

The lawyer's invocation was made all the more compelling by the fact that it was made in the NGT. The tribunal itself was grounded on the right to life. The right to environment has been enshrined in India's common law as a constitutive aspect of right to life and the NGT Act of 2010 invokes it as the sole constitutional principle grounding it in the Constitution. The lawyer therefore was claiming that his right to life was violated in an institution which was based on the idea of right to life. This showed how pervasive the idea had become in Indian law as well as the authorizing significance that the concept had acquired in Indian institutional life. One the one hand it showed the institutional efficacy of the concept, a whole branch of the judiciary could be created on its singular invocation. It also showed the passions and the intensities that its invocation could potentially embody.

Let me provide another small account. In 2014 I was in Imphal in north-eastern state of Manipur. Irom Sharmila had been on a prolonged hunger strike against the draconian Armed Forces Special Powers Act for close to fifteen years, refusing to eat or drink anything. The Indian state arrested her and charged her with attempt to commit suicide and she was force fed for this period of time. The question of her criminality was never settled for fifteen long years in spite of her repeated appearances before the court. Eventually after fifteen long years, the appellate district court of Imphal declared that she was innocent and the state had failed to substantively prove that she ever had any intent of killing herself.

Upon her release, as expected Sharmila returned to the little shack near the hospital with her supporters had built for her and resumed her hunger strike. She made it clear that her acquittal did not imply that her hunger strike was going to end, rather it would continue till the law was not fully repealed from the state. The question now was whether she would be re-arrested or not as she had

been in the past. By the end of the first day, it was clear from the movement of the police that her arrest would be a matter of time. Her supporters who had gathered around her in the shack were also deeply intent on preventing her arrest come what may. Around mid-morning a small contingent of female police officers came to the shack and made their first attempt to arrest her. However, a group of elderly women repelled the police and they retreated. But one of the women yelled at the police, grasped her arms and yelled at her face 'right to life, right to life.' As if the police's attempt to arrest the protest faster was a violence of an extreme kind. Part of the anger was directed at the police and the state in general. Many of the women had lost their children in the protracted war of the Indian state against Manipuri insurgency and saw in Sharmila the last hope of the end of AFSPA in Manipur.

Sharmila's hunger strike, AFSPA and the invocation of right to life in the scuffle against the police are intimately tied together. Armed Forces Special Powers Act suspends the right to life, allowing the armed forces to kill anyone on mere suspicion. Under the shadow of the law, Manipur had seen immense violence and suffering.[2] Sharmila's hunger strike was a protest against the violence and seeking an end to it through the repeal of the AFSPA and she vowed to continue fasting till that reality did not materialize. That woman's cries of right to life tie together the long history of exceptional violence in India. Her cries symbolized the angst, frustration and anger at the prolonged violence of the Indian state against her people.

But the invocation of right to life and its authorizing grounds is not limited to everyday affective interactions, situated in moments of tension. In contemporary India, right to life is one of the critical legitimating tools. This was best demonstrated last year in two instances. In 2018 the Supreme Court of India has passed a series of decisions which leaned explicitly or implicitly on the idea of right to

[2] A recent filing in the Supreme Court alleges that as many one five hundred and twenty-eight cases of extra-judicial killings had been carried out in the state. Extra Judicial Victim's Families Association vs Union of India 2012.

life as a grounds of legitimation. The most important of these was the decision by the court to declare section 377 of the Indian Penal Code as unconstitutional.[3] A colonial artifact, section 377 had criminalized homosexuality in India since middle of the nineteenth century. Activists had been engaged in protracted legal battle to get the section removed from India's law books since the 2000s. The petitioners had claimed that the prolonged criminalization of homosexuality in India had violated the dignity of the LGBTQ community in India. The right to dignity in Indian law has been enshrined in Indian jurisprudence through precedence. The Supreme Court had argued that the right to dignity is an essential element of the right to life. The Supreme agreed and finally after several trials the Supreme Court declared sec. 377 unconstitutional and paved the way for the decriminalization of homosexuality in India.

The Supreme Court also upheld India's biometric law. This law was premised on the concern that India's public distribution schemes were immensely wasteful and to ensure that Indians, especially the poorest were able to secure the benefits, the government proposed a unique ID for each citizen based on their biometric information. The law was challenged on the ground that the gathering of biometric data amounted to a violation of the right to privacy of Indian citizens since it forced them to part with sensitive biometric information for securing welfare benefits which they were entitled to. The Supreme Court passed a judgement declaring that though the law did indeed infiltrate on the privacy of Indian citizens, the government of India was only discharging its basic duties for the welfare of the poor in India. To lead a life of poverty was to lead a life of indignity. This law the court held, was constitutional because by addressing this perennial menace of the Indian situation

[3] Prior to the decision the Supreme Court had refused to pass a judgement on the matter and had overturned a decision of the Delhi High Court which had first ruled against section 377 in India. NALSAR vs. NCT 2009.

would allow the Indian citizens to meaningfully live the life of dignity guaranteed under article 21 of the Indian Constitution and also enjoy the rights that it guarantees.[4]

The environmental court, the protests of the hunger striker and the expansive judgements of the Supreme Court show only a slice of the innumerable circumstances in which right to life is invoked, by different people and institutions, as both an authoritative claim as well as a claim by the powerless. The two Supreme Court cases show the divergences that its invocation entails in the Indian context. On the one hand, based on right to life the Supreme Court read down the draconian provisions of the Indian Penal Code and limited the powers of the state. In the case of the biometric law there is reversal of this position. Here a clear expansion of state power occurs- it gains the capacity to mandatorily secure biometric data of all citizens. This expansion happens with the simultaneous curtailment of the rights of a significant populace in India. Now securing welfare benefits is contingent on the willingness of sections of the Indian citizens to regularly part with their biometric information. But this too is legitimized on the grounds of right to life. The Parliament too has passed legislation which has been premised on the right to life. These include the Right to Education Act, The National Green Tribunal Act and the Right to Food Act among others.

Right to life as a matter of fact does not exist in the constitution. It is derived from Article 21 of the Indian constitution which states the following: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' But from the late 1970s right to life came to be associated with this article, with the section 'deprived of his life' being read as a guaranteeing a specific right. As we will see in the later chapters this is a deeply ambiguous term with its meaning changing radically from cases to case. Nonetheless, as an authorizing grounds in Indian law, right to life has become a key category. Its emergence marked a key moment of institutional rearrangement

[4] See chapter II for a detailed discussion of AADHAR.

which saw the emergence of the constitutional courts as crucial site of power. This dissertation is a historical, conceptual and ethnographic study of this particular concept. It seeks to understand the underlying institutions, affects and logics of the postcolonial Indian state which has made a concept like right to life so significant in the emotional life of Indian law and jurisprudence which has acquired a unique significance in India's political life and by extension in India's social life as well. In the last forty years, right to life has been used to make substantive claims on issues ranging from questions of environment, welfare, gender, prisoner's rights to name a few. It brings together and binds tightly some of the fundamental concerns of socio-political life in India. This dissertation takes the proliferation of right to life as its starting point and asks, given the absence of the term in India's constitution, how did right to life emerge as a thinkable proposition in Indian law in the first place? What does the term mean and how has it gained the authority that it has in contemporary Indian law? What does the invocation of right to life make possible which other rights in the Indian Constitution do not allow and why is that the case? What are the different situations in which the principle is invoked and what work does it do? To answer these questions this dissertation ethnographically focuses on certain situations which have been seen the efficacious use of right to life and seeks to understand the various meanings of right to life and what its invocation makes possible.

II. Situating the project:

This project is primarily interested in the conceptual world of the postcolonial state especially concepts that lie at the interface of the state and its subjects and mediates this relation. Postcolonial states have taken their own unique trajectories and one of the registers where these differences have manifested has been in the conceptual realm. I am interested in exploring and understanding the potentiality certain concepts seem to possess and the reasons for that. Why do certain concepts gain

strength and are able to communicate certain anxieties, intentions and visions about the present and the future more effectively than others? Stoler has argued that concepts are useful because, 'they seem to offer the possibility of disrupting the dulling familiarity of common nouns, or allows us to cut through to the interpretive dissonance of contemporary political predicaments' (2018: 45). The world of politics, especially law is saturated with concepts, but they diverge in different contexts. The entanglement of liberty and poverty will have very different connotation in India and the US (Tani: 2016, Dauber: 2012). I do not see these concepts merely as legal units but as sites of entanglements where questions of history, affect, institution, language and action are intimately tied together. Anthropology has a long tradition of focusing on concepts as critical sites to comprehend the specificities and generalities of socio-political life, of trying to parse out these entanglements.

The world of postcolonial politics, society and culture is a productive site for the study of concepts. As Chakrabarty (2001) has famously argued, political modernity in India is eventually a product of European inheritance. The categories through which we think about the political life in South Asia- citizenship, rights, civil society, public and private among others have their deep roots in European enlightenment and we are broadly taught to see and think through terms which are rooted in the western world. While true, that is only part of the story. Indian politics also has distinctive concepts which cannot merely be understood in terms of its inheritance but also in the manner in which it seeks to grapple with the problems of modernity and beyond- concepts which only seem to have unique valence in India. Take for example the concept of *reservation*. An otherwise innocuous English term the notion is laden with tensions, social prejudices and economic anxieties in contemporary India. Broadly understood, the term is a short hand for the governmental policy of reservation of seats in jobs and institutions of higher education in government run institutions for India's historically marginalized and oppressed lower caste groups. However, reservation has immense political charge and is one of the most contentious terms in Indian political life. Whereas lower caste

groups see reservation as the first term in correcting a long historical injustice, upper caste groups see it as an attempt to deprive them of economic opportunities which they feel entitled to. Economic anxieties, caste discriminations, political and social rights coagulate around this term. Not only that, the term 'reserved' is often used as a caste slur in contemporary India. Upper caste groups have also demanded extensive reservations for themselves. The significance of reservation cannot be grasped merely by carrying out a historical or etymological analysis but one would need to understand how it acts in social life, its performative dimensions, the work it does and the anxieties that it provokes. Therefore, the concept of reservation has both an intellectual weight as well as a social life, it has both linguistic and pragmatic capacities and abilities. My point is that the rich conceptual world of the postcolonial state cannot be reduced to the question of inheritance. Rather a thorough and attentive focus on some of these concepts would help us understand some of the specificities of contemporary politics in India, but also how they remain entwined in emerging global concerns. I am interested in those concepts often rooted in the English language, though not always, which seemingly have come to acquire immense resonance in India- those concepts which since the withdrawal of colonial rule have come to capture the imagination of the people and have specific roots in the postcolonial condition.

I understand these concepts to be sites of entanglements- they bear histories and logics- they are the product of intellectual labor and also have performative dimensions. Histories, anxieties, affects, institutions and contingencies remain embedded in them. My task as an anthropologist would therefore be to slowly disentangle these knots and see the underlying presumptions that have made these concepts possible in the first place. How they emerge and how they slowly congealed into a unit of thought and practice and how they have persisted in the world. What are the underlying powers that make such concepts thinkable in the first place and what makes them persistent?

I take Adi Ophir's intervention to be crucial in understanding the significance of concepts and how to approach them. Concepts are often thought of epistemic or mental units. Ophir urges his readers to think beyond the mentalist notion of concept. They are not merely a unit of thought where we first pursue what a concept means, historically or etymologically. Rather, he argues that concepts have performative dimensions. Investigation of concepts 'begins with the appearance of concepts, rather than with the mental capacity to conceptualize, which we tend to attribute to people based on their ability to identify, recognize, or correctly use a certain term' (2018: 63). Concept and conceptualization therefore according to Ophir appear in a discursive field and in relation to other objects, it is always part of a language game- '(c)oncepts properly appear when one tries to explain, to present, and to express the essence of what the concept refers to' (61). The very act of conceptualization according to Ophir is central to the emergence of a concept and what he refers to as its performative dimension. It is a performance made possible within a discursive field and in relation to the questions that have been posed. Thus, there is a story to be told in the emergence of concepts, in their conceptualization and authorization. I will return to this point in the methods section.

III. Situating Right to Life

The young leader of the Communist Party of India, Kanhaiya Kumar in a recent public meeting in August 2019 stated that the only authority that he was willing to submit to was the authority of the Indian constitution because it was the only document that truly preserved and represented the diversity of Indians. Kumar made his assertion at a time when this supposed diversity was especially under threat from the policies of the right wing hindu nationalist BJP which won two consecutive national elections in 2014 and again in 2019 by huge majorities. Though the statement does not seem to be out of place in the current discourse in India, it is still an interesting observation coming

from the member of the communist party. This is because historically the communists in India have rejected the constitution as being a bourgeois document, one which seeks to preserve bourgeois rule and the structures of power that supports it. But in the long seventy year history of the constitution the communists have come round to upholding its authority. But they are not the only critical group which had had an about face on this subject. A similar thing can be said about the fascist hindu nationalist organization, the BJP which currently controls the government with overwhelming majorities at the center. The PM Prime Minister Narendra Modi has repeatedly vowed to uphold the constitution at all costs and as a source of authority. This again is a significant turnaround for the hindu nationalists who had historically claimed opposition to India's secular constitution. The current supposed consensus about the constitution is at odds with the opinion about the constitution in say the 1970s when the ruling party and Congress and the opposition Jay Prakash Narayan were keen on framing a new constitution, though for different reasons. These claims obviously do not suggest that the egalitarian vision of the constitution has in any ways materialized in contemporary India neither does it deny the fact that the supposed custodians of the document have been more than eager to abuse its fundamental tenets. It nonetheless shows that the much abused document has acquired a semblance of legitimacy in contemporary India that was not known in the earlier periods. Whereas Nehru saw the document as a tentative document whose full potential was only conditional, Ambedkar in his later life disavowed the document and Indira Gandhi was always ready to amend it, the fate of the constitution in contemporary India seems a bit more secure at least in the language games of contemporary Indian politics rather than in its substance.

The constitution came into force in 1950 and was the product of an almost four year exercise by which a constituent assembly drafted the document (Austin 1999b, Chaube 1971). It envisioned a

state with a strong centralized government which would share some powers with the states.[5] It was the realization of the modernist vision that many in the nationalist movement had aspired to. Gandhi had been opposed to such a centralized state and urged the formation of a village society with no centralization of authority. But both Ambedkar and Nehru ridiculed such an idea as utterly regressive (Austin 1999a). Support for the Gandhian vision was thin and India through its constitution pursued the path of what was supposed to be the path of the classical liberal state based on the Anglo-American model (Parekh 2001). The constitution drew heavily on the American constitution as well as other European constitutions.[6] The new Indian state nonetheless, was heavily dependent, schematically on the colonial state and this was well reflected in the extensive reproduction of the Government of India Act of 1935.[7] The office of the President was largely modeled on the position of the Viceroy, though with much diminished powers. The Indian Parliament was also modelled on the British Parliament and the style of government was broadly drawn on the Westminster model. The most notorious similarity between the two was in the emergency provisions of the colonial state which was extensively reproduced in the Indian constitution. The Indian constitution has extensive provisions giving the state elaborate powers to impose the state of emergency across India and this has been abused extensively (Singh 2007).

But what makes the Constitution different from the colonial era? The major difference between that the colonial state was the grounding and authorizing basis of the constitution and the introduction of two parts in the constitution which laid down the fundamental rights and a charter for governmental action. The preamble of the constitution categorically stated that the authority of the

[5] India is often described as a quasi-federal system meaning a stronger central government but a clear jurisdiction for states as well.
[6] The most obvious imprint of the American constitution in the Indian one is in the preamble. The Indian preamble heavily leans on the American one. The division between the Fundamental Rights and the Directive Principles is drawn on from the Irish constitution. (*see* Chapter I).
[7] For other sources of the Indian constitution *see* De 2016.

constitution was derived from the Indian people- the people had given the constitution to themselves. The other point of distinction was the introduction of set of rights, rights which had long been demanded for by the nationalist movement and which had been denied. The section on fundamental rights elaborated a long list of rights for Indians. This included the freedom of speech, freedom of movement and association among others (Article 19). The section also includes elaborate right to religion. Under Ambedkar's stewardship caste violence especially the scourge of untouchability was explicitly recognized as a criminal offence (Article 17). The right to property has been a highly contentious matter in Indian constitutionalism from the very drafting of the document and today no such right is recognized explicitly. Though the constitution has laid down these rights, they also remain extremely restrictive. All of these rights could be subject to 'reasonable restrictions' like the sovereignty and integrity of India, security of the state, public order and decency. In a memorable quip in the constituent assembly, Somnath Lahiri noted that the rights of the constitution were really laid down from the standpoint of the police constable.[8]

It is here in the part on Fundamental Rights that Article 21 is situated and right to life is derived from this article of the Indian Constitution. The article itself, as I noted previously does not mention the right to life, rather it argues that no one's life would be deprived by the state except under the condition that it is done through the procedure established by law. The Constitution does not frame a right to life. Nowhere else in the Constitution is it mentioned that Indian citizens have a right to life. Thus, in spite of its express absence in the original text of the Indian Constitution, Indian jurisprudence, law making and the general thinking about rights in India is overwhelmingly dependent on this idea of right to life. It emerged in the aftermath of one of the most consequential

[8] The standpoint of the constable is best demonstrated in Article 22 of the constitution which empowers the state with the powers of preventive detention. This power has been widely abused and one of the reasons for the staggering proliferation of exceptional laws in India.

events of postcolonial India the emergency of 1975-77. But before going into that I want to provide a brief overview on the major conflicts around the constitution in India prior to the rise of right to life.

The history of Indian constitutionalism till the emergence of right to life can be divided into three phases.

In the first phase spanning the prime ministership of Jawaharlal Nehru, the main contention was over the right to property. In the constituent assembly meetings, there was extensive disagreements over whether such a right should be granted or not. The main players in the debates, especially Jawaharlal Nehru, the Prime Minister and Sardar Patel the Home Minister seemed to have diverging views on the matter. It was clear that the state would have to play a centralized and authoritative role in the development of India, reduce poverty and to move the economy. But in that case having an absolute right to poverty would be a serious impediment. On top of that one of scourges of colonial India was the *zamindari* system, the exploitative system of rent extraction by big landowners in rural India which wrecked the lives of the poor in India (Guha 1963). The system was propped by the British and despised by the nationalists (Chatterjee 1984). There was a uniform consensus that the *zamindari* should be abolished which would be hard to achieve if property rights were granted (Austin 1999b). But at the same time India was a deeply poor country and in spite of the primacy of the state it was widely acknowledged that India would require domestic and global capital in its pursuit for economic development which by no means could be mobilized without a semblance of protection for property. The constitution made a compromise granting some right to property, allowing the state to appropriate it under select circumstances and at the same time limiting the role of the courts in deciding over the matter. But within a year of the promulgation the high courts in the states passed at least three critical judgements which undermined the capacity of the state in

acquiring such property.[9] This prompted Nehru and the parliament in 1951 to pass the First Amendment Act which principally sought to protect the land reform bills passed in the various state legislatures protecting them from the scrutiny of the judiciary (Menon 2001). But that intervention did not resolve the problems as state action continued to be challenged and the central government continued to pass amendments to fend off these challenges.[10]

In the second phase of constitutional antagonism spanning the reign of Indira Gandhi till the declaration of Emergency in 1975, saw a more protracted attempt to change and undermine the constitution, an aggravation of the conflicts between the courts and the state, a greater concentration in the hands of the Prime Minister and ultimately the suspension of the constitution itself. The question of property remained a crucial link between the two phases as the new Prime Minister sought to more aggressively carry out economic reform agenda. But early in her tenure in 1968 the Supreme Court declared that right to property was a fundamental right. It also added that the amending powers of the Parliament were limited and that it could not alter the character of the Fundamental Rights through amendments.[11] Indira Gandhi was not keen on subjugating her agenda to the pronouncements of the Supreme Court and entered a phase of open confrontation with the judiciary. She was firm that the right to property held no sanctity given India's poverty and underdevelopment and she was far more aggressive than her father in pursuing this agenda.[12] In line with her agenda dramatic move in 1971 Indira Gandhi decided to nationalize all banks in India. In her tenure from 1968-77 Indira Gandhi had amended the constitution a number of times which included the undermining of the Fundamental Rights, increasing the powers of the parliament and

[9] *Bela Chatterjee vs Union of India.*
[10] Within a few years' time the Parliament again passed the Fourth Amendment to the constitution (Austin 1999b).
[11] *I. C. Golaknath vs. Union of India*
[12] The 1971 election manifesto of the Congress Party not only reemphasized its socialist commitments but also made clear that the Congress would prioritize Directive Principles over Fundamental Rights. The manifesto also declared that the judges of the Supreme Court were the members of the elite who sought to impede the task of social revolution. *See* Chapter I.

limiting the jurisdiction of the Supreme Court. The Indian Supreme Court repeatedly sought to undermine these amendments but it was bound both by the Constitution and Gandhi's populist mandate.[13] Finally, in 1975 when the Allahabad High Court declared her election in the previous general election void, Indira Gandhi infamously declared a state of emergency. This declaration was a culmination of her struggles with the judiciary. Unsurprisingly one of the crucial moves made by Gandhi in this period was her attempt to amend the constitution through the forty-second amendment act, abrogating the fundamental rights and expanding the powers of the state. The Supreme Court unfortunately upheld the emergency declaration despite the widespread abuses of power by Indira Gandhi's regime. In 1977 Indira Gandhi decided to call for an election and in an unexpected turnaround lost the election by a significant margin, bringing to an end the era of arbitrary constitutional amendments.

In the aftermath of the Emergency the Supreme Court, in the third phase, asserted its power in a time when the authority of the central government had been greatly undermined and judges were willing to address the abuses of the Emergency. Right to life as an authorizing claim emerges in India in the aftermath of India's infamous Emergency from 1975-77. In conventional historiography this emergence of right to life is read usually read as a moment of course correction, a time when the Supreme Court of India in the aftermath of the subversive impact of the Emergency sought to restore Indian democracy in its proper glory especially by limiting the powers of the state, as well as expanding the rights of the Indian citizens.[14] The Supreme Court in this account plays a heroic role in the restoration of the rights of Indian citizens.[15] Not only did the Supreme Court of India play a crucial role in this account it was precisely through the invocation of right to life that the courts

[13] *I. C. Golaknath vs Union of India*
[14] The emergency has received very little academic attention so far. A few exceptions include. For a recent authoritative account of the event see Prakash 2019.
[15] Baxi 1985 provides a sentimental account of this phenomenon with the rise of the Public Interest Litigation.

significantly expanded their powers. The Supreme Court of India today is recognized as one of the most powerful constitutional courts in India.[16] The rise of right to life in India occurs with the emergence of a very specific jurisprudence- the Public Interest Litigation. The premise of this jurisprudential technique was simple. The judges of the Supreme Court argued that the Indian citizens have always had a hard time in accessing the constitutional courts because of procedural strictures. The court therefore would dilute those processes and ease access to the courts much easier. Journalists, independent lawyers, academics bypassed the political process to bring a large number of matters in front of the courts. With this dilution the court saw an influx of petitions from multiple sources seeking the intervention of the court on substantive issues. It was in this period of time that the Supreme Court and other state High Courts significantly increased the use of right to life to give a wide array of rights to individuals. The substantive content of the PIL jurisdiction came from an expansive interpretation of the provisions of Article 21.

Article 21 has two clear components- *life* and *personal liberty* on the one hand and *procedure established by law* on the other. The article clearly is derived from the fifth amendment of the American Constitution and the major debates on the constitution have centered on this particular Article of the Constitution. Let me provide a brief account of the two different components.

Procedure established by Law: This term has been derived from the fifth amendment of the US Constitution though the US Constitution does not use this term. The fifth-amendment uses the term *due process of law*.[17] What is the difference and why was this article framed particularly differently than

[16] The rise of the Supreme Court in India has also left its mark in the south asian neighborhood. PIL has emerged as an extremely powerful organization in Pakistan. In Bangladesh as well recently, attempts were made by the constitutional courts to increase its own powers though they have less successful than in India or in Pakistan.

[17] Fifth amendment of the US Constitution says the following:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

from the fifth amendment of the US Constitution? The debate in the constituent assembly over this term primarily had to do with the question of the role that the judiciary and more specifically the constitutional courts were going to play in the new republic. The framers were wary that the judiciary manned largely by the colonial era judges would be conservative and not conform to the vision of the new constitution. Thus the term *procedure established by law* was meant to communicate that the Indian constitutional courts would not have the powers of the American Supreme Court, but that their powers were much constrained. This principally entailed that the Supreme Court was bound to assess the constitutionality of a particular piece of legislation merely on its procedural merits which is to say whether a particular law made by the parliament had been framed following proper procedure. That would be the extent of their powers. They did not have the powers to decide whether a particular piece of legislation contravened the principles of natural justice or other constitutional provisions. This was precisely the position that had been upheld by the court till about the late 1970s. By and large the courts conformed to the position of parliamentary supremacy especially regarding laws related to civil liberties. As early as the 1950s the Supreme Court laid down that the *procedure established by law* implied only an assessment of the fulfilment of the procedural merits of law making and assessing the substantive question of natural justice remained well beyond the purview of the court.[18]

This position was altered in the post emergency era when the Supreme Court laid down that no longer would the court be limited by such interpretative restrictions and would focus on the substantive aspects of the law as well, meaning they would now assess whether a particular law passed by the legislature was *just* or not. This was justified primarily in lieu of the experiences of the

deprived of life, liberty, or property, without *due process of law*; nor shall private property be taken for public use, without just compensation (emphasis mine).

[18] A. K. Gopalan Vs State of Madras

arbitrary actions of the government during the Emergency. Thus the principle of procedure established by law was now read to encompass the powers to interrogate the constitutional merits of law beyond its procedural proprieties. Though the role of the Supreme Court in the post emergency era has been widely commended, it has also created its fair share of confusions and arbitrariness. For one the courts have argued that they would uphold the basic structure of the constitution, meaning the legislature would no longer be allowed to make any amendments to the constitution which violates its basic structures. But it is an open question as to what that term implies. Critics have pointed out that instead of leading to a more consistent principles the arbitrariness of the government has been replaced by the arbitrariness of the judges (Mehta: 2005)

The expansion of right to life as a powerful conception cannot be detached from the fact that this has happened simultaneously with the rise of judicial authority in India. And the way judicial authority rose was in the post-emergency. But one of the questions that has often remained unaddressed was how could the judiciary exercise such elaborate authority at this particular juncture? Though this is often seen as a new jurisprudence, I will argue in chapter one that this was principally a reconstitution of one of the fundamental principles of Indian constitutionalism. This brings me to the second aspect of the constitution the right to life.

Right to Life: Like the attempt made by the court to read procedure established by law to mean an expansive judicial review principle for itself, the court in the post-emergency era read the phrase 'deprived of his life' as indicating a right to life.[19] Right to life emerges in post- Emergency India primarily as an attempt to rein in the state, but more importantly in the context of an emerging judicial tool the Public Interest Litigation. If procedurally PIL allowed the courts to make access to the courts much easier, the principle on which it expanded the rights of Indians was the right to life.

[19] One of the earliest cases in which the Supreme Court invoked the right to life was *Kharak Singh vs The State of U.P.* 1962 which dealt with the question of privacy.

In one of the earlier cases from this era the problem of life was posed in the following manner. The court derived the meaning of life from the American case *Munn vs Illinois*:

> 'By the term 'life' as here use something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg…'

Life in this conception is meant to communicate both the integrity of the body as well as the inviolability of the principle of life. This was especially important since the Emergency saw a massive violation of the bodily rights of Indians through coercive family planning programs. But as the quote notes, life is not meant to be some form of an animal existence. Life here also emphasizes on the very quality of life. Life in this usage did not merely mean biological life- but something more. But this excess has rarely yielded any clarity or generated any underlying principle. A variety of rights in the PIL era have been recognized as a fundamental rights, but their exact content or the principle driving it has remained vague (Surendranath 2016). This has often become an exercise in judicial discretion rather than a clear legal principle.

One of the crucial areas which saw a significant expansion was in the realm of social rights. Right to life has been interpreted to include the right of 'food, clothing, decent environment and reasonable accommodation to live in'[20]. In *Sant Ram* the court had clearly argued that 'life' in article 21 did not in anyways entail livelihood in the Indian Constitution. However, this view was altered in the *Olga Tellis* a case involving pavement dwellers in the city of Bombay (presently Mumbai) who approached the Supreme Court to stop their eviction by the Municipality Corporation. The Supreme Court concluded that depriving the street dwellers from their place of dwelling would deprive them of a

[20] Shanti Builders v. Narayana Khimalal Totame 1990.

chance at livelihood and the latter was guaranteed by Article 21of the Indian Constitution.[21] Through *Mohini Jain* and *Unni Krishnan* the Supreme Court first expanded the right to education as a fundamental right and then concluded that every child till the age of fourteen had the right to a free education. In 2009 the Indian Parliament passed the right to education act which introduced Article 21 A in the constitution which guaranteed the fundamental right to education as a fundamental right (Surendranath 2016: 769). Similarly in 2001 the Supreme Court declared that the right to food was an integral part of the right to life. A law along similar lines was passed by the Indian Parliament in 2013 (771).

Another area progressive impact was in the realm of prisoner's rights. Supreme Court has upheld the right to a free and fair trial as a key component of Article 21. This also includes the right to a speedy trial.[22] The courts also decided that every prisoner has the right to a lawyer and it was the judges responsibility to make prisoners aware of their rights. Similarly, handcuffing individuals has been held to be violation of their constitutional rights derived from article 21.

The proliferation of right to life and the jurisprudence has also led to the usage of several concepts which have gained significant importance. This was most clearly seen in the realm of environmental jurisprudence.[23] One critical concept was the notion of dignity. Dignity has been a key component of legal thinking on rights law. In the PIL era of Indian law there has been a growing jurisprudence around the idea of dignity. In *Francis Mullin vs Union of India* (1981), the court noted the following:

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[21] The Supreme Court in subsequent years has taken far harsher view of the rights of the slum dwellers in India. This was best instantiated in the difficulties they have faced in Delhi in the name of restricting pollution. Massive number of people have been displaced over the years in the name of protecting Delhi's environment. The majority of these have been the poor. *See* Bhan, Ghertner, Bhuwania.

[22] In Hussainara Khatoon vs Home Secretary, State of Bihar AIR 1979 SC 1360 the Supreme Court noted,

> 'No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial and by speedy trial we mean reasonable expeditious trial, is an integral and essential part of the Fundamental Right to life and liberty enshrined in Art. 21.'

[23] *See* Chapter III

> 'We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adeqaute nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellows human beings.'

Dignity since has become a crucial concept for the authorization of judgements by the Indian state. Dignity was crucial in the removal of section 377 from the courts as well as the facts. In both the decriminalization of homosexuality case and the upholding of the biometric laws, it was right to life as dignity which was the guiding principle. My intention has been to capture two things here. On the one hand the extensive use of right to life as a grounds of legitimation for multiple cases in India by the Supreme Court of India and on the other hand, in most of these instances through the eighties and the nineties the matters raised had to deal with the problem of poverty and suffering. This was the constitutive core through which much of these cases were deliberated over.

The Comaroffs (2006) have noted that one of the characteristic features of politics in the global south especially in the age of neoliberalism has been the rise of the courts as crucial deliberative institutions. As less and less, substantive questions can be settled by the political processes, people are increasingly turning to the courts as the last resort in trying to find a settlement to crucial socio-economic and political questions. The rise of judicial supremacy has been a global phenomenon and India has been a pioneer in his regard. In contemporary India hardly any issue escapes the scrutiny of the higher courts. While all of these things have been extensively commented upon, what has surprisingly received relatively less attention has been the conceptual basis of this expansion powers of the courts. Ideas like suffering, dignity form the crux of this jurisprudence in contemporary India- but they all eventually tie back to the idea of right to life. It is precisely this concept that is of object of interrogation in this dissertation.

IV. Approaches to the Constitution of India

In India the scholarship around the constitution is still at a nascent stage. Histories of the text are few and far between (Chaube, 1979, Austin 1999b, De 2018) and substantive analysis of constitutional questions are an emerging field to say the least (Mehta et. al. 2015, Thiruvengadam 2016, Khosla 2015).[24] Compared to the United States, India does not have a rich tradition of legal thought and theory, neither are there specific schools of thought when it comes to constitutional interpretation (Mehta 2006). There is no vivid distinction between conservative or liberal constitutional positions in India or any explicit ideological divide, this in spite of the fact how crucial courts have become in Indian socio-political life. Though there has been greater emphasis on improving the quality of legal education in India, the field of constitutional argumentation remains primarily a lawyerly concern. Not long ago a legal scholar described the Indian legal profession as nothing more than people bickering over legal minutiae.

In spite of the relative poverty of legal constitutional thought, the social scientific approach to the problem of constitutionalism in India can be divided into two broad approaches. The first can be described as the normative-pragmatic approach to the Constitution and the second approach may be called the thesis of insignificance. The first approach primarily focuses on the substantive content of the Constitution, the various principles enshrined in it and contestations over them. These studies interrogate whether the different institutions have succeeded or failed in upholding the vision of the Constitution and what might be the ways in which the supposedly constitutional vision can be brought forth in India. This approach sees the Constitution as an authoritative document to guide

[24] Legal anthropological scholarship in India has broadly bypassed the question of constitution, they are more focused on the question of the everyday. For recent anthropological accounts *see* Basu 2015, Jauregui 2016 Baxi 2019, Ghosh 2019, Suresh 2019, Das 2011, 2019.

sociopolitical life in India. It also insists on seeing constitutional politics as a critical locus to understand politics in India.

The editors of the recently published The Oxford Handbook to the Constitution of India argue that the document was a culmination of the modernist impulses of the nationalist movement. But still it is not a merely local document, limited to the specificities of the Indian condition, but is deeply situated in the arc of global conversations on constitutionalism. They argue that through the Constitution, the Indian state was seeking to find 'a way to resolve major substantive debates and disputes over norms and values. What this foundational document offered was a morality that transcended positions and disagreements on particular issues; indeed, its strength was that it gave a framework for having a common institutional life despite disagreements' (2016: 2). This *constitutional morality* was a critical aspect of the new constitution and was famously espoused by Ambedkar in his famous speech in the Constituent Assembly. It was a set practices which sought to eschew revolutionary violence. Rather it provided a framework for 'self-constraint.' The latter was not a conservative principle but provided a roadmap for effective change and social transformation (4). The Constitution drawing on a multiplicity of traditions, sets a distinctive path for constitutionalism in India- a path that sought to prevent any singular entity from claiming to be the unique representative of the sovereign will of the people, but rather espouses to a plurality more deeply. The Constitution was providing a coherence for a nation of immense diversity and difference.

Along similar lines Rajeev Bhargava (2008) in another edited volume on the constitution has argued that India's Constitution has provided for the conceptual framework for the contestation of different groups and claims. It provided a framework for people to not only live together but to also bring about profound social change. The Constitution provided a vision to break down the chains of injustice that seemed to have enslaved so many in India and to bring about a progressive era of

freedom, democracy and independence. The Constitution, Bhargava sees as the natural consequence of Indian nationalism and its pursuit of modernity. As the idea of the nation as a collective of equal individuals emerged through Indian nationalism, where the notion of the Indian citizen was based not on ascriptive social hierarchies but on equivalence a nation slowly came into being. The constitution then is an expression of those which recognizes citizens as having equal rights. The constitution gives expression to some of the contentious questions of the tussle between group and individual identities, as well as the tussle between caste groups. But it provides an authoritative framework within which these claims and counterclaims could be made.

Among recent works which looks beyond the normative scope of the document and focuses on the social aspects, how it impacted the everyday lives of common citizens, the most critical intervention in this regard has been made by Rohit De (2018). Rohit De seeks out to demystify the supposedly elitist biases of the document and show that document made a significant mark in the lives of the poor and the needy. Through his research in the archives of the Indian Supreme Court, he brings the point of contact between the common Indians and the Constitution into light and shows how social life in India was transformed by the Constitution of India. Whereas the colonial state never granted Indians any substantive and formal rights, the new Constitution had a full part devoted to fundamental rights. Not only that, the Constitution also granted them a set of remedies as rights allowing them to now approach the court to seek action from the court against state intrusions. Thus, street vendors, prostitutes, college professors and other commoners from across India approached the court to enforce their rights. The locus of De's thesis is on the emerging culture of writ petition in early independent India and how it shaped economic life in India. De's principle contention was that the Constitution of India mattered to ordinary people of India and had a substantive role to play in the rise of the litigious state. Through a detailed history of constitutional litigation in the early years of the Indian Republic, De shows how people from often the weaker

sections of society approached the courts to seek interventions and secure their rights against an appropriating state, thus showing that beyond the normative, aspirational dimensions, the Constitution had a real impact on the lives of people in India.

Within this set of scholarship, there are others who see the promise and future of the document more skeptically. Pratap Bhanu Mehta (2005) has been more circumspect about the Constitution arguing that its custodians have more often than failed to uphold constitutional principles faithfully and consistently and have more often than not proliferated arbitrariness and vacuous constitutional principles which have only exacerbated confusions rather than create the basis for an ordered constitutional systems.[25] Mehta holds both the constitutional courts as well as parliament as being responsible for this. Whereas the courts have failed to develop consistent principles for determining questions of judicial reviews, Indian parliament has been more than keen on using temporary and transient majorities to make changes to the Constitution often ignoring basic constitutional principles. Mehta's basic contention has been that he preservation of the Indian constitutional order would require a notion of constitutionalism that seeks to preserve the popular sovereignty of the Indian people. He sees Constitutions not as being subject to whims of the transient majorities but a founding document establishing the sovereignty of the people and securing their freedoms and liberties. Thus, when amending the Constitution or when reviewing a constitutional amendments with the intent of preserving the democratic sovereignty of the people of India. One of the contentions in postcolonial politics has been the question- who is the custodian of the Constitution? Though the Supreme Court of India has assumed the authority in this regard, that authority has been made possible primarily because of the coalitional politics since the early nineties.

The Thesis of irrelevance

[25] Mehta here is particularly critical of the Basic structure doctrine. *See* also. Mate 2010.

The second potion on the Indian Constitution broadly sees the Constitution as nothing more than a product of bourgeois consensus which offers very little or nothing for the people of India. It is a realm of abstraction and derivation of European principles which finds very little resonance with the lived realities of the people of India. Partha Chatterjee has argued that ideas of law and constitutionalism are simply too marginal to the lived realities of the Indian people. The conditions of Indian politics are not subservient to the conditions of law and the constitution of India does not reflect the really real of Indian politics. According to Chatterjee the real politics in India lies with what he calls the political society. This is the category that he develops in contravention to the idea of civil society. Civil society conforms to the idea of the formal politics in lieu with the ideas of western political thought. Politics in the majority of the world is not conceived along those lines. Rather they spill over the lines of formal politics as conceived in the nations of the third world- this is the politics of the most of the world.

> 'Most of the inhabitants of India are only tenuously, and even then ambiguously and contextually, rights bearing citizens in the sense imagined by the constitution. They are not, therefore, proper member of civil society and are not regarded as such by the institutions of the state. But it is not as though they are outside the reach of the state or even excluded from the domain of politics. As populations within the territorial jurisdiction of the state, they have to be both looked after and controlled by various governmental agencies. These activities bring these populations into a certain political relationship with the state. But this relationship does not always conform to what is envisaged in the constitutional depiction of the relation between the state and members of civil society. Yet these are without doubt political relations that may have acquired, in specific historically defined contexts, a widely recognized systematic character, and perhaps even certain conventionally recognized ethical norms, even if subject to varying degrees of contestation.'

Chatterjee in this characterization makes in clear that the relation that state sets up between the state and the people is ostentatiously false. This is because the constitution sets up a normative order which is derived liberal constitutional principles, European/colonial in origin and thus distant from the realities of the Indian para-citizens. Thus, Chatterjee draws a clear line on the one hand the legal institutional politics of civil societies which are bound by legalistic concerns of rights at the heart of which lies the idea of the individualized citizen. On the other hand lies the *political society* which is not centered on the idea of the citizen but rather on the idea of governmental population. In these realms what is important is not the proprieties and legalities of the civil society but the often extra-legal functions of the political society.

> 'Many of these groups, organised into associations, transgress the strict lines of legality in struggling to live and work. They may live in illegal squatter settlements, make illegal use of water or electricity, travel without tickets in public transportation. In dealing with them, the authorities cannot treat them on the same footing as other civic associations following more legitimate social pursuits. Yet state agencies and nongovernmental organisations cannot ignore them either, since they are among thousands of similar associations representing group of population whose very livelihood involve violation of the law. These agencies therefore deal with these associations not as bodies of citizens but as convenient instruments for the administration of welfare to marginal and underprivileged groups.'

Chatterjee regards that the conception of civil society is restricted only to a small section of the Indian population and civil society and constitutionalism represents the high water mark of modernity which leaves out a vast majority of Indians from their resources. I am broadly in agreement with Chatterjee's characterizations. I do agree that many of the popular movements in India often fall outside the boundaries of conventionally understood boundaries of modernist

politics and much of it is about breaking the law. But why precisely is this the case? One answer lies in the fact that the Indian state driven by and large by the politics of governmentality as described by Michel Foucault.

These approaches however raise a set of problems. As far as the normative pragmatic position of Indian constitutionalism, there is a methodological problem. The starting of these analysis is primarily from the propositional content of the constitution- meaning they start from what the constitution says. In doing so often curious questions about the very structure or the conceptual basis of the constitution gets elided. For example, both Mehta and Bhargava seem to be arguing that the Indian Constitution represented the will of the Indian people or at least that it was based on a form of popular sovereignty. Now for any form of popular sovereignty, a conception of the people is inherently important. But the people are not already pre-given, neither the manner in which their supposed will could be constituted. As a matter of fact as we will see, the manner in which the people were constituted in the Indian Constitution has been one of the persistent problems in India and is one of the reasons why the courts have come to play such a crucial role in the socio-political life in the country. Take for example another instance, the introduction of the two chapters in the Constitution of India which made it distinct from the Government of India Act of 1935. One was the part on Fundamental Rights and the other on the Directive Principles of State Policy. Hundreds of books and articles have been written on the two. What is fundamental rights, what are their limits? Similar questions have been raised about the Directive Principles. But here is the question that has never been explored- why at all did the framers of the Indian Constitution feel the need to make a distinction between the two realms? Why could they not have just the fundamental rights, especially since the Directive Principle were initially conceived as to be beyond the realm of the judiciary? Besides keeping the postcolonial perspective in mind one could very well ask that if the

Indian constitution heavily relied on constitutions of the Euro-American world, then is Indian constitutionalism merely derivative?

Similarly, Chatterjee's critique is also well taken. However, one can easily agree that for India's poor the judicial system has emerged as a crucial resource for seeking redressal for their conditions. India's marginalized whether it be tribals, labor organizations, women's group have repeatedly appealed to the courts for justice. No other sub-group has as emphatically embodied and invoked the promise of the constitution as India's most vulnerable sub-group the Dalits, who have lionized Ambedkar and the constitution as an icon of liberation. Besides the Comaroffs' assertion about the growing judicialization of politics under the neoliberal condition in the polities of the global south seems to be quite emphatically true for the Indian condition. Around ten years a group of tribals in the Indian state of Chhattisgarh, the Dongria Kondh approached the Supreme Court to stop a global mining conglomerate from destroying their native homeland. Similarly, much of the disputes around land acquisition in the late 2000s eventually reached the doors of the High Courts and the Supreme Court. Thus, it would be hard to argue in favor of the complete dismissal of the legal constitutional concerns in India. It also raises the question as to the conditions of possibility for the emergence of the politics of the political society in postcolonial India. If Chatterjee sees distinctive continuities between the colonial and postcolonial conditions and also argues that the political society is a distinctive feature of postcolonial conditions, then at least there needs to be an explanation for the reasons of this distinction.

What kind of a problem is constitutionalism and how to approach it in the postcolonial condition? Focusing on the propositional content of a constitution, though useful, creates the tendency to focus on the divergences and convergences of Indian constitutionalism with some abstract idea usually rooted in Anglo-American normativity. It often fails to explain why a concept like right to

life emerges as such a central proposition in Indian law with almost no parallel in any other jurisprudential system. Why did liberty never acquire the kind of centrality in Indian jurisprudence like the right to life did, in spite the fact that article 21 talks about both life and liberty? Similarly, the dismissal of the constitution as a marginal concern, presumes that all there is to the constitution is a mimicking of European ideas, an abstraction simply detached from the everyday realities of Indian life. Again, in India it is the marginalized groups that have most effectively mobilized the constitution for the protection of their rights and have been often looked at the constitutional courts for the redressal of their grievances. The question remains, ethnographically and historically how to approach the problem of constitutionalism in India and how to study a particular concept derived from it?

V. Methods:

As far as the question of constitutionalism is concerned this project seeks to shift its focus beyond the propositional content of the constitution. Instead I focus on the questions which the constitution sought to answer. The conceptual innovations in the constitution, the points of emphasis, even the length of the constitution were all informed by certain problems, they were answers to certain questions which the members of the constituent assembly were grappling with, and those answers were embedded in the constitution giving it its conceptual distinction. Focusing on the questions which stoked the framing of the constitution will enable us to understand the emerging question answer field at the moment of independence and how the dynamics of that field has changed or persisted over the years of the republic. Methodologically this approach is derived from the idea of the problem space as proposed by David Scott. A problem space Scott says is an,

> an ensemble of questions and answers around which a horizon of identifiable stakes (conceptual as well as ideological-political stakes) hangs. That is to say, what defines this

> discursive context are not only the particular problems that get posed as problems as such (the problem of "race," say), but the particular questions that seem worth asking and the kinds of answers that seem worth having. Notice, then, that a problem-space is very much a context of dispute, a context of rival views, a context, if you like, of knowledge and power. But from within a problem-space what is in dispute, what the argument is effectively about, is not in itself being argued over.

Scott's intervention draws on the English philosopher R. G. Collingwood who had claimed that a philosophical interrogation of a particular idea should not be limited to interrogating the proposition itself. Rather it was necessary to understand that all such propositions were answers to particular questions. Thus, methodologically one ought to figure out what was the question to which this proposition was an answer and interrogate the question answer field.

Scott proposed this in his discussion of the limits of postcolonial criticism which was satisfied with showing the contingencies or essentialism of certain Western ideas. Such criticisms were focused broadly on the propositional content of certain theoretical ideas. But this approach did not put emphasis on the question to which this was an answer to. Thus, the Scott argued that the thrust of postcolonial criticism needs to shift from focusing on critiquing certain theoretical premises to actually understand the question-answer field in which they were situated.

I think the departure of the colonial rule in India marked a new situation for the Indian state. In these circumstances, though certain institutional mechanism persisted, codes of law were reproduced and implemented, all of them nonetheless were addressing a different set of questions. The single most important work that the Indian Constitution did was that it inaugurated a new field of argumentation- a set of questions which were put at the heart of the practice of politics and the state only because colonialism had formally ended and because Indians could now have self-government.

It was a new field of argumentation where certain questions and problems which had been deferred due to India's colonial condition and till India attained sovereignty, took the center stage, questions which framed the larger discursive field of politics in India. The postcolonial condition marked a new situation- a situation almost unparalleled in the postcolonial world. These questions were unique to the Indian condition, a country emerging from two hundred years of colonialism and seeking to establish a modernist developmentalist state and a society fraught with poverty, communalism and caste-based violence.

The single most significant problem that stared at Indians evidently at the end of colonialism was the problem of *mass destitution*. Indians were so overwhelmingly poor that the political order to succeed could not focus on the questions of liberty or freedom, rather the future of the republic depended on the ability of the Indian state to put an end to condition of poverty. Only a few years prior to independence Bengal had seen the most devastating famine which saw the death of millions of Indians due to hunger and extreme poverty remained the condition for staggering number of Indians. This moment marked a strange paradox. India had become free, the colonizers had left and Indians had chosen the path of democracy as the mode of self-governance. The Indian constitution claimed that the authority of the document was derived from the people of the country, but the Indian people were in a state of debilitating incapacity. This fundamental paradox has been rooted in the constitution and much of the procedural conceptual innovations that the constitution sought to bring in were actually rooted in this problem.

If we are going to study constitutionalism through the problem space, how should the concept of right to life be studied? Right to life following Reinhart Koselleck can be called a 'basic historical concept' meaning concepts which through the range of their meanings and application, 'make it possible to analyze historical structures and major complexes of events' (2006: 7-8). In the preface

to his mammoth lexicon of German concepts, argues that the 'diversity of historical experience- past and present- has been captured by concepts in different languages and in their translations' (7). The central problematic that guided Koselleck's project extended from 1700 to 1950s. Limited to the German speaking European world, Koselleck argued that this was the period when the Germanic world underwent radical social and political changes moving from the premodern to the modern age. This was a time of rapid change and these changes were registered in critical concepts in use in this period of time. Thus, studying these concepts closely, especially as they changed would provide insights into the structural changes of German society and polity. In Koselleck's account, it seems, the study of concepts was not be oriented necessarily towards coherence of concepts or in pursuit of its singularity. If concepts are going to be a resource in understanding historical structures and processes, one has to focus on reorientations it undergoes in the maelstrom of historical change, the shifts and the ruptures that it undergoes.[26] It is these shifts that indicate the forces in play in a historical moment and the intensities and powers it can unleash. Similarly, this project also does not seek to place right to life as a singular coherent concept carrying the same meaning across different situations but how a situation reorients and folds the concepts in new ways creating new avenues of action and interpretation. Right to life as I see is a node of entanglement getting molded, reframed and mobilized for different purposes.

Ann Laura Stoler has recently proposed a certain orientation to the study of concepts. According to her concepts do not merely persist or change, they also have a recursivity. *History as recursion* she argues is the sort of history 'marked by the uneven, unsettled, contingent quality of histories that fold back on themselves and, in that refolding, reveal new surfaces, and new planes. Recursion opens to novel contingent possibilities' (26). Recursion is not just about the political processes

[26] This project therefore belongs to the long trajectory of conceptual anthropological inquiry *see* Asad 2003.

playing out in a 'repetitive and mimetic fashion…(r)ather, they are processes of partial reinscriptions, modified displacements, and amplified recuperations' (27). She takes Foucault's analysis on blood in *History of Sexuality* as a classic example of this recursion. Foucault showed that the symbolics of blood was not lost, rather it was converted and now made to serve the purposes of sexual analytics. 'The former 'lending its weight' to a power exercised through the 'deployment' of the latter' (27). Recursivity implies that one does not look for a repetition of the historical instance- rather to understand the piecemeal change and strategic alterations that has been undergone. Thus, in Stoler's account recursive concept work is an object of inquiry. The folds that recursive conceptualizations create, open up new planes on which forces can act in different manners. If one takes Stoler seriously then a studying a recursive concept implies that one not pursue a presumed singularity of a concept like right to life. Rather it is to understand how the concept possesses certain qualities but nonetheless its use in different contexts requires paying attention to the specificities of those circumstances. This idea of folding and the opening of new spaces is particularly useful in understanding the right to life. One of the main contentions in this dissertation has been that right to life was an attempt by the judiciary to ground its authority in the founding problem of the Indian state viz. the question of mass poverty. But as the concept moves between different jurisprudences it gets folded and molded which grants it different kinds of efficacy in different situations. Thus, in the realm of environmental jurisprudence it was not merely a question poverty that right to life communicated. Rather in its use by lawyers, petitioners and judges in the court, its invocation communicated the deep sense of crisis that seems motivate the space of environmental governance in India. Thus, right to life here opened a new plane of action and jurisprudence which focused on the immediacy of the environmental crisis creating in the process anxieties and arguments.

My project poses another challenge which cannot be resolved by looking to the past. Because right to life is a concept that is not located in the past and I do not have the advantage of historical

distance. Right to life is a concept that is very much situated in the present moment. Lawyers, judges, citizens and the state are actively using it as an authoritative principle and the concept is likely to remain in effect for at least the near foreseeable future. This problem necessitates that we adopt an ethnographic approach which immediately raises the question- how do you study a concept ethnographically? To study concepts in a manner which preserves its recursivity while also being ethnographically sensitive, I propose that we ought to study concepts *situationally*.

The idea of studying *situations* is not new in anthropology (Kelly 2009, Zigon 2015, Eckert 2016). As a matter of the, the Manchester School of Anthropology in its heyday in the fifties and sixties under the stewardship of Max Gluckman produced pioneering ethnographic studies work based on the study of situations. Gluckman's emphasis on the study of situations was derived from his belief that societies were in constant change and closely studying situations would help reveal the forces at play in the creation of social realities. In his famous study of bridge opening in colonial South Africa, Gluckman took the event to show the racial dynamics at play in South Africa alongside the operations of the colonial state. As Bruce Kapferer in his review of Gluckman's work notes,

> "the term 'situation' refers to a total context of crisis, not just contradictory and conflicting processes but a particular tension or turning, a point of potentiality and of multiple possibility. This conception of the situation as crisis demands an understanding of the micro dynamics are always integral within macro forces, and that these larger processes must be attended to if anthropological explanation and understanding are to achieve any kind of adequacy…Gluckman stresses (that) it is in crisis- in the situation as crisis and specifically in events that constitute concentrated and intense dimensions of the overall crisis of the situation- that the vital forces and principles already engaged in social action are both revealed and rendered available to anthropological analysis" (2005: 89).

More recent anthropological literature has been skeptical about the possibilities of crisis and the limits that it might impose on thought (Masco 2016, Roitman 2015). But still, the idea of situation as a point of tension and potentiality where social actions are made legible can be particularly useful, a situation enables the anthropologist to see the interaction between the macro and micro. Situations are also moments where the particular use of a concept, the tension that it embodies and the changes that is can usher can also be displayed. Thus, to my answer to the question, how to study concepts ethnographically? My approach to studying concepts is studying them situationally. The unit of my ethnographic interrogation are *concepts in situations*. These situations range from concerns which are national foundational to those which are more historically constituted. Locating the ethnographic study of concepts in situations enables a focus on the some of the coherences across situations as well as critical divergences. In this dissertation I look at three specific situations and interrogate how right to life fits into those situations and what work it does in those situations, they are the foundational situation, the overdetermined situation and the exceptional situation.

The foundational situation: This relates to the founding of the Indian republic and the framing of the Indian constitution. The critical *tension* in this situation were the problems that decolonization brought forth as the immediate questions to resolve for the nation state. Based on those problems what kind state, power and authority were imagined at this particular moment? What rights and entitlements did Indians have and how in this milieu did right to life emerge as a thinkable proposition in Indian law? How have those concerns enabled the persistence and significance of right to life as a significant concept of legal authorization in India? Here I will look into the debates in the constituent assembly debates to understand the emergence of the constitution and also the key conceptual interventions that were introduced by it. How the tension between the executive and judicial branch emerged and how this tension eventually led to the emergence of the Public Interest Litigation and the right to life.

The overdetermined situation: The overdetermined situation is one were right to life was the lens through which a particular kind jurisprudence was framed and which continues to frame that jurisprudence, restricting the ways in which it could be engaged with. By this I specifically mean the realm of environmental jurisprudence. Since the 1980s the right to a clean environment has been constituted in terms of a right to life and the Indian judiciary as well activists have used right to life frame the concerns about environment. The tension here lies in the fact that India today faces catastrophic environmental damage and the Indian state has been broadly incapable of handling the issue. Not only that the broad contours of environmental governance in India is determined by the judiciary which plays an oversized role in these matters. In spite of this extensive interventions India's fight against environmental continues to falter despite the fact that the India over the years has seen a massive proliferation of environmental laws. How then has the question of environmental degradation framed by the judiciary through the use of the concept of right to life? Here I provide an account of close to twelve months of ethnographic fieldwork in the newly formed National Green Tribunal which exercises wide jurisdiction on environmental matters in India.

The exceptional situation: This is the situation where simply put the right to life as a principle stands suspended. The Indian state has widely used exceptional laws as a means of governance quite widely since independence. Very often, the reason for the use exceptional laws in India has been because of the widespread insurgency in different parts of the country. The draconian tool used by the Indian state to achieve this purpose has been through the use of the AFSPA and the law specifically suspends the right to life. In this situation in spite of its suspension there are way in which the tension around the problem of life, the promise of protecting the life of the subject persists and creates certain problems for the state. To study this situation I carried out ethnographic field work in the Indian state of Manipur which has historically been under AFSPA because of the continuing insurgency in the state. In this part of the study my focus was on the hunger strike carried out by

Irom Sharmila a human-rights activists for a period of almost sixteen years protesting this law. How particularly this hunger strike manifested and what were the underlying dynamics of it was the subject of my analysis.

VI. Chapter Summaries:

In the first chapter I turn my attention to some of the historical and conceptual underpinnings of the concept of right to life. The chapter seeks to understand the very emergence of this concept in Indian law, a puzzle that I have briefly alluded to above. Article 21 does not mention anything called the right to life- it only proposes that citizens should not be deprived of their rights except according to procedure established by law. Right to life in as many words cannot be found in any other part of the Constitution either. In spite of its express absence in the Indian Constitution it has acquired great significance in Indian law. This chapter seeks to understand how the right to life emerged as a thinkable proposition in Indian law. How at a certain point in time not only could an argument like right to life be made but be made effectively as it proved to be the case from the late 1970s in the post-emergency era.

To explore the problem space of Indian constitution I begin with the following question, who was the subject of the Indian constitution? This question is derived from a theoretical intervention by Partha Chatterjee who had argued that colonialism in India was based on the idea of colonial difference, the idea being that Indians were fundamentally inferior to the British. If that was the constitutive element of colonialism then in the postcolonial era how was the subject of the Indian Constitution imagined when India became free? Through a detailed exploration of the debates in the Constituent Assembly I argue that the subject of the Indian Constitution was not imagined as a liberal agential subject, rather it was the poor suffering subject. Thus, repeatedly in the deliberations over the constitution, its conceptual distinctions and the allocation of rights were determined by

facilitating primarily the ability of the state to first resolve the problem of poverty. Indian sovereignty was therefore was based on the principle idea of *sovereignty through destitution*. This had two features, poverty was thought of as a problem of the now leading to a sense of *immediacy*. Secondly, it was marked by a sense of *absolutism* meaning that if Indians were overwhelmingly poor and poverty was the problem to be solved quickly then there would be an unmediated relation between the people and the state, the state's pursuit of the fight against poverty would be unimpeded by concerns of individual rights, property rights etc. This sense of immediacy and absolutism reached its height in the Emergency of 1975-77 when Indira Gandhi suspended the Indian constitution. Whereas the event is predominantly read as unconstitutional, I argue that the Emergency was a deeply constitutional moment. However, the abuses of the Emergency especially the violence against the very poor bodies which were supposed to be liberated, created a deep crisis of authority. It was at this moment that the Indian Supreme Court under the leadership of P. N. Bhagwati created a space for the expansion of judicial power and discretion. Usually this moment is regarded as a moment of the restoration of Indian democracy. But we will see in this chapter that the judiciary builds its authority on some of the basic presumptions of Indian constitutionalism and that right to life emerging as a critical category of judicial legitimacy at this moment was a reconstitution of the principle of sovereignty through destitution.

Chapter two stays on the judicial interpretation of right to life in India. In this chapter I take up the fairly common presumption in India that the judiciary exercises an exaggerated power in India well beyond the limits that had been originally conceived for it. This rise in power coincides with the rise of PIL and the right to life. Turning away from the framework of judicialization I look at this phenomenon through the framework of jurisdiction arguing that with the rise of right to life in India the Supreme Court and the High Courts have to exercise an absolutist jurisdiction. The chapter traces what I claim is the key contradiction that has been rooted in Indian constitutionalism. Though

the constitution is a popular constitution, meaning that its claims to authority is based on a popular will, it has also been an underlying presumption in Indian constitutional politics that the people cannot act because of historical and structural conditions. Turning to the jurisprudence of the Public Interest Litigation, in this chapter we see that what distinguished it was not just its procedural innovations. As a matter of fact, the critical judgements of the PIL kept telling this story which was marked by distinctive concepts like suffering, dignity in transformation. I suggest that this story continually poses this constitutive contradiction of Indian constitutionalism. But by posing this story and seeking to resolve it has had a significant impact on the jurisdictional bounds of India's constitutional courts- it has turned into an absolutist jurisdiction. I give an account of how the basic presumptions of a trial have been overturned in India and a lot of settled presumptions of western jurisprudence are now subject to the discretion of the judges. This chapter also shows how absolutism is persistent and recursive feature of Indian democracy.

Chapter three turns to the second situation. This chapter deals with the question of environmentalism and Indian law. In this chapter I show how the emergence environmental jurisprudence was framed by the right to life. The key tension that this chapter engages with is the rapid and expansive proliferation of environmental laws in India on the one hand and the simultaneous continuation of reckless environmental damage. This chapter provides an account of the ethnography carried out in the National Green Tribunal looking at the functioning of an institution which is solely grounded on the right to life. Here I ask, in an institution so overdetermined with concerns with life, how does life become legible and spoken about in the first place. I show that life emerges and is placed in the environmental courts primarily as an endangered life- it is the primary register through which the notion is comprehensible in the first place. It does the work of conveying the deep sense of crisis that informs thinking about the environmental realm given the fact of widespread environmental damage in India. Through an account of an attempted

demolition of a governmental building in the court I show the two competing sensibilities that are at work in environmental law in India. On the one hand there is this deep sense of crisis about the progressive destruction of India's natural world. On the other there is the clear sense of suspicion that marks the law. Suspicion, as we will see, is both a feature of modern law itself and also an aggravated feature of the relationship between India's judiciary and government. This sense of crisis operates to create expansive judgements and laws in India with wide jurisdiction. However, in the court there are always suspicions about the working of the bureaucracy and the minutiae of rules that the bureaucracy is attentive to in its actions, reluctant to implement laws or judgements where the jurisdictional boundaries are not clear. The consequence of this tension between crisis on the one hand and suspicion on the other repeatedly leads to the creation of an impasse in the institutional sphere. However, when the impasse gets broken it usually results in greater concentration of powers in the hands of the state and the judiciary but leaves the substantive questions of environmental protection unaddressed.

The Fourth chapter turns to the third and final situation- the exceptional situation. Here I provide an ethnographic account of Irom Sharmila's hunger strike in protest of AFSPA. This is the situation when the right to life is specifically suspended but through the hunger strike the problem of life and the need to protect it persists in a unique way. In this chapter I turn to the following question, when Sharmila finally broke off her strike in 2016 why did she claim that her hunger strike had been a failure? How do we understand the efficacy of a hunger strike? Hunger strikes are often understood as the attempt by the protest faster to protest some injustice usually directed against the state and the police. However, I contend that the key tension in the act of the hunger strike is the question of affect. Through a detailed account of Sharmila's hunger strike I show that her primary objective was to create an affective community through the public display of suffering, a community which would then protest against the state and overthrow the draconian law. The state administration recognized

this affective potential of Sharmila and sought to diffuse it. They did so through an elaborate legal ritual which continually posed the question of her criminality but never resolved it. Through a sixteen-year long period when she repeatedly came and went from the court her affective charge was diffused and made redundant-whereby the very immediacy of the hunger striker's protest, her suffering and possibility of death came to a naught. This performance which in the chapter I call the *ritual of indistinction* shows the affective politics that lies at the heart of exceptional politics-how even when normal laws gets suspended the affective realm remains a source of potentiality and risk which the state has to find ways of managing and administering. But I also suggest that this was not the only reason for her 'failure' since there is a particular grammar of incitement which has great efficacy in Manipur, a grammar which Sharmila throughout her hunger strike disavowed.

VII. A biography of the Project

This project has been many years in the making. This is a project that has emerged from other projects and objects of curiosities from different times and places. One place of the origin of the project was my undergraduate studies in Kolkata in Political Science. Political Science as the course is designed leans heavily on western political theory and we read primarily derivative texts on the subject which themselves were far removed from the original. In this milieu it was only the paper on Constitution of India that brought us closest to the real life developments in India and I took a keen interest in that paper. This was one of primary origins of my interest in the law, this however was not so much an interest in formal law but rather in the politics that underlies the law. A key of point of emphasis here were the fundamental rights provisions of the constitution. The other issue which stoked me was an interview on BBC Hard Talk with Jane Roe who had been the litigant in the famous *Roe vs. Wade* case in the United States. She had since turned into an anti-abortion activist. The question of bodily rights of women and the fetus struck a chord with me and I found that the

global politics of abortion does not always map onto India. While pursuing my Master's degree and later my MPhil degree in Calcutta I decided to pursue my interests and wrote a thesis on the politics of abortion in India. It focused on the significant points of convergences and divergences with the global politics of abortion.

Firstly, abortion is legal in India- this happened in 1971 when the Indian Parliament passed the Medical Termination of Pregnancy Act. This piece of legislation was curious act because it held abortion in genral to be criminal. But allowed a series of exceptions under which women could be allowed to have an abortion in India. These exceptions were widely interpreted and abortion since became widely available in India. The other curious thing about this piece of legislation was the fact that legalization of abortion in India was not enacted because of any women's movement, rather the government of India at the time saw the legalization of abortion as another potential tool to restrict India's population growth. In the ensuing years abortion in India has remained uncontroversial, non-political and widely available.[27]

But the wide availability of abortion and the developments created another set of problems in India. With the proliferation of imaging techniques there emerged the massive proliferation of sex-selective abortion. Abortion was legal but the practice of sex-selection and the termination of female fetuses led to massive skewing of gender ratios in the country. There are parts of India where the gender ratio remains shockingly low. This was the practice that led to the politicization of the abortion question. Women's group across the country started campaigning to put an end to this corrosive practice. The government of India eventually passed another law which banned all pre-screening technologies which would reveal the gender identity of the fetus and doctors were banned from communicating the information. Some of the restrictions imposed in these laws were subsequently

[27] Though some scholars have pointed out that if the need ever arises to restrict abortion in India it could be done without changing the law by simply restricting the interpretations of the exceptional provisions in the MTP Act.

challenged in the courts. And the court sometimes came down heavily against sex-selection. It did so by invoking the idea of right to life in India, to the extent that sometimes even the legal basis of abortion could seem to be undermined. It was during this project that I first realized the scope of right to life in India, but more importantly the slippery slope one could go down when it is invoked. This was the initial curiosity which led me to explore what precisely made the idea of right to life so apt for the Indian situation and how come it was so widely invoked in such a wide array of situations and what consequences did such a wide invocation have for the politics of rights in the postcolonial republic.

Chapter One

Sovereignty through Destitution

On the emergence of Right to Life in India

I. Situating the Problem

In early 2016 the Supreme Court of India in the landmark case *Subramanian Swamy vs Union of India* upheld the constitutionality of criminal defamation laws in India- a relic of the colonial era. Criminal defamation laws have been widely used and abused to intimidate and harass journalists, critics and settle political scores.[1] There was an expectation in the country's progressive circles that the Supreme Court would put an end to this practice by striking down its constitutionality. On the contrary, the Supreme Court argued that the oft-criticized practice was protected under Article 21 of the Indian Constitution viz. the right to life. The court argued that to be defamed was to be deprived of one's right to live with dignity and thus one's right to life and therefore criminal defamation had basis in constitutional law in India. Noted political scientist Pratap Bhanu Mehta (2016) in an editorial for the Indian Express expressed his dismay at how the notion of right to life had been stretched to cover anything and everything in India. He asked, '(i)s it any surprise that judges now read "reputation" as a fundamental right deriving from Article 21? In the name of progressivism, we eroded all distinctions between civil and economic rights. Is it any surprise that judges treat civil rights on a consequential calculus of policy, and economic matters as fundamental rights? This judgment is atrociously argued.'

[1] Criminal defamation in India is used often by powerful politicians and corporate houses to create legal complications for journalists and writers who are critical of their work. A critical piece of investigative reporting is often challenged in court on grounds of criminal defamation thereby creating a hostile circumstance for journalists to carry on their work. Details on a notorious case are here- http://www.caravanmagazine.in/perspectives/iipms-rs500-million-lawsuit-against-caravan-republished

Those familiar with Indian jurisprudence over the last forty or so years have little to be surprised by the invocation right to life in this particular instance. It is symptomatic in two distinctive ways. Firstly, it shows how right to life has emerged as the authorizing legitimating principle in Indian jurisprudence. This has been the case in two major cases in 2017, viz. the abolition of triple talaq and upholding of privacy as a fundamental right.[2] Both these cases resorted implicitly or explicitly to the language of right to life to determine the judicial question, decisions which were widely celebrated. Today in India an array of rights are at least on paper protected by the right to life, irrespective of whether they have any consequence or not.[3] Even the brief decriminalization of homosexuality by the Delhi High Court was premised on the right to life.[4] Secondly, it shows the extent of power of the higher courts in India- something often characterized as judicial sovereignty- and how this form of sovereignty has intimately depended on the invocation of right to life (Sathe: 2003). But it would a mistake to think that it is solely the court that has invoked right to life as a ground of claim making. Since the emergence of Public Interest Litigation in the late 1970s citizens groups, individuals, religious bodies have repeatedly invoked the principle to protect and expand their rights against the state.[5] By the 2000s the Parliament itself was invoking the principle of right to life in making crucial legislation. The Right to Education Bill, the Right to Food Bill, The National Green Tribunal Act all invoked the principle of right to life as the central constitutional principle (Surendranath: 2016). Right to life today has emerged as the common sense of Indian jurisprudence and celebrated as a progressive provision of the Constitution (Bhan 2017). It is a curious category that has been invoked in a wide array of *situations* as a legitimating principle and could help us understand the central perplexities of Indian sovereignty and rights in a distinctive manner.

[2] Right to privacy was upheld as a fundamental right in *Justice KS Puttaswamy vs Union of India*; Triple Talaq was declared unconstitutional in *Shayara Bano vs Union of India and Others*

[3] D.D. Basu (2015) lists the rights that have upheld under Article 21 (121-123)

[4] *Naz Foundation vs Government of NCT of Delhi*. The decision was overturned by the Supreme Court.

[5] A new jurisdiction introduced in the late 1970s. *See* section V.

Article 21 of the Indian Constitution states that 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'[6] Though right to life is derived from Article 21, the Article itself does not mention the proposition and is not mentioned anywhere in else in the Constitution either. This brings me to what I think is the foundational question to begin thinking about the right to life in India and the question that this chapter seeks to address, viz., how did the notion of right to life emerge as a thinkable proposition in Indian law? What were the circumstances under which not only could an argument like right to life be made, but be made by a certain institution and could also be effective as it proved to be starting from the 1980s?

Why is this a foundational question? The reason that I am asking this question is twofold. Firstly, the term 'right to life' is not a part of the Indian constitution as I noted, Article 21 is constituted as a negative right i.e. no person shall be deprived of his life. Besides during the Constituent Assembly debates for writing the Indian Constitution, right to life was rarely invoked and the extensive debate on Article 21 had very little to do with this specific proposition.[7] Secondly, even in the jurisprudential traditions that the Indian Constitution most heavily drew on viz. the American and British there is nothing called the right to life.[8] Right to life has been distinctively Indian response to a certain problem.[9]

The central argument that I will make in the course of this chapter is simple. I will try to show that India's Constitution created a new field of argumentation in postcolonial India. At the heart of this new field of argumentation lay the figure of the destitute masses. Indian sovereignty and political order was constituted around this question of destitution. Indian scholarship has attended to the political economic dimensions of this question (Kaviraj 2012), especially evidenced by the volume of

[6] This article is situated in Part III of the Indian Constitution titled Fundamental Rights.
[7] There was an elaborate debate on Article 21 (Article15 in the Constituent Assembly). The debate was around the phrase 'procedure established by law.'
[8] Right to life is invoked primarily around the question of abortion in USA. But right to life is not a legally recognized position in the US.
[9] There is a global trajectory to right to life but as I will show the emergence of right to life in India was a specifically Indian response.

literature around the question development in India (Zachariah 2005, Gupta 1998). However, there is still a gap in terms of understanding how a discursive field was created by the conditions of destitution within which questions of rights and sovereignty were articulated. I will argue that the conception of sovereignty in the post-independent era, instituted in the Constitution, was a *sovereignty through destitution* and was based on a vision of the state which Uday Mehta (2013) has described as *absolutist*. The rise of right to life is intimately tied to this figure of destitution and emerges in the post-Emergency[10] era. Right to life in India becomes a thinkable proposition not as an attempt to expand the rights of Indian citizens as is conventionally argued, but rather as an attempt to reconstitute the principle of *sovereignty through destitution* at a particular moment of crisis of authority. This was the post- Emergency period of 1977. The Emergency in this account will emerge not as an aberration but rather as a *critical event*, an event that fundamentally changed the trajectory of the postcolonial nation state in India (Das: 1996).

This chapter is situated in the newly emerging scholarship on Indian Constitutionalism and law, both historical (De 2014, Dasgupta 2014, Mehta 2010, Elangovan 2016) and ethnographic (Baxi 2015, Bhuwania 2017) which has shown the significance of the post 1947 legal constitutional framework for Indian politics and nation building. However the principle critique of constitutionalism in India has remained unaddressed. The argument being that Indian law and Constitution do not embody the really real of Indian politics- that it belongs to a high tradition of liberal thought with little bearing for politics of the masses exemplified by the political society (Chatterjee 2004). This essay will show that this argumentation is based on a misunderstanding of Indian constitutionalism and propose that the conditions of possibility of the political society emerges from the Constitution.

[10] The suspension of the Indian Constitution by Indira Gandhi from 1975-77.

Following David Scott's idea of the problem space (1999, 2004) methodologically, I will try to understand how Indian constitutionalism emerged in a historically constructed and ongoing field of moral arguments. What were the central questions that the Indian Constitution sought to answer? The objective would be to excavate those questions and see the manner in which these questions have persisted and have been reconstituted.

This chapter has three sections. The first section traces the subject of the Indian Constitution and lays bare the primary problematic that the nation state was confronted with viz. destitution and how Indian sovereignty was organized around this question- a *sovereignty through destitution*. The second section explores the manner in which the question of rights were conceived. This I do by exploring the central conceptual innovation of the Indian Constitution viz. the introduction of the parts on Fundamental Rights and Directive Principles of State Policy- what did this distinction signify and what necessitated it? What vision of the state did it imagine? The third section moves into the period of India's infamous Emergency and shows how it proved to be a transformative event for the nation state and inaugurated a period of crisis of authority for the nation state. After laying this crucial groundwork, the last section shows the emergence of right to life and how it fundamentally was an attempt to reconstitute the founding idea of sovereignty of the Indian Constitution.

Let me begin this inquiry by focusing on the following question: who was the subject of the Indian Constitution? Chatterjee (1993) argued that the Indian subject during colonialism was constituted through the principle of colonial difference viz. the idea that there was fundamental difference between the Indians and the British. Colonial sovereignty was premised on the idea that the British were fundamentally superior to the natives and thus were naturally competent to rule along democratic norms. If that is true then in the post-independent era how was the new subject of the Indian Constitution imagined?

II. Subject of the Indian Constitution

Written in the early 1930s, Nehru in *Whither India?* expressed his prolonged frustration with the nationalist movement which seemed fixated singularly on the colonial question viz. the desire to free India from colonial rule. But that for Nehru showed the short sightedness and an inherent flaw of the nationalist movement, its inability to see the deeper structural problems that afflict India. The crucial questions of class conflict are sidelined by the nationalists in the hope that the 'national issue must be settled first.' Capitalism, he argued has solved the problems of production but still has generated unseen poverty on a global scale. India's struggle therefore cannot thus be merely against colonialism but it has to be a great struggle for the emancipation of the oppressed. It would be a struggle with 'hunger and want as its driving forces…The whole basis and urge of the national movement came from a desire for economic betterment, to throw off the burdens that crushed the masses and to end exploitation of the Indian people' (19-20).

Nehru was not the first leader in the nationalist movement to make claims about the significance of hunger. Economic nationalism and the exploitation of the Indian masses by British imperialism has long been critical in constituting the Indian opposition to colonialism (Chandra [1966]2016). Gandhi, himself spoke extensively on poverty. However, the way in which he conceived poverty was distinctly different from the way Nehru did. Gandhi often held poverty as a sign of virtue and regarded widespread famines to be the consequence of moral shortcomings. The way Nehru conceived poverty and destitution as the central question of Indian nationalism, the political, social and economic question to be resolved. The authority and legitimacy of the new Indian regime would be premised on this fundamental promise. Nehru's lament was that Indian nationalists failed to recognize this central task of Indian nationalism.

Nehru at this crucial moment of nationalism recognized who ought to be the true subject of freedom and independence in India- they will be the millions of destitute masses of India whose struggle would not end with the end of colonialism but continue because 'their drill sergeant is hunger. Swaraj or freedom from exploitation for them is not a fine paper Constitution or problem of the hereafter. It is a question of the here and now, of immediate relief' (21). This immediacy of the problem and his hopes of making this the axis around which the question of nation building ought to be resolved will be taken up by Nehru in the Constituent Assembly.[11] The recognition of the destitute masses as the real subject of independence and the political project would provide crucial background in understanding what happens when India gains independence and the Constituent Assembly starts the task of writing the Constitution and how a distinctive field of argumentation emerges.

But what was the Constitution about? As Granville Austin, the eminent biographer of the Indian Constitution argues, it was about a *social revolution*,

> 'Two revolutions, the national and the social, had been running parallel in India, since the end of the First World War. With independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end in itself, only 'a means to an end', Nehru had said, 'that end being the raising of the people…to higher levels and hence the general advancement of humanity" (Austin 1966[1999a]: 32).

Speaking in the Constituent Assembly on 22nd January 1947, Nehru stated,

> 'The first task of this Assembly is to free India through a new constitution to feed the starving people and cloth, the naked masses, and to give every Indian fullest opportunity to

[11] The body tasked with the making of the Indian Constitution. *See* Chaube 2000 for a history of setting up of the Assembly.

> develop himself according to his capacity…We are sitting here and there in despair in many places, and unrest in many cities. The atmosphere is surcharged with these quarrels and feuds which are called communal disturbances, and unfortunately we cannot avoid them. But at present the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn, we are confronted with problem. If we cannot solve this problem soon, all our paper constitutions will become useless and purposeless' (CA-1947, 316-17).

Nehru here reaffirms what he had regarded as the central question of Indian nationalism- a question which had only been partly resolved by decolonization. The new state and the constitution would have to resolve this question and the success or failure of the nation state would depend on it. The constitution thus in Nehru's vision is not some eternal document for the nation state but rather a provisional document whose success or failure would depend on whether the question of destitution gets resolved or not.

One of the anxieties in the early days of the CA was over the fate of the nation itself and the pending question of partition. The Muslim League had decided not to attend the proceedings of the Assembly and the members were deliberating over how far they could possibly go in the absence of such a crucial constituent. There were members like Ambedkar who urged restraint and patience in dealing with the League. S. Radhakrishnan, the first speaker after the rules of procedure had been decided upon, argued that the abstention of the Muslim League from the Assembly was only temporary. The real problems facing the country were – 'our hunger, our poverty, our disease, our malnutrition- these are common to all. Take the psychological evils from which we suffer- the loss of human dignity, the slavery of the mind…these are common to all' (CA Debates Vol I., 37). Radhkrishnan hope that the 'temporary' problems of religious difference which had so far

obfuscated the vision of the Muslim League would eventually be set aside and the League would soon see the real problem facing the nation state, that of destitution and diligently focus on that.

Similarly Nehru also argued that the CA could not wait on for the Muslim League to eventually come to the assembly, he was frustrated that this deferring the real purpose of the new state.

> 'There has been waiting enough. Not only waiting six weeks, but many in this country have waited for years and years, and the country has waited for some generations now. How long are we to wait? … This resolution will not feed the hungry or starving, but it brings a promise of many things-it brings the promise of freedom, it brings the promise of food and opportunity for all. Therefore the sooner we set about it the better' (CAD Vol II.: 319).

The religious divide between Hindus and Muslims according to Nehru was a relatively smaller problem and the real problem was the scourge of poverty. What is important here is not merely the point of emphasis, but the way in which the anxiety and possibility about partition was being countered with an emphasis on the more immediate and more necessary question of the needs of the masses- the real question for the nation state.

The question of destitution is significant not only as an underlying assumption, but how crucial questions on the nature of the federation, the limits of its powers and what rights citizens of the new republic were supposed to have all returned and rested on this question of destitution. At the heart of the conceptualizing this new Constitution lay the figure of the suffering body of the Indian masses, hungry and destitute. If Indians were in a condition of destitution then the project of the new nation would have to have greater focus on the question of poverty- to end this condition of poverty which would create the basis for true freedom, the condition does not exist yet but would eventually come in the future. This centrally indicated the question to which the CA was confronted with. How to build a constitution which would not only create the basis for an independent

nationhood but would also address the problem of mass destitution in India? The nation at this point in time was in a state of becoming, a fundamental incompleteness afflicted it.

This emphasis on the problem of destitution and the urgent need to resolve it was the active principle of sovereignty in postcolonial India (Agrama, 2012: 30), that is the state's legitimacy was premised on the idea that it was sole institution which could resolve this primary and pressing crisis.[12] Let me propose a guiding heuristic to understand this concept of sovereignty. It was a *sovereignty through destitution.* Postcolonial sovereignty as laid down in the Constitution was premised around the question of destitution as the central question for the nation state. Power though derived from the people rested for its legitimacy on the ability of the nation state in freeing India from poverty. Thus it could not be a negative state. There was no other institution which at this point could claim to resolve this problem. This sovereignty was *immediate* in two ways. It was temporally immediate, meaning that the problem of destitution was a problem for the now- something to be resolved first. This was signified by the emphasis on the term social revolution in the first few decades of Indian politics. The Constitution and the nation state would bring about a radical change. Secondly, as we will see next, it was institutionally immediate, meaning it sought to establish a direct relationship between the people and the government. A relationship which would not be hampered with concerns of divisions of power. I will elaborate on this point in the next section.

But why is this a *new* field of argumentation? Was the question of destitution new in the Indian context? As James Vernon (2007) has shown Indian nationalists since the late nineteenth century had argued that exploitation of the Indian masses was caused by British imperialism. As a matter of fact even the colonial state justified its own existence on the grounds of poverty in India. But this articulation was premised on an inherent inferiority of the Indian people, their prejudices and

[12] For a recent historical account of the significance of hunger in the early years of the Indian Republic *see* Siegel 2018.

backwardness and it was up to the British government to fix this. Post-independence however, the *situation* was different. Were Indians poor? Yes, they were but this was not the consequence of some inherent lack, they were rather the victims of structural inequalities perpetuated by the colonial state and the hierarchical structures of Indian society. The colonial state was never derived its legitimacy from the people. But as the Objective Resolutions[13] moved by the CA clearly states, 'all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people' (CAD I, 59). With colonial power withdrawn, the Indian state now had to find new mechanisms to resolve this question. There was no self-evident answers available for them. Yes, they realized that the task of political overthrow had been established and that state socialism would be crucial in overcoming the exploitation of colonial capitalism. Members would speak of the French example, the Russian example or the American example- but no answer was already given. This new situation required a new grammar, a new language of political rights and responsibilities for the state. The demand for full political rights could be granted and were granted but that still kept open the reality that such freedoms and rights made little sense in the conditions of deep inequality and poverty. It is this that I am calling the new field of argumentation. It was different because the question raised and the situation in which it was raised was novel and had never happened before in the subcontinent.

What consequence did the situating destitute masses at the heart of the Indian Constitution have for the making of the Constitution? Or to be more specific if Indian sovereignty was a *sovereignty through destitution*, how were rights conceived? To understand this we need to understand the central conceptual innovation of the Indian Constitution viz. the introduction of the chapters on

[13] The objective resolution was introduced by Nehru in the first session of the Constituent Assembly in 1946. He saw this brief statement as an introductory statement on what the Constitution would achieve for the people of India, a broad outline and schema which he hoped the members of the assembly would be aware of as they sought to write the Constitution. For a discussion *see* Zachariah (2015).

Fundamental Rights (FR) and on Directive Principles of State Policy (DP).[14] In the next section my guiding question is to understand the underlying assumptions that necessitated the distinction between the FRs and the DPs.[15] Lot has been written on what the differences are between the two chapters, but my question is why at all there was a need to distinguish between the two?

III. Conceptualizing Rights in India

The chapters on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) in the Indian Constitution inaugurate the rights of citizens in India and the obligations of the nation state. Whereas Fundamental Rights (FRs) lays down the rights of Indians, Directive Principle of State Policy (DPs) lays down a set of precepts which the state is supposed to uphold. Article 36, the second article of Part IV of the Constitution articulates the difference between the two sections.

> *Application of the principles contained in this Part*: The provisions contained in this Part (Directive Principles) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The key and constitutionally mandated difference between the FRs and DPs is that the former can be enforced by the judiciary and are held against the state, the latter on the contrary are supposed to guide the actions of the state. However, failing to do so would not result in any punitive action, or not at least from the courts. However, I want to point out that these two parts of the Constitution also imagine two different subjects.

[14] This was the central innovation because structurally the Constitution of India derived significantly from the colonial Government of India Act of 1935. This Act did not guarantee any rights for Indians. The fundamental difference between these two was the introduction of the Fundamental Rights and Directive Principles of State Policy chapters in the Indian Constitution. The Congress had demanded recognition of rights in 1928 and 1931 and did not conceive the need to make a split between the two realms.

The Fundamental Rights in the Constitution are conceived in the classical liberal manner. Take for example the right to speech enshrined in Article 19(1)(a) of the Constitution. It guarantees that, 'All citizens shall have the right to freedom of speech and expression.' These rights however were heavily regulated. Right to speech will not prevent the state to make which reasonably restricts speech on the grounds of 'the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence' (Bakshi 2018: 56).[16] Other provisions of the FRs also impose such elaborate restrictions on rights. The subject of the Fundamental Rights is the citizen, the individual.

What are in the Directive Principles? There are sixteen articles under Part IV of the Indian Constitution. Article 38 states that the 'state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life' (124-125).

Article 39 lays down that the state should direct its policy towards securing for citizens the right to an adequate means of livelihood, ensure that ownership and control of material resources are directed towards the common good, that economic systems should not result in the concentration of wealth, that there should be equal pay for equal work for both men and women, the health and strength of workers should be preserved (125). Article 41 calls upon the state 'within the limits of its economic capacity to secure the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want' (128). The DPs also calls upon the state to ensure that the state will ensure 'just and humane conditions of work and for maternity relief' (Article 42) and secure living wage for workers and conditions of

[16] Other rights in the Part include right to equality, movement, assembly, right to practice and profess one's religion (Bakshi: 14-123)

'work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities' (Article 43) (129). Similar provisions are also included for the economic and educational interests of 'Scheduled Castes, Scheduled Tribes and other weaker sections' (Article 46) (131).

What is evident, is that the subject in the Fundamental Rights and Directive Principles have different points of emphasis. Whereas the subject of negative rights was the individual; the subject of the DPs was the subject of destitution- the masses whose welfare it was the responsibility of the state. Besides the question of justiciability, this is the other critical though often missed difference between the two Parts.[17]

This distinction between the FRs and the DPs I will argue, is not only founded on the principle of *sovereignty through destitution* but illustrates a crucial aspect of it. It shows how this principle sought to establish a direct and unmediated relationship between the state and its people. B. N. Rau a key figure in the CA debates illustrates this.

Rau was a former judge of the Calcutta High Court and had been appointed the principal advisor to the CA by Nehru. It was Rau who for the first time introduced the proposal for separating the domains of FRs and DPs. In a note Rau (1963) prepared for the subcommittee on Fundamental Rights, he laid down the complications of thinking about rights in the Indian context. The note dealt with the structure of authority within which the question rights and their enforcement was to be determined, more specifically the role the judiciary was supposed to play in the interpretation and enforcement of rights.

[17] Part IV also includes provisions on Uniform Civil Code, Cow Protection and Protection of historical sites, but these provisions come later and the main emphasis of the section- in terms of the number of articles dedicated to the welfare question- is on the question of poverty.

Rau was deeply skeptical about the role of the judiciary primarily because of what he saw in the US where the rise of judicial review had led the Supreme Court to usurp too much power and thus impede legislative work. Laws which were held constitutional at one time were struck down at other times (263-271). With such an arbitrary process of determination of questions of law, the legislature unsure of what the judiciary may have in its mind would become circumspect about the lawmaking process. Besides he feared that there would be a substantial increase in litigation about the validity of laws. The main problem in empowering the court was that Indian courts likely to be manned by an unmovable judiciary, trained more in the nitty gritty of law and not sensitive about the social and economic needs of the country, would create roadblocks for the main socioeconomic tasks of the new nation state. On the contrary, legislature and the government due to periodical elections would in a position to be more sensitive about these issues. For Rau the social and economic needs of the country were prior to the question of rights and he did not think that judiciary with its colonial remnants was equipped to handle the problem.

Rau argued that what was more suited for India was the example of the Irish Constitution of 1937 which had a distinction between 'fundamental rights' and the 'directive principles of social policy.' He believed that that there needed to be a distinction between the precepts which required positive action on the part of the state and which can be guaranteed only so far as such action is practicable viz. directive principles. The other set of actions should be limited to where the state abstains from performing prejudicial action viz. fundamental rights. This short note prepared by Rau became the basis for the distinction between the Fundamental Rights and the Directive principles.

The matter would subsequently be thrashed out in the subcommittee on fundamental rights and also in CA[18]. The substantive point of disagreement would be on whether the DPs should be made

[18] For more on the debate in the CA on the enforceability of DPs *see* (CAD Vol VII, 473-495)

enforceable in the court of law. Ambedkar after his initial reservations, strongly came out in in favor of keeping DPs out of the judicial purview. He argued that the Indian parliamentary system was based on the principle of one man, one vote. '(E)very government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government' (CA Vol VII, 494). The CA, Ambedkar argued, wanted to establish economic democracy just as it had established political democracy. It would be best to leave it to the people to decide whether the government had kept its promises or not and to determine its own course of action at a particular time.

Rau and Ambedkar agreed on the centrality of the social and economic questions in the country but also on the need for a more direct relationship between the state and its people- a relation unmediated by authorities like the judiciary. It shows that the central conceptual innovation of the Indian Constitution, the introduction of FRs and DPs were an expression of *sovereignty through destitution* and was premised on it. It was the priority of the destitution question which both believed showed the insufficiency of the liberal rights framework. In the problem space of Indian constitutionalism having a negative state made little sense. This necessitated that there should be a separate set of precepts guiding state action, a set of precepts which as we saw had the destitute masses at the center and made elaborate promises to improve the lives of the poor on many different registers. But this was not to be made enforceable by any intermediate authority like the judiciary. The judiciary could not intervene if the government violated any of these principles. If the government failed then it was up to the people to overthrow the government. The relationship that Ambedkar and Rau wanted to establish between the people and their government was to be unmediated by the judiciary. This need for a direct relationship between the people and the government was a crucial aspect of *sovereignty through destitution* and as we will see, gets reasserted at crucial moments in Indian history and would be an underlying principle in the emergence of right to

life in India. The priority of the socio-economic question was also evidenced in Ambedkar's argument that the fundamental rights were the gifts of the state and they could be taken away whenever the need arises by the state (Ambedkar quoted in Mehta: 24). This may seem like an odd statement coming from evidently one of the most progressive members of the Assembly, but is instructive of the problem space of Indian Constitutionalism at this juncture. Fundamental individual rights Ambedkar quite properly stated would not impede in the primary task of the nation state. The division between the FRs and DPs and the notion of Fundamental Rights as a gift both showed the vision of the state that this constitutionalism embodied.

Uday Mehta has provided the most compelling account of this vision. He argues that the Indian Constitution has an unacknowledged father and that father is Thomas Hobbes. Unlike the American or the French Revolutions, the Indian movement for independence was not revolutionary in the sense of a radical rupture given the continuities between the colonial and the postcolonial state. What was revolutionary according to Mehta was the very act making a Constitution. If the colonial logic of colonial difference implied that Indians were still stuck in the waiting room of history- the new Constitution revolted against this history and time and inaugurated a period of radical becoming.

Members of the Constituent Assembly were not naïve or unaware of the dire circumstances of poverty and social strife that the country was confronted with. The debates in the CA could not be carried out in the register of the past or the present but could only be directed towards the future- an anticipated becoming. This sense of a future when the nation would fully come into being, informed how liberty was conceptualized in the CA. It was clearly understood that the immediate questions of unity and social uplift were far more critical than questions of liberty. Thus it was curious situation

whereby India was liberated from colonial rule but Indians could not still be free, freedom would come later.

This vision on which the Constitution of India was based according to Mehta is a Hobbesian vision. The idea of the social domain as divisive, broken up along lines of caste and religion and that the political was the realm of unity, the realm which can bring order in a disruptive social order. This Hobbesian because it reproduces in a certain way the distinction between the social and the political that was crucial in the works of Hobbes.[19] Mehta calls this vision of the political an *absolutist* vision. 'The constitutional vision was meant to eviscerate or, at a minimum, trump these social and fissiparous tendencies by fixing them within a unified political frame' (2010: 24). The rights question in the Constituent Assembly corroborates Mehta's argument. The guaranteed rights of the FR chapter were heavily regulated and as Ambedkar stated could be taken away if the state desired, they were gifts of the state. The Directive Principles on the contrary were meant to guide political action in India but they could not be regulated by the courts. In both realms the political was absolutist.

I am sympathetic with this conceptualization as proposed by Mehta and his notion of absolutism would be critical for my analysis. But I will argue that it is necessary at the same time to add a necessary fold to the conception of absolutism. The picture of absolutism that Mehta draws here is almost unrecognizable in contemporary India. One would be hard pressed to consider the realm of the Indian political as being any longer absolutist. As we will see the undoing of this absolutism and the rise of right to life are intimately intertwined. But first, Nehru, Indira Gandhi and the Emergency.

[19] The absolutism that Mehta speaks of was best demonstrated in the debate around Article 21 in the CA. The debate there was not on the question right to life- there was no right to life. The debate hinged on the phrase 'procedure established by law' meaning what were the criteria under which the judiciary could review a law. The above phrase was settled on because it was believed that this would prevent the judiciary from getting into the substantive merits of a law and limit its scope to only judging whether a law was framed and applied following the correct procedure. *See* (Rao: 1968, 233-249)

III. The Shifting Register of Rights: Indira Gandhi and the Emergency

So far we have traced how *sovereignty through destitution* was the active principle of Indian sovereignty based on an overarching *absolutist* Constitutional vision. In the remainder of the chapter I will trace what came of these two ideas and their relation to the emergence of right to life.

Nehru's era saw one of the earliest challenges to the authority of the state on the question of rights. In *A.K. Gopalan vs State of Madras* (1950) a communist party activist from Tamil Nadu challenged his preventive detention on the grounds that it violated his rights to freedom under Art. 19 and life and liberty under Art. 21 of the Indian Constitution.[20] The challenge was against the preventive detention laws which the Constitution had allowed. One of Gopalan's argument was that preventive detention was a violation of the principle of natural justice. The majority opinion written by Justice Kania, dismissed the petition claiming that the state government was well within its rights to make laws on preventive detention. In a heavily restrictive reading of the Constitution, Kania made it clear that the Constitution in no ways allows the courts to assess a law on substantive points of justice but only on whether the procedural requirements had been fulfilled.

Kania noted,

> 'There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of

[20] Preventive detention means arresting someone not for a particular offense but on the possibility that they might act illegally. The Indian Constitution under Article 22 gives the state the power to make such preventive laws. Some of India's most abusive laws have been promulgated under this provision. On India's exceptional laws *see* Singh 2007.

> the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary too great and too indefinite either for its own security or for the protection of private rights' (para 26).

This reading made by J. Kania was thoroughly in line with the framing of the Constitution and its underlying absolutist vision. The authority of the legislature and the limits of the judiciary, the pervading 'spirit' of the Constitution and the inability of the judiciary to read meanings into the law which were not expressly stated was an astute a statement on the absolutism of the political.

Kania and others on the SC were clear than in the political project of the new nation state, the role of the judiciary was to remain subservient. Individual rights were clearly not a priority for the courts. However it is important to keep in mind that the SC was not always accommodating about this absolutism. The 1950s and the 60s were marked by a series of confrontation between the judiciary and the executive on the question of land reform. Whereas Nehru and his cabinet by and large wanted unmitigated powers to issue legislations which would abolish the practice of *zamindari*, the judiciary continually impeded the process on the grounds that it was in violation of the fundamental right to property enshrined in the Constitution. However given the power of the executive and the Parliament at this point in time, Nehru and his government with ease could dismiss such reservations expressed by the courts with Constitutional amendment as they did with the First and Fourth amendments (Menon 2008). In so far as the question of destitution was concerned, liberal

anxieties over right to property was in no way going impede the executive function. The fight over property rights in the first decade of the republic was the clearest expression of *sovereignty through destitution* a battle that would continue well into the 1960s. But what happens after Nehru? Well, Indira Gandhi and the Emergency happened.

Indira Gandhi: Emergency was declared by Indira Gandhi in June 1975. This event proved consequential for the principle of *sovereignty through destitution* and for the absolutist concept of the state. The question that I want to address in this section are twofold. First, was the Emergency premised on *sovereignty through destitution* or did it undermine it? And second, what were the consequences of the Emergency on this constitutive idea for Indian sovereignty?

No other politician embodied *sovereignty through destitution* as much as Indira Gandhi. Her battle cry was *Garibi Hatao* or end poverty and she based on legitimacy on fulfilling this promise. Her battles with the Supreme Court on property rights, the bank nationalization program were all premised on this promise. The most consequential event in Indira Gandhi's rule was the Emergency- the decision to suspend the Constitution and the rule of law. In June 1975, Indira Gandhi made the declaration in a radio broadcast.[21] The immediate reason for imposing the emergency was decision by the Allahabad High Court that her election in the 1971 general elections was invalid due to violation of electoral laws. The Supreme Court had subsequently stayed the order of the High Court but it did so with the condition that Mrs. Gandhi would no longer be able to vote in the Parliament. On 26th June 1975, Mrs. Gandhi in her radio address to the nation declared,

> 'The President has proclaimed Emergency. This is nothing to panic about. I am sure you are all conscious of the deep and widespread conspiracy which has been brewing ever since I

[21] The Indian Constitution lays in Part XVIII lays down the conditions under which Emergency can be declared by the state.

began to introduce certain progressive measures of benefit to the common man and woman of India' (Full text in Weiner 1978: 115-116).

Let me turn to the first question viz. whether the Emergency was guided by the *sovereignty through destitution* principle or did it undermine it? To understand this let me turn to the central legislative/constitutional move during the Emergency viz. the 42nd amendment act passed by the Parliament in 1976, an amendment that has hardly received any academic attention. The amendment to the Constitution which clearly laid down what the Emergency was premised on, what it wanted to achieve, what the government thought justified it and the fundamental changes that the Emergency sought to institutionalize.[22]

The Amendment Act in its first four paragraphs setting out the objectives of the amendment had the following to say:

1. A Constitution to be living must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer virtual atrophy. The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and in equality of opportunity, has been engaging the active attention of Government and the public for some years now.
2. The democratic institution provided in the Constitution are basically sound and the path for progress does not lie in denigrating any of these institutions. However, there could be no denial that these institutions have been subjected to considerable stresses and

[22] The 42nd amendment Act though undone by the subsequent Janata government, its remnants have proved to be consequential for the Indian democracy. This was the amendment which introduced the terms *socialist* and *secular* which have proved highly contentious in contemporary India.

strains and that vested interests have been trying to promote their selfish ends to the detriment of the pursuit of public good.

3. It is therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make directive principles more comprehensive and give them precedence over those fundamental rights which have been relied upon to frustrate socio-economic reforms for implementing the Directive Principles. It is also proposed to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities, whether by individuals or associations.
4. Parliament and the State Legislatures embody the will of the people and the essence of democracy is that the will of the people should prevail. Even though article 368 of the Constitution is clear and categoric with regard to the all inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt. It is proposed to strengthen the presumption in favour of legislation enacted by Parliament and State legislatures by providing for a requirements as to the minimum of number of judges for determining questions of constitutionality of laws and for a special majority of not less than two-thirds for declaring any law to be constitutionally invalid. It is also proposed to take away the jurisdiction of High Courts with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different High Courts and the consequent possibility of the Central law being valid in one state and being invalid in another.

The statement of objectives of the 42nd Amendment Act is probably the clearest statement of the absolutism of the political ever expressed and premised exactly on *sovereignty through destitution*. It is

also in line with the democratic imagination of the Constitution. It invoked the conditions of 'poverty and ignorance and disease and inequality of opportunity', invoked the 'socio-economic revolution' which had been impeded because the Constitution had atrophied. Thus, to further the cause of the revolution it would be necessary to introduce these constitutional amendments. It also sought to remove the impediments in the unmediated relationship between the people and the government created by the courts.[23] The courts thus could no longer use the excuse of Fundamental Rights to undermine the progressive policies of the state. It is true that Indira Gandhi had subverted the norms of parliamentary democracy and incarcerated a large number of opposition leaders. But the way in which the emergency was argued for and was justified remained well within the field of argumentation. Social revolution and destitution itself were the basis for the emergency, the terms through which the legitimacy was to be reclaimed in the moment of crisis for Mrs. Gandhi. It only reaffirmed the sovereignty through destitution principle. The Emergency in India is often remembered as an aberration, a momentary lapse in the unending glory of Indian democracy. The suggestion certainly has never been made that the Emergency was aligned with the original constitutional vision, but the 42nd amendment Act precisely shows the crucial link between the Emergency and the original idea of Indian sovereignty. However, the 42nd amendment act would not only be the last expression of this absolutism but would also put in crisis the constitutive principle of Indian sovereignty.

This brings me to the second point viz. the sinister consequence of the Emergency, the initiation of massive and coercive family planning program that was executed by Indira Gandhi's eldest son Sanjay Gandhi with the full backing of the Indian state. Family planning and growing population had always been an issue of anxiety for the Indian state and international agencies and was intimately tied

[23] In 1967 the SC again passed a judgement in *IC Golaknath vs Union* of India arguing that the Constitution guarantees the right to property and the government could no longer confiscate land from large landowners.

to concerns about poverty. But the Emergency saw the implementation of a draconian and coercive regime of family planning on an unprecedented scale. *Nusbundi* or Vasectomy became the buzzword during this period of time covering the fears of bodily invasion by the state. The lead in this regard was taken by Sanjay Gandhi, Indira Gandhi's eldest son. In the period of 1975-77 the city of Delhi saw a 477 percent increase in the rates of vasectomies (Tarlo 2000: 244). Having undergone a vasectomy oneself or having motivated someone to undergo the same was now the prior requirement to make a claim on citizenship in India. Emma Tarlo (2003) in her moving ethnography of the colonies of Delhi showed that Emergency and its violent regime adversely invaded the bodies of poor and vulnerable men in the country. For the poor the ability to get a ration card, getting children admitted to school all depended on their ability to show that they had fulfilled the requirements of the government. Incentive structures and motivators were instituted, but underneath such procedural niceties, there was massive abuse of the powers by the state, especially in north India. The key point here was that even if the Emergency was premised on sovereignty through destitution, the Emergency also broke it. In this moment of unmitigated absolutism the body of poor and destitute was regarded as what was wrong with the nation state. If the original idea of sovereignty was premised on saving the lives of the poor masses, the Emergency argued that the bodies of poor needed to be eliminated. Like vasectomies, Sanjay Gandhi's massive resettlement plans couched in terms of beautification also sought to remove the poor from the city spaces. Rebecca Jane Williams (2014) has shown that this was the period in time when the body of the poor and poverty was not the premise on which sovereignty was founded it was rather the moment when poverty itself became an impediment to the becoming of the nation. And this gesture would prove transformative for the nation state.

Unaware or in denial of the consequences of the emergency and confident that she would be voted back to power, Indira Gandhi called for snap general elections in 1977. Newspapers which had so

long been under heavy restrictions started reporting extensively on the abuse around this period. Realizing the discontent around the invasive family planning program, Indira Gandhi and the Congress tried to distance themselves from their action. In a stunning reversal of fortunes, Indira Gandhi lost the election of 1977 by a wide margin (Weiner: 67).

How then do we make sense of the Emergency and Indira Gandhi's defeat in the 1977 elections? The defeat of Indira Gandhi in 1977 is believed to have shown the fundamental resilience of Indian democracy. That under duress, the Indian electorate was capable of making the right decision to uphold their democratic values. Emma Tarlo (2000) in passing described the emergency as a *critical event* following Veena Das (1996). In Das's conceptualization critical events are transformative events which inaugurate new modes of action and lead to the redefinition of traditional categories. The question then is, if the Emergency was a *critical* event what made it critical, what was transformative about it?

I have shown that the Emergency was founded on the original absolutist constitutional vision. In the moment of unmitigated absolutism, the Emergency saw a dramatic reversal of the principle of sovereignty through destitution. The 1977 election I will argue signified the final breakdown of the absolutism of the state which had already been under strain through the rule of Indira Gandhi and but more importantly it ushered in a crisis of authority. The overarching state was faced with a crisis of legitimacy and this was seen in the realm of politics, economics and law. Politically it was the first time that the Congress lost a national election. It was defeated by a ragtag coalition which was driven more by its opposition to the Emergency and Indira Gandhi than any ideological coherence.[24] The subsequent years was never able to reproduce the executive strength of the Nehru and the early Indira era. Economically too, the state increasingly withdrew itself from its all-encompassing role. As

[24] The Jan Sangh had members from a wide ideological spectrum from the Hindu fundamentalist RSS to the socialist Jayprakash Narayan.

Arvind Rajagopal (2011) has shown, the roots of India's liberalization which officially came about in the early 1990s was situated in the post Emergency era. It was after her reelection that Indira Gandhi in the 1980s took the first steps in the withdrawal of the state. It was period when Indira Gandhi was willing to identify the middle class as the new site for new economic agency and authority in India and concede that the state was not the most rational actor in the economic realm (Rajagopal: 1012). A critical reader would raise the point that Mrs. Gandhi's departure from power was only temporary and she would back in the driving seat within a few years' time. It signifies a continuity rather than a departure. Yes, it is true that the Indira Gandhi was reinstated in power, but the Indira Gandhi of 1980s was a different one from her previous avatar. No longer was there the rhetoric about the total governmental control over the economy but the slow withdrawal of the state. But more importantly this break in the absolutism created a crisis of authority and fundamentally reoriented the role of the judiciary in Indian democracy and this is where right to life emerges, not necessarily as a progressive proposition but because of the persistent problem of destitution.[25]

IV. Public Interest Litigation and the Right to Life

If the Emergency was the dark era for Indian democracy then the period after the Emergency was the period of redemption, a period when Indian democracy was restored to its full glory. This is an oft-repeated narrative and it has many strands. But the most crucial, both historically and for the purposes of this essay, is the one about the restoration of the rights of the citizens by the Supreme Court of India, rights which had been brutally suppressed during the Emergency (Baxi 1985: 107).

Though it is true that the period did indeed see a flourishing of rights, with the higher courts curbing the powers of the government and declaring that an array of rights were protected by Article 21,

[25] In *Shivakant Shukla vs ADM Jabalpur* (popularly known as the *Habeas Corpus* case) the SC upheld the constitutionality of the Emergency arguing that under conditions of Emergency the powers of the executive were unmitigated.

there was a distinctive structure of argument that emerged at this point in time. The key element in this structure was the right to life and it did a specific function here. I will show that right to life becomes a thinkable proposition not as a progressive resource for the recovery and expansion of rights as has often been argued, but rather it is an attempt to recover and reinstitute the principle of sovereignty through destitution. The recovery however is not made by the executive whose claim of centralized control had been undermined. Rather, it was done by the Supreme Court of India. It emerges at a moment of crisis of authority in India and under the leadership of two judges, P. N. Bhagwati and V. Krishna Iyer. Through a reading of the most consequential cases in the post-Emergency era till 1986 I will show, how in the remnants of Emergency, sovereignty through destitution was rethought and recovered and put to effective use by the judiciary and how right to life emerged as a key resource for that purpose.

This brings us to a crucial judicial innovation that emerged at this particular juncture. Bhagwati, Iyer and their cohort of judges in the late seventies and through the eighties were most famous for the introduction of a new jurisprudence known as the Public Interest Litigation or PIL (Sathe 2003, Bhuwania 2017).[26] PIL eased the access of the masses to the higher courts by diluting the procedural concerns of Anglo-Saxon law. It also allowed the courts to adjudicate on matters that before the Emergency remained outside the realm of its jurisdiction- i.e. the rise of judicial sovereignty. PIL is part of the story of the redemption of Indian democracy. The conditions of possibility for the emergence of Public Interest Litigation was the breakdown of the original idea of sovereignty during the Emergency, but a new sovereignty needed still to reframe the old idea to be effective.

The structure of the argument that the judiciary developed after the Emergency had three distinctive features:

[26] For a difference between American PIL and Indian PIL *see* Baxi 1985.

a. It questioned the arbitrary powers of the government.
b. How these arbitrary powers most adversely effects the destitute masses in India. But it recognized that the formal procedural structures of law were insufficient to provide necessary relief to the masses.
c. The need for the judiciary to play a more expansive role in protection of the rights of the subjects. Right to life as a doctrine which was intimately tied to the destitution question in so far as it also allowed for a more expansive and creative interpretations of the Indian Constitution.

Let me elaborate on each of them. There are four cases that I will be looking into here decided between 1978 and 1986. These cases were significant because of the precedential significance they acquired over time and were crucial in the rise of the PIL.

Arbitrary powers of the executive: In *Maneka Gandhi vs Union of India* (1978)[27] Maneka Gandhi, wife of Sanjay Gandhi and the daughter in law of Indira Gandhi had her passport impounded by the Passport Authority of India after Congress's defeat in 1977. Challenging the action of the state, she moved the Supreme Court pleading that Fundamental Rights under Articles 14 (equality), 19 (freedom) and 21 had been violated and demanded a return of her passport.

Bhagwati in his majority opinion criticized the arbitrary nature of government action. Bhagwati argued,

> 'Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an

[27] After the unexpected electoral loss of Indira Gandhi in the 1977 general elections, the new Janata government (the first non-Congress government in independent India) set up the Justice Shah Committee to investigate the abuses of power during the Emergency. Maneka Gandhi's passport was impounded by the Passport Authority of India because the government thought that she was a flight risk and could dodge a possible appearance before the Shah Commission.

> element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive' (para. 21)

Article 14 is the equality clause in the Indian Constitution and Bhagwati's reading of it as restricting arbitrariness was novel. Bhagwati who in the *Habeas Corpus* case had upheld the constitutionality of Emergency based on a restrictive reading of the Constitution was now seeking to reverse that reading. It is fair to argue that this anxiety about arbitrariness was rooted in the experiences of the Emergency. The question of limits on the powers of the judiciary and the Parliament had persisted in the India since the framing of the Constitution. But Bhagwati through *Maneka* made a break with this precedence and made a restrictive reading of the powers of the government.

Bhagwati in *Maneka* argued that this arbitrariness was in violation of natural justice- something embedded in the Constitution.[28] What did natural justice mean? It was 'a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action.' Thus, if natural justice was a part of Indian law then it was up to the courts to decide when a law was in violation of that principle. Natural justice as fair play was applicable even in administrative cases. Thus, passport officers needed to abide by the principles of natural justice and fair play. Their actions would also be subject to judicial review. It meant that unlike the previous consensus which laid down that the Indian Supreme Court would only consider the procedural merits of a law made by the Parliament, from now on the court took on itself the power to evaluate even its substantive merits.

[28] In *A.K. Gopalan*, Justice Kania had specifically had decried this.

The Supreme Court and the government had sparred on this question on several occasions. That Bhagwati could limit the powers of the government this time round and institute judicial review, was possible because of the crisis of authority that this moment signified. Not only in this case but in a series of subsequent cases the court slowly eroded the powers of the executive in matters that were firmly beyond the purview of the judiciary.[29] The rise of judicial sovereignty and the power of the Supreme Court is rooted at this particular moment. This point has been made by several scholars. But whereas this transition has been attributed to the embarrassment thesis i.e. the court embarrassed by its capitulation during the Emergency was trying to fix a historic wrong, I am arguing that this was a more structural transition.

The *Maneka* judgement has often been credited as being the necessary antidote to the Emergency. The judgement that restored the rights of the Indian subject (Mody 2013: 46). But who was the subject of these rights? Bhagwati argued, 'These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest.' Government according to Bhagwati should not prevent the individual from developing his fullest capacities and in that regard the rights of the Constitution are crucial (para53). This individual that Bhagwati is projecting here is projecting here is the classic subject of liberal law. But what happened then to the question of poverty and destitution that seemed not only constitutive at the moment of Constitution framing but through the period of the emergency? Did the Indian subject fully come into being with the *Maneka* judgement?

Concern with Procedure: Whereas *Maneka Gandhi* has been read as the liberalization of individual rights, the original subject of the Indian Constitution loomed large in some of the critical cases that

[29] Notably in *SP Gupta vs Union of India* 1981, the Supreme Court curbed the powers of the Central government in appointing the judges of the Supreme Courts and High Courts.

emerged before the court in the subsequent years. Though *Maneka* recognized the full scope of the Indian subject it was the original subject of the Indian Constitution which determined the contours of the new jurisdiction of the PIL. Beginning from the 1970s the court would be confronted with a series of cases where the precise question that Nehru had posed in the Constituent Assembly would re-emerge. In *Bandhua Mukti Morcha*,[30] (1983) the court noted the following,

> 'in a country like India, where there is so much poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding of enforcement of a fundamental right would become self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man and the entire remedy for the enforcement of fundamental rights…would become a mere rope of sand so far as the large masses of the people in this country are concerned.'

Here Bhagwati re-posits the problem of destitution and articulates the central question that the PIL sought to address. What sense did liberal rights make when the people of the country were in such a dire conditions? This case and others[31] brought back the central subject of Indian Constitutionalism. By 'rigid formula' Bhagwati is referring to the overbearing procedural concerns of Anglo-Saxon law which according to him made the courts inaccessible to the masses. Just as Nehru had sought a direct relationship between the people and the government, the court similarly was seeking to get rid of the procedural concerns that were proving to be a major impediment, it gave to much law and too little justice. The court addressed these questions by diluting some of the procedural limits that had been set on its powers- bringing itself closer to the people.

Bhagwati believed that to guarantee the fundamental rights of the people:

[30] In this case an NGO *Bandhu Mukti Morcha* in 1983 (Freedom for Bonded Laborers Front) approached the Supreme Court alleging that the practice of bonded laborers remained thriving in the state of Haryana in its stone quarries in violation of constitutional protections.
[31] *Hussainara Khatoon vs State of Bihar* 1979.

> 'this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in the realization of this constitutional obligation that this court has, in the past, innovated new methods and strategies for the purpose of securing the enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to who freedom and liberty have no meaning' (*MC Mehta vs Union of India,* 1986)

The power to innovate therefore has come clearly from the fact that for India's poor freedom and liberty have no meaning, a precariousness which was debilitating. Not requiring a direct petition, accepting petitions from a third party, accepting letters as petition were only some of the innovations that were brought about by the Supreme Court in this period of time.[32] What characterized them was the belief of the court that it needed to ease the access of the masses to the court. The decision to diminish the procedural burdens were based on humanitarian grounds. But the court in the attempt to expand its own powers, sought to limit the procedural concerns that mediated the relationship between the authority (here the court) and the destitute masses and establish a more direct relationship. As I said this was precisely what Nehru and Ambedkar were arguing for in the CA debates for their own authority. Authority when claimed on behalf of the poor and for their sake is always constituted as unrestrictive. This is key point in understanding how the sovereignty through destitution principle gets reconstituted in the post-emergency era.

Emergence of right to life: It is in this matrix of the post emergency era, the crisis of authority that the period marked and the persistent problem of the destitute masses that right to life emerges as a central legitimating principle for the Supreme Court. But what work did right to life do which other

[32] For a more detailed and critical account of these innovations *see* Bhuwania 2017.

rights could not? To understand that let's see one of the earliest cases where right to life is invoked by the judges in 1981. In *Francis Mullin*, Bhagwati argued that

> 'right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.'

Right to life in this characterization is the right of last resort, it is about the bare necessities of life. The invocation of right to life in this context does two things, it simultaneously connects it to the condition of the destitute masses and also creates the basis for the Supreme Court to claim to be the institution of intervention and not merely of regulation. *Francis Mullin* was a curious case for the invocation of right to life. But it proved to be the most consequential for the years to come. Francis Mullin was a British citizen who was detained by the Government of Delhi on the charge of smuggling contraband substances from India. Mullin alleged that the conditions of her detention were illegal and arbitrary because the government of India imposed unreasonable restrictions on her ability to speak with her lawyer and her family. Francis Mullin was by no means a representative of the destitute masses. But it showed the mood and judicial disposition of this particular moment. What is striking is how Bhagwati articulates this particular case in terms of deprivation:

> 'Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include the faculties of thinking and feeling. Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover, it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore,

> deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be accordance with procedure established by law.'

This question of deprivation was precisely what could be seen in a number of cases at this particular moment. Whether it be the situation of bonded laborers in *Bandhua Mukti Morcha*, the condition of under trial prisoners in Bihar in *Hussainara Khatoon*; or the case of a gas leak in the vicinity of a slum in Delhi in *M. C. Mehta*. It was through the interpretation of right to life that the Supreme Court sought to limit the powers of the government and expand its own powers, just as had been done by the executive in the Constituent Assembly. Underlying right to life was not so much the expansion of rights, but a claim to sovereignty. A sovereignty based on destitution. Bhagwati argues,

> 'The principle of interpretation which requires that a Constitutional provision must be construed not in narrow and constricted sense but in a wide and liberal manner so to anticipate and take account of changing conditions and purposes so that the Constitutional principle does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirt so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.'

Bhagwati's argument here is strikingly similar to the argument made by Indira Gandhi during the Emergency viz. the need to reinterpret the Constitution, otherwise it would become atrophied and redundant. The creativity was best suited for application in the case of Article 21, a right most

foundational precisely because of the manner in which it was made to relate to the original subject of the Indian Constitution.

But if the judiciary was attempting to reclaim the principle of sovereignty through destitution, why did it need right to life and not say liberty? This had to do with the question of the subject itself. The principle of liberty in a certain manner presumes an independent subject. But that was not available to the judges. It was the original subject of the Constitution that posed the main problem for them. It is not that the judiciary simply replaced the executive, it certainly did not. But as absolutism lay in tatters, in the post-1980s Indian political landscape, the courts have gained an upper hand.

This is the manner in which Right to life emerged as a thinkable proposition in India in the 1980s. Through the above mentioned cases and subsequently through a series of subsequent cases, right to life became the bedrock of jurisprudence in India. In this chapter what I tried to show was the problem space within which the question of Indian constitutionalism emerged in the first place. The central problem was the question of mass destitution. I proposed the concept of *sovereignty through destitution* to explain the manner in which a new principle of sovereignty arose and a vision which was absolutist. The most *critical event* in the history of Indian democracy was the Emergency which undermined the absolutism of the state. As a consequence a space was created where the absolutism of the state got undone and a crisis of authority was created. It was here that the Supreme Court arose as a crucial authority and it did so through the reconstitution of sovereignty through destitution. A key resource here proved to be right to life, because it helped the judiciary signify the absolute basic conditions of survival and its promise now to resolve it.

Though the initial promise of PIL has receded (Bhan 2017), right to life has become a part of the common sense of Indian jurisprudence and law making. It still is an expression of judicial and executive sovereignty as the recent proliferation laws based on Article 21 have shown, though the

principle does not hold hope for the poorest in India and is more an expression of judicial arbitrariness.

Let me conclude by making a brief observation about the significance about constitutional politics in postcolonial India from the above discussion. Partha Chatterjee in his now famous formulation of political society has argued that *real* politics in India is not the institutional realm of the Constitution but in the realm of the masses- the political society which is not always bound by the proprieties of the rule of law. The politics in this realm often deals with questions of everyday survival, like the supply of electricity and water. Representatives of high politics have to maintain their legitimacy by continually addressing these extra-legal demands because their electoral success depends on addressing these issues. It is fair to argue that at the heart of the political society also lies the figure of the poor. But what are the conditions of possibility of this political society? In my chapter I have tried to show that this concern over destitution was the foundational concern of the Indian republic. The Constitution embodies and institutionalizes it. Chatterjee's formulation of the political society is undeniable, but his distinction between the higher realm and lower realm of politics I have shown is unfounded. Like the realm of political society, Constitutional politics itself has been defined by this question of destitution. What I am calling the new field of argumentation encompassed both the higher and the lower realms of politics and it was made possible by the Constitution.

Chapter Two

The Power to do Complete Justice

Right to Life and the Return of the Absolute

I. Introduction

The judge said that he had recently visited the Kalighat Temple in Kolkata and was appalled. In his words he was shocked by the number of beggars on the street leading up to the temple, how this site of worship was sullied by the presence of this wretched poverty. His aesthetic sensibilities were further offended by the fact that the beggars were cooking their meals and drying their clothes on the road. It was 2016 and I was sitting in the thick of affairs at the National Green Tribunal in Kolkata. The filth and dirt in the city offended the judge quite often and he did not hesitate to express it in open court, he did not also hesitate to express his disgust with politicians who never seemed to be doing anything about it because of the 'votes'. These observations were all made during the course of court proceedings. In this instant the judge promptly turned his personal dislikes and frustrations into a judicial order, unprompted and of his own volition and also unchallenged. He ordered the state government to clear out the beggars from the vicinity of the temple promptly and to ensure that the temple and its premises were kept clean. Now the original petition which was being deliberated over had nothing to do with beggars, no one had made any petition seeking their removal either. The original case dealt with the question of pollution in a tributary of the Ganges. This case which was filed by a self-proclaimed Public Interest Litigant had sought judicial action in cleaning the river, the petition unsurprisingly claimed that the continued pollution of the river was a violation of the right to life. The petition was vague in terms of the

substantive complaints that it made but subsequently morphed into something else- in this instance the cleanliness of the temple.[1] This I found to be not an uncommon phenomenon in these kinds of cases. The fact that a large number of such cases could start someplace and then morph into something else was again a product of the discretionary actions of the judges. Judges have as we will see later, start cases of their own volition and sit in judgement on those cases,[2] continue with cases after dismissing the original petitioner[3] and completely change the course of cases from their original intent. The fact that judge could take one instance of his personal dislike and turn into a judicial command is indicative of judicial power, discretion and more importantly *jurisdiction* that I want to explore here. Judges have come to exercise substantive power in India, they claim that they have the *power to do complete justice* and to adopt whatever path they think is necessary to secure justice.[4] Let me give two examples of this expansive powers of the higher courts in India from recent experience.

In 2016 a homeopathy student in the southern state of Kerala decided to convert to Islam without informing her family. Subsequently, she married a Muslim man. Since she left her home without informing her parents, they moved the Kerala High Court with a Habeas Corpus petition claiming that he had been moved out of India. The Court summoned the woman who came to the court and claimed that she had taken all the decisions of her own volition and was under no coercion and that she had converted of her own accord (Jacob 2017). In spite her plea the Kerala High Court gave her father her custody and instituted an investigation into her husband and his background. Based on the report by the report which alleged that she had been brainwashed the court decided to annul the marriage. The Court said it was playing a parental role and claimed there was enough grounds to

[1] A lawyer in the NGT told me another story about this judge. There was supposedly an auto stand near his residence, something he considered to be a nuisance. When he was appointed the acting Chief Justice, he got a lawyer to file a writ petition against the auto stand in his court. Then presiding over the case he ordered the auto stand to be shifted from the vicinity of his house.
[2] *See* Chapter Three
[3] Sheela Barse vs. Union of India and Others 1988.
[4] *See* Ramanathan 2014, also Article 142 of the Indian Constitution.

take this action. The court could intervene in the personal life. When the matter reached the Supreme Court, the court reversed the judgement and claimed that there was insufficient evidence to suggest that she had been coerced into marriage and into converting her religion and therefore restored her marriage (Mahapatra 2018). Is there any law or provision under which empowers any court in India to discretionally annul a marriage? Not really. The important thing to note here is not that the answer to this question is no, but rather that this question was not even raised in all the subsequent commentary that followed the case. Even if one attends to the institutional dimensions of the case one would find this to be a curious instance. The father had approached the court directly. The court proceedings were not the consequence of a completed police investigation but rather it was the court that instituted this investigation by a central investigative agency and passed a judgement based on it. Thus, all the jurisdictional railings that guides court action had been completely reversed in this instance. If we think jurisdictionally then the Supreme Court did not reverse the jurisdictional basis of the case, it did not argue that the court had overreached when it reversed the judgement but had made its decision based on facts of the case.

Another curious instance in recent times has been the case of the court administration of the Board of Control (BCCI) in India. Hit by massive corruption charges against the then president of the Board of Cricket Control in India, the Supreme Court based on a PIL decided formed a committee under its supervision which proposed a series of reforms. The Supreme Court asked the BCCI to implement these reforms which the agency was reluctant to do. In the face of its recalcitrance to take over the governance of the BCCI and appointed a committee and took over the leadership. From 2017-2019 cricket administration in India was run under the Supreme Court's oversight, by a panel appointed by it (*The Times of India* 2017). An American equivalent of this event would look like something like this. A self-proclaimed fan of say, the NFL, approaches the Supreme Court on the grounds she was bothered by the reported corruption in the league and wants the Court to carry out

an investigation. The court forms an investigative panel which finds evidence of malpractice. The Court then forms a committee, dismisses the administrative head of the NFL and replaces it with the committee. The committee is now charged with the task of managing the NFL, its affairs and bringing about reforms. This is quiet an unimaginable scenario in the US. But this is precisely what happened in India with the BCCI and the Supreme Court.[5]

Pratap Bhanu Mehta commenting on the multiple indiscretions of judges argued that the fundamental problem of India's higher judiciary remained the fact that there was lack of transparency and accountability in its practice as well as in its judicial philosophy and methodology (2005). Mehta gave the example of the absurd opinion by a Supreme Court chief justice who had declared that people who had more than two children should be barred from holding public office in India- a judgement supposedly out of concern for India's rapid population growth. The opinion flew in the face of logic, practicality and the law. Such judicial opinions have only proliferated in India since the rise of the PIL. Mehta argued that judges in India engaged in what can be described as:

> 'jurisprudence of exasperation. The function of law in this view is to express, both literally and figuratively, exasperation at the state of affairs. This is not a jurisprudence based on a concern for the *formal allocation of powers*. Nor does it consider carefully the actual consequences of the law. Rather, it expresses a certain impatience with reality…Much in our society would prompt us to tear our hair out in exasperation. Judges now see it as their job to give these sentiments expression in law. But how far a jurisprudence of exasperation will sustain the *authority* of the court remains to be seen' (emphasis mine).

[5] To be clear this in no matter entails that American judges do not have power or that abuse does not happen in the American legal system. However, the scope of jurisdictional authority in the US clearly would prevent the constitutional court from taking such actions. The powers of the court in India are far more expansive.

Mehta raises two closely related points that concerns me in this chapter. On the one hand he is speaking about the diminishing concern for formal allocation of powers between the courts and other agencies of the government- the question of jurisdiction; on the other hand, the sustenance of authority in a jurisprudential system which seems to take the question of jurisdiction less and less seriously. But similar criticism has risen from within the court itself.

> 'If the judiciary does not exercise restraint and overstretches its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence of the judiciary. If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it. Judges must know their limits and must not try to run the government. They must have modesty and humility, and not behave like emperors…We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive of legislative functions' (Katju quoted in Mate 2010, 177).

This opinion was written by Markanday Katju, one of India's maverick judges in his opinion and summarizes what I would like to describe as the absolutist jurisdiction. Meaning there is no realm of Indian politics, economics, social and personal life which can be regarded as being beyond the jurisdiction of the Indian Higher Courts. In the first section of the chapter we saw a few instances of this phenomenon. A number of factors have contributed to this situation- activism of the judges, dysfunctional governance or non-responsiveness of the political system. This claim of absolutism has both an empirical dimension and a conceptual dimension. This has also remained closely tied to the question of right to life.

The question of the growing powers of the judiciary is hardly new and hardly limited to India (Hirschl 2009). The growing powers of the judiciary is now a global phenomenon that encompasses

the global north and south. John and Jean Comaroff (2006) have identified this trend as a critical aspect of what they have termed as *lawfare* functioning of politics through the court, since progressively it has become harder to address for the state to address critical political and social questions in the midst of the neoliberal withdrawal of the state from the various avenues of social economic life. This growing judicialization has both been criticized as well positively received. But the Indian situation does not always correspond with the global phenomenon. I am more interested in the specificities of the Indian instance.

I want to take a slightly different tack in addressing this judicialization question, I want to approach this primarily as a jurisdiction question. Jurisdiction is principal feature of the law which defines the authority of an institutions its geographical and material scope and also the questions and matters over which it can have decision making powers. Richland (2013) argues that jurisdiction allows us to pay close attention to both the ideal-normative and the pragmatic questions of law. It draws attention to the significance of language use in the operation of law, to the moments and contingencies of emergence as well as the pragmatics of power involved in jurisdiction. In the previous chapter I had contended that right to life was a reconstitution of the principle of sovereignty through destitution. The court's power had expanded and as the above accounts shows there is very little limit to this power. The specificity lies in its jurisdictional capacity. It does not mean that it can do anything it wants but in contemporary India it is fairly clear that there is no substantive matter over which it cannot deliberate. Its jurisdictional scope is absolutist. Though sovereignty through destitution in the form of right to life inaugurates an expanded form power- it certainly does not explain how this expansive jurisdictional scope comes to be exercised by Indian court. The chapter therefore seeks to answer the following question, how did the constitutional courts in India come to exercise this absolutist jurisdiction. What are the underlying jurisdictional politics of right to life in India?

In this chapter I will argue that there is key tension underlying constitutionalism in India. Popular constitutionalism co-constitutes a relation between a people and a form of power, each being dependent on the other. In India there was an underlying contradiction in Indian constitutionalism. Though it was well assumed that the authority of constitution is derived from the people however at the same time it was well acknowledged that neither the people had come into being nor did they have the capacity to act because of structural and historical reasons. In spite claiming that power of the constitution is derived from the people, the pragmatics of constitutionalism has kept reasserting that the people have still not arrived in India and that they lacked the agency to change the course of the country. Through a close reading of judgements over a period of time I will show that in the jurisprudence of PIL beyond its legal innovation there was particular kind of story which was being told repeatedly through the last forty years. This was made evident through the distinctive markers that came to inform these judgements namely, suffering, dignity and transformation. It was story of transition. This narrative did a particular kind of work, which was posing the constitutive problem of Indian constitutionalism repeatedly. In doing and then seeking to resolve changed the jurisdictional orderings of the constitutional court eventually leading to the emergence of an absolutist jurisdiction.

II. Jurisdiction

The conventional legal idea of jurisdiction deals with lines- lines drawn over space and lines drawn over subjects which divide the sociopolitical world into different segments over which authority is to be exercised. Sometimes jurisdiction have no limits like that of the Popes in the medieval Catholic Church, but others are more circumspect (Dorsett and McVeigh: 2012, 1). In the modern world, jurisdictions are partial and more often than not contested. Jurisdiction is the key underlying presumption of any legal order; every law marks a space over which it works and authorizes certain

bodies to act legitimately. Jurisdiction also indicates when that authority is to be exercised. Thus, in the Indian Constitution the Courts had jurisdiction only over Fundamental Rights and not on questions laid out in the Directive Principles.

Richland (2018) has been pushing this conventional understanding of jurisdiction to understand its more normative and performative dimensions and challenge its supposedly settled nature. He has invited us to think about juris-*diction* emphasizing the two constitutive roots of the word, juris meaning law and diction meaning spoken (Benveniste quoted in Richland 2013). Whereas in normative legal theory, jurisdiction would be clearly defined Richland has shown that it is neither settled an dis being continually provoked and unsettled. Richland argues that focusing on language practices and especially it performative dimensions shows how a certain effect of normative authority is produced performatively through various pronouncements, in courts of law as well as very far away from it (Kahn: 2017, 2018).

> 'These jurisdiction markers tie the discourses of a present legal act or specific context to those of past or anticipated legal acts or contexts, producing a sense of an enduring field of coherent legal practice and normativity' (269).

As Bradin Cormack (2008), has argued, such an approach to jurisdiction overcomes the distinction between power derived from founding documents like the Constitution and everyday legal acts and processes. He argues that focusing on jurisdiction helps undo the seeming stability of 'sovereignty' and helps better understand that sovereignty is an 'ongoing accomplishment', a tentative and unstable process achieved through jurisdiction.

III. The Jurisdiction of the Supreme Court of India

The remedial powers of the Supreme Court are derived from Article 32[6] of the Indian Constitution and seeking constitutional remedies are recognized as a fundamental right in India.[7] Other articles which address the jurisdictional scope of the Supreme Court are Article 136 and 142. Though the expansive powers of India's constitutional courts are a widely acknowledged fact, there has been very limited commentary on the matter from a jurisdictional stand point. One of the exceptions to this lacuna has been Usha Ramanathan. She has provided one of the more substantive accounts of this phenomenon articulating how the courts have amassed power since the end of the Emergency. She shows how the courts used an innocuous phrase in an article in the Constitution to exaggerate its authority in the 1980s. This clause was Article 142 of the Indian Constitution.[8] Ramanathan argues that the expansion of judicial power in India occurred when the Court read the phrase 'pass such decree or make such order as is necessary for doing *complete justice* in any case or matter pending before it' (emphasis mine) as having an unlimited scope. In *Nadiad* the Supreme Court had issued the order to quash a criminal trial against an accused (quoted in Ramanathan 2014, 46). The then

[6] Article 32 states: Remedies for enforcement of rights conferred by this Part- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

[7] Corresponding powers of the state high courts are laid out in Article 226.

[8] Article 142: **Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary **for doing complete justice** in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself (emphasis mine).

attorney general noted that the Supreme Court had no authority to dismiss an ongoing trial in a criminal court. The court has however asserted its capacity to be able to precisely that:

> 'The inherent power of this court under Article 142 coupled with the plenary and residuary powers under Articles 32 and 136 enhances power to quash criminal proceedings before any court to do complete justice in the matters before this court. If the court is satisfied that the proceedings in a criminal case are being utilized for oblique purposes or if the same are continued on manufactured and false evidence or if no case is made out on admitted facts, it would meet the ends of justice to set aside or quash the criminal proceedings' (quoted in Ramanathan 47).

Thus, the court argued that even in the absence of any express powers, it could take a critical legal step like the quashing an ongoing criminal case by virtue of its capacity to do complete justice. This unchecked power to do complete justice was in greater display in the Bhopal gas leak case. Following the Bhopal disaster, the Indian Parliament had passed a law through which the government of India appointed itself as the sole representative of the victims of the gas attack in any litigation or settlement negotiations. In this case, while dismissing the criminal petitions the court again argued that the 'power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, *ipso facto*, act as prohibition or limitation on the constitutional power under Article 142' (quoted in Ramanathan: 51). The Court in the same judgement read Article 136 as giving it virtually arbitrary powers.

Ramanathan argues that this power was to do complete justice has been exercised in the name of *public interest*. The higher courts have repeatedly invoked the notion of public interest to exercise authority in realms which were beyond the original limits of the powers of the Courts in the Constitution. Public interest as a concept of judicial deliberation, as we saw in the previous chapter,

emerges in the post emergency era as the Supreme Court repeatedly invoked it for making wide reaching interventions. The power of judicial review is certainly one good example of that which certainly emerged with the PIL. But it is also true that the powers of the higher courts have gone beyond the limits of conventionally understood judicial review. Public interest, right to life and the absolutist jurisdiction of India's constitutional courts are intimately tied together. Bhuwania (2017) has made similar arguments. But it is an insufficient answer. Both Bhuwania and Ramnath seem to be suggesting that the mere invocation of populism or the people lead to an expanded power of the judiciary. But why does that happen? Both of them are presuming something that needs an explanation. Though one can understand the efficacy of the judiciary at a certain time, it still does not follow that judicial power inevitably leads to a form of absolutism. To explore this tension, I want to turn to some of the tensions in Indian constitutionalism.

IV. The Paradox of Popular constitutionalism

Modern popular constitutionalism is based on particular conception of the source of authority and how the state is to be organized, who can act in it and when. Popular constitutions around the world are likely to ground their authority and legitimacy through the invocation of a people which is posited as a pregiven entity. This is more often than not a feature that is consistently found in postcolonial constitutions which seek to legitimize themselves through a claim to popular sovereignty. This relationship between the constitutional form and the people that underlies it creates some tensions. The political theorists Loughlin and Walker have the following to say about this tension:

> 'Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the 'consent of the people' and that, to be sustained and effective, such power must be divided, constrained and

> exercised through distinctive institutional forms. The people, in Maistre's words, 'are a sovereign that cannot exercise sovereignty'; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established' (Loughlin and Walker: 2007).

The central elements of this paradox lies in the tension between the 'constituent power and constitutional form, politics and law' (1). Constitutional texts do not only establish a governmental form in the process they also constitute the people. There is a tension between the *constitutional* identity of a people and the *constituent* power supposedly possessed by the people. This inter-relational and co-dependence between the two implies that the constitutional form is fluid and malleable and so are the people who are supposed to authorize it- they co-constitute each other. In the history of political theory this idea of the people has also been highly contingent. Sometimes it could be nothing more than a mere rhetorical formulation and at other times purely symbolic which is 'retrospectively instituted collective entity.' Thinking therefore about the constitutional form, Loughlin and Walker pose an interesting question, 'if the people is treated as an active agent of change, is its agency merely momentary, or is it of continuing significance?' What would be an answer to this question in respect to the Indian situation? The Indian situation also necessitates such an interrogation because the constitutional form and the conception of the people that underlies it has been in critical tension since the very inception of the republic.

This tension between the constitutional form and the conception of the people has interesting implications for our present analysis. If we think through this tension, then it is clear that Indian constitutionalism has its own set of paradoxes. In the previous chapter we saw that the founders of the Indian constitution clearly sought to derive the authority of the constitution from the people- the preamble clearly lays down such an assertion. Through various gestures made in the constituent

assembly, it was made clear that the members of the assembly were representing the people of the India. But nonetheless the people were in a particular condition of poverty and structural incapacities which were historically produced through the Indian social order as well as colonialism. Thus, if one were to ask the question, can the people act? The answer would be at least be not yet.

To reemphasize, the conception of this people was not based on the principle of colonial difference, but rather an acknowledgement of the historical reality of the Indian state. Thus, a key paradox of Indian constitutionalism persistently has been that though the authority of the constitution is derived from the people but, the people themselves were in a state of incapacity. It was precisely this paradox that had haunted the Indian state since its founding and led to the creation of an expansive state with a potential for absolutism. The Emergency of 1975-77 was one instantiation of that. One of the people who provided a clearest account of this tension, of the problem of the people and what constitutionalism in India entails was B. R. Ambedkar.

V. Ambedkar's Complaint

Ambedkar's speeches in the Constituent Assembly were some of the clearest articulations of the contradictions that the Constitution embodied. At the conclusion of the debates in 1949 Ambedkar talked about what was at stake and what the success or failure of the Constitution depended on. Nothing guaranteed the fruition of the vision of the Constitution according to Ambedkar, the task of nation building remained ahead. According to him, India's independence was not guaranteed and certain conditions needed to be fulfilled to maintain her independence. There were three arguments that Ambedkar made. The first had to do with the state of the incompletion of the Indian state. In his last speech Ambedkar noted,

> I remember the days when politically-minded Indians, resented the expression 'the people of India.' They preferred the expression 'the Indian nation.' I am of opinion that in believing

> that we are a nation, we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realize that we are not as yet a nation in the social and psychological sense of the world, the better for us. For then only we shall realize the necessity of becoming a nation and seriously think of ways and means of realizing the goal. The realization of this goal is going to be very difficult – far more difficult than it has been in the United States. The United States has no caste problem. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are antinational also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality (Constituent Assembly Debates, Vol XI: 980).

The idea of the Indian nation or the Indian people was not self-evident for self-evident. A society as divided as the Indian society was, could not be a nation. Therefore, Ambedkar acknowledges that the nation needs to come into being which is not an already pregiven entity, especially given the many divisions and dissensions among various castes and groups. Ambedkar argued that Indian society completely lacked equality both social and economic. At the level of society there were innumerable grades of caste and at the level of the economy there were those who lived in the conditions of abject poverty.

> On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?

> If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up (Vol XI, 979).

Ambedkar paints a clear picture of the state of the nation and the risk that it poses. He ties the question of transformation with the viability of the nation state project. Indians continue to be so poor and so unequal that the very viability of the nation state depended on the ability of the country to put an end to these gaping contradictions. If the contradictions evident in the India were not mended then those who suffer would destroy that structure and also destroy structure of political democracy. In a previous speech Ambedkar had spoken about constitutional morality. Drawing on the British historian George Grote, he had argued that constitutional morality was a paramount reverence for the form of the Constitution, it was about

> enforcing obedience to authority and acting under and within these forms, yet combined with habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution will not be less sacred in the eyes of his opponents than his own (Constituent Assembly Debates, Vol. VII: 38).

Ambedkar was insistent not only about the need for transformation but also about the fact that this can be **made possible only within a distinctive authoritative structure**. This authoritative structure that Ambedkar insists upon is however not present in India.

> It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the

> Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic (Vol VII: 38).

Ambedkar in this instance was responding to the criticism that the Indian Constitution was merely reproducing the administrative structure of the colonial state. Defending this move he argued that this was necessary because constitutional morality that the Constitution envisions was absent in Indian society. By ensuring an administrative authoritative structure, the Constitution ensures that the spirit of the Constitution does not get perverted. This was necessary because Indian society does not have democratic spirit that the Constitution envisioned. This indicates the crucial link that Ambedkar draws a link between the need for transformation and the need for a clear authority to make that possible. Ambedkar was insistent during his time of the debates on the form of the Constitution that any transition cannot occur without a form. The adoption of the Constitution meant that it provided the form which could guide the task of transformation and also provide the basis of legitimate action.

> If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no

> justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us (Vol. XI, 978).

Why is Ambedkar so insistent on respecting the form of the Constitution? As Ambedkar makes clear in the two speeches, not only is radical transformation needed in Indian society but also that transformation is only possible within some authoritative structures. If that structure of authority did not exist then the search for transformation would descend into chaos. Unconstitutional methods were legitimate under colonial rule which was an exploitative and illegitimate form of rule. But the Indian Constitution changes that because it gives a framework within which transformation could be authoritatively ushered in and also be legitimate. Without it the task of transformation would lead to violence which would make the possible transition of Indian society more implausible.

> (T)here can be no gainsaying that political power in this country has too long been the monopoly of a few and the many are only beasts of burden, but also beasts of prey. This monopoly has not merely deprived them of their chance of betterment, it has sapped them of what may be called the significance of life. These down-trodden classes are tired of being governed. They are impatient to govern themselves. This urge for self-realization in the down-trodden classes must not be allowed to devolve into a class struggle or class war. It would lead to a division of the House. That would indeed be a day of disaster. For, as has been well said by Abraham Lincoln, a House divided against itself cannot stand very long. Therefore the sooner room is made for the realization of their aspiration, the better for the few, the better for the country, the better for the maintenance for its independence and the better for the continuance of its democratic structure. This can only be done by the establishment of equality and fraternity in all spheres of life. That is why I have laid so much stresses on them (Vol XI, 980).

Ambedkar similarly feared this chaos. But that chaos and violence could emerge if the Indian state failed to address the contradictions of Indian society. It could also emerge from the attempt to transform society without any guiding framework. It was here that the Constitution played a constructive role. It promised a transformation of Indian society and also provided an authoritative roadmap for doing so. The best instantiation of this promise came in the Directive Principles. These would be principles which could not be enforced by the judiciary but was a pact between the government and the people. As Ambedkar said, if the government of the time failed to fulfil these promises they would be thrown out by the people. Ambedkar also intended to keep the Constitution open ended enough. This was one of the reasons that he resisted efforts to incorporate terms like socialism into the Constitution because he believed that every generation had the right to decide for itself the form and ideals they were supposed to adopt. But such a transformation would nonetheless happen within a democratic framework which would not undermine the very system itself.

Ambedkar's assertion shows the nature of the tension between the people and the form of constitution in India. There is a tragic sensibility that underlies Ambedkar's assertion, a sense of hope and skepticism regarding the deep subjugation that Indians were suffering from and the contingent possibility of overcoming it. The key problem was one of national becoming. The people and the nation had not yet come into being, and Indians lacked the democratic sensibility and also the ability to act because of social structural reasons. This situation posed a revolutionary risk which could wreck complete destruction on any possibility of redemption. This opened the space for democratic action on the part of the state, to avoid the descent into chaos and also securing a transformation of the Indian condition. But the constitutive tension takes a distinctive shape- that the constitution has been authorized by the people and the people at the same time cannot act- they need to be saved by the state.

VI. The Suffering Subject and the Tragic Time of Indian Law

I now return to the question of jurisdiction. My contention in this section is that beyond its procedural distinction, the jurisprudence of PIL in its various judgements told a particular kind of story, a tragic tale of the Indian present. In doing so it posed the central aporia of Indian constitutionalism, the aporia that Ambedkar had identified. It was an attempt to seemingly resolve this aporia that has been consequential in the creation of the jurisdictional absolutism that we see in India today.

The question of narrative has been at the heart of legal scholarship for a while and anthropologists have taken a keen interest in how narrative action plays a critical role in how the law operates in everyday life (Cover 1986, Mertz 1994, Richland 2013). Robert Cover in his classic formulation argued that law is primarily a question of a normative order- a guiding sense of right and wrong and the imposition of this 'normative force on a state of affairs' is achieved through narrative. Richland argues that 'narrative figures importantly in generating not just legal power, but also the legitimizing authority that undergirds that power.' Narrative action he argues is a key component of juris-diction. Richland provides two key insights on jurisdiction as narrative that will be useful here. He argues that through narrative, the law mediates the normative and factual. Every case has its factual specificity, but in a court of law those facts have to be presented in a manner that makes it legible to the court and key players in the legal setting. It is through narrative that the facticity of the case and normativity of the law gets mediated thereby making it possible to represent every case as a token of a particular type of case (Mertz 1994). Secondly, Richland argues that through narrative the law 'discursively collapses or expands social space and time by forging intertextual links to other events of legal language in the past, or legal language events anticipated in the future, is central to the mediation that law affords in any given instance of language use.' This work of legal narrative

Richland argues is similar to what Mikhail Bakhtin called the chronotope- the 'envelope of narrative space-time within which the events being narrated are understood as taking place.' Legal judgements or other legal texts have this time space dimension which enable the production of law's perpetuity, by showing every case is fundamentally an example of a prolonged legal formula. The task of the lawyer is to show how the particularities of a case correspond to a legal formula. Similarly, the judge in writing their decisions couches their decision in that formula through citations and precedences, to make them seem like a continuity. Richland provides a framework through which to understand the manner in which the force of law gets generated- how the present gets connected to the past generating an authoritative force, a force which is nonetheless, unstable and contingent (2013, 218). I will however argue that Indian law does not generate its force by drawing on any perpetuity rather it generates its consequential force by posing the contradiction of Indian constitutionalism and seeking to solve it.

With the emergence of the PIL a kind legal argumentation was emerging in India. As we saw in the previous chapter, the judiciary was posing itself as the primary institution in the fight for the constitutive objective of the Indian republic namely, the battle against poverty. This was a logic based on a vision of national becoming. To understand the efficacy of the PIL and how subsequent to the emergence of the PIL the Indian judiciary came to exercise an absolutist jurisdiction, following Richland I want to explore the underlying narrative structure of the PIL jurisprudence, how a certain normative idea was taking hold at this point time and how it was distinguished through certain concepts and legal markers. How in pursuit of this normative objective, the Indian judiciary was confronted with the constitutive contradiction of Indian constitutionalism and how that problem eventually led to the emergence of the absolutist jurisdiction of the Indian judiciary. To understand it I will explore here the narrative dimensions of the early and later PIL judgements to interrogate its key time-space dimensions and how the early PIL was telling a particular kind of

story. This would be to establish that the PIL judgement is eventually a particular style of argument which is rooted I the constitutive aporia of Indian constitutionalism.

But how do you analyze a narrative structure? To do this I lean on Hayden White's methodological suggestions in pursuit of this analysis nineteenth century historiography. White in his study argued that a historian's narrative is a 'verbal structure in the form of a narrative prose discourse that purports to be a model, or icon, of past structures and processes in the interest of explaining what they were by representing them' (1974: 2). White says that to structurally study a historians conceptualization of the historical events an analyses of a set of constitutive elements are crucial.[9] For our present purposes I will focus on two elements from White's tool box. The first of these is what White calls the *mode of emplotment*. This focuses on the kind of story being told through the particular arrangement of facts in western historiography. Any historian works with a set of given facts, but through their arrangement in a particular narrative he tells a particular kind of story. Following Northrop Frye's classic categorizations, White argues that there are four modes of emplotment, the romance, the tragedy, the satire and the comedy. The second is what White calls the *mode of argument* aspect of a narrative whereby the narrator seeks to provide an answer to the question 'what is the point'? Here the narrator seeks to give an account of a 'nomological-deductive reasoning' that is showing how a particular event under consideration is a minor premise of a larger historical law (11). In reading the early PILs we will see that what binds all these cases with very different empirical premises is not merely a procedural-jurisprudential distinction, rather they are tied together by a particular mode of emplotment and a particular style of argumentation- both of which have *jurisdictional* consequences.

[9] He lists them as follows: chronicle, story, mode of comportment, mode of argument and mode of ideological implication (White: 1973, 5)

Modes of emplotment: Public Interest Litigation was organized around a key conception of legal subjectivity and an injury that came to be constitutive of PIL jurisprudence. PIL was meant to be a transformative jurisprudence, but what kind of transformation was being sought in this instance? This question of transformation emerges from the manner in which the subject of the PIL was posed by lawyers, judges and activists. The subject of the PIL was the suffering subject and this suffering subject also marked the distinguishing sensibility of PIL. The PIL jurisprudence was marked by a tragic sensibility. An array of cases which appeared before the court in the late 1970s and the early 1980s led to the emergence of the suffering subject as a constitutive subject of PIL jurisprudence and played also a critical role in the emergence of the unlimited jurisdiction of the court. The cases I have selected here are drawn on their early significance in the framing of PIL, their invocation of right to life, and on their precedential merit.[10] Let me provide a brief overview of this account. In this account P. N. Bhagwati, the Chief Justice of the Supreme Court in the early eighties will play an oversized role. Primarily because in many of the cases he wrote the classical judgements, though I will show that the mode of argumentation was not only limited to him. The cases that he wrote provided the broad framework through which PIL developed but more importantly through which the jurisdictional scope of India's courts expanded exponentially.

In *Hussainara Khatoon* journalists reported that in the Indian state of Bihar a number of under trial prisoners had been lying in prison without any trial. They had spent more time than the maximum period for the crimes they had committed. This even before they had reached the trial stage. Both the police and the judicial system had done nothing about their plight. The news came to light after

[10] The cases are as follows:
Hussainara Khatoon vs State of Bihar 1979
Bandhua Mukti Morcha vs. Union of India 1983
Francis Mullin vs. Administrator, Union Territory of Delhi and Others 1981
Olga Tellis vs. Bombay Municipal Corporation 1985

its publication in the news media. It showed the massive indifference of the Indian legal system to the plight of these people. The journalist went on to file a PIL on their behalf in the Supreme Court, demanding their release. This was one of landmark cases in PIL history.

In his much-cited opinion Bhagwati argued that the case,

> 'exposes the callousness of our legal and judical system which can remain unmoved by such *enormous misery and suffering* resulting from totally unjustified deprivation of personal liberty. It is indeed difficult for us to understand how the State Government could possibly remain oblivious to the continued incarceration of these under- trial prisoners for years' (emphasis mine) (Huassainara paragraph 5).

Bhagwati in his judgement notes 'the poor in their contact with the legal system have always been on the wrong side of the law.' (para 9) Bhagwati offers a chronotope of the Indian legal system and the tragedy that it represents. The injury here is suffering and misery. How long have these people been suffering? *Always* as Bhagwati offers. And where do they belong? They belong to the *wrong side of the law*. The latter assertion does not indicate that the poor are doing anything illegal, rather that they have been treated unjustly that their very existence has rendered them illegal. There is the right side of the law which would ideally alleviate their suffering, help them overcome the structural limitations of their condition and secure the rights and capacities that the constitution had imagined for them. Instead they were on the wrong side of the law, where instead of finding or securing liberty and freedom they have found the law only aggravated their suffering. The state and the legal system in India therefore historically worked against the interests of the poor. In this case people had been arrested and kept in jail for without a trial for unlawful periods of time. The court asserted that this apathy denied them a speedy trial and resolution to their predicament. This amounted to a violation

of their right to life and a right to a speedy trial was held to be an essential ingredient of the right to life. *Hussainara* only provided a contour of an emerging script of judicial decision making.

In *Bandhua Mukti Morcha vs Union of India* 1983 a non-governmental organization brought in a case which showed the widespread labor abuses in the stone quarries in Haryana. The NGO alleged that the people were being made to work in conditions of human bondage, something explicitly banned in the constitution of India. Bonded labor has been a scourge in India and the constitution, explicitly in a provision in the fundamental rights chapter laid down that the practice would be illegal. The conditions of bonded labor were described in this case as being 'inhuman and intolerable.' Not only that the workers were working in quarries which had been leased by the state government, who ought to have enforced the fundamental rights. This was compounded by the fact that the state government refused to acknowledge its own failures during the proceedings of the case. Here again Bhagwati and his cohort assert the complete failure of the state mechanisms to address the misery of the people and their conditions. The fact that they had to live and work in these miserable conditions was a violation of their dignity and thus a violation of their right to life. The complaint, the judge, says was made on behalf of people who were,

> 'held in bondage and are working and living in miserable conditions without any proper or adequate shelter over their heads, without any protection against sun and rain, without two square meals per day with only dirty water dirty water from a nullah to drink' (Bandhua paragraph 2).

Bandhua is a landmark opinion and framed the procedural contours of the PIL. This was the case were the court said that even a letter by a well-meaning person or organization would be sufficient to merit a response from the judiciary. As in *Hussainara*, the subject of the PIL was emplaced in terms of their misery, as a suffering subject. It is this suffering that is held to merit a response from

the state. It was not just the extent of the suffering of the Indian subjects but how the state itself blatantly aggravated and increased this condition was what made the intervention of the courts immediate and urgent. In this case the state in its counter petition simply denied that such abuses had taken place in the miners and even opposed the appointment of a fact-finding commission to look into the conditions of the working poor. This only showed the continuing apathy of the state to the misery of its citizens.

It is important to note here that it was not just Justice Bhagwati who was the main facilitator of this style argumentation. Similar assertions were made in *Olga Tellis vs Municipal Corporation of Bombay* 1985 a case decided by a bench of the Supreme Court led by Justice Chandrachud. The case was brought to court by a journalist and two petitioners. The case involved a decision by the then Bombay municipality corporation to evict people who were living in slums on public land and the determination by the said corporation that it had no obligation to give prior notice to the residents of these slums on the grounds that they had already been trespassing by living on public property. The petitioners on the contrary did not claim that they had a right to live on the land but rather that living on the land was essential for them to earn a living in the city since they were poor- that to evict them would be a violation of their right to livelihood which should be an essential ingredient of right to life protected under Article 21. Thus, the petitioners wanted the Supreme Court to declare dismiss the original notice of the municipality as arbitrary and to declare the right to livelihood as an essential ingredient of Article 21. The court did agree on the latter assertion making this case a landmark intervention.

In his unanimous opinion Justice Chandrachud opened with this following assertion:

> 'These Writ Petition portray the plight of lakhs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first

> group of petitions relates to pavement dwellers while the second group relates to both pavement and Basti or slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passersby, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: 'Who doesn't commit crimes in the city?' (Olga Tellis paragraph 1).

The opening paragraph reproduces the deep tragic sensibility and the suffering subject of Public Interest Litigation. The people living in these slums are so miserable that their lives are almost equivalent to those of animals. They have the barest of existences. The rhetorical question- Who doesn't commit crime in the city?- also communicates the structural impossibility of being legal in the city. The state and the legal system instead of creating a path towards justice only perpetuates an existence made possible through criminality. This tragic sensibility pervades through the judgement especially when the judge contended with the question of trespass. He acknowledges that the building of shanties in these public lands clearly constituted an act of trespass. But at the same time such a trespass was not a mark of intention but rather of desperation- they were living on the 'very hell on earth.' The court set out some guidelines for the Municipality to follow if it was to continue evicting people from these slums. The key assertion of the court here as that before evicting anyone from the land they should be given alternative accommodation. The court also suggested that if these guidelines could not be followed then the Corporation or evictees should approach the Supreme Court.

This suffering subject however was not always the poor subject. It certainly alluded to the poor but over the years this became a far more all-encompassing conception often extending to situations which did not correspond with the problem of poverty. In *Francis Coralline* where a woman accused of being a smuggler was held in prison with limited access to her lawyer. Bhagwati characterized her situation as one of a suffering individual and argued that the denial of her right to a lawyer was a violation of her right to life. In another landmark case *Minerva Mills* which involved a challenge to a government takeover of a private mill Bhagwati similarly spoke of the suffering as a grounds whereby the court could review a law which the government claimed was issued to fulfill provisions of the Directive Principles. Women, tribals, laborers, homosexuals would be brushed together as suffering subjects.

What kind of a narrative is this then? Per Hayden White's scheme this would be a tragic narrative. Unlike a romantic narrative where the hero can transcend the world his/her situation and be liberated, a tragic narrative is one where the protagonists are stuck in a structural condition from which freedom is only marginally possible. Even if liberation were to come it would only be tenuous, that overcoming would happen momentarily and would not be a permanent change. The strictures operating on humans are fundamental and humans in a tragedy would have to learn to work within those set conditions. This was also the underlying sensibility through which Ambedkar had seen the Indian condition and seen the work of the constitution, one where redemption could happen through a slow process of change, it was not a freedom always guaranteed. In the above judgements it is obvious the point of emphasis is on how the subject of law in India remains hopelessly subjugated because of these conditions with little possibility freedom and how the promise of the constitution had not materialized for them.

This tragic sensibility and the suffering subject continue to structure contemporary PIL almost forty years later. Take for example the landmark case in 2018 the legalization of homosexuality in India. Here is how Dipak Misra, the Chief Justice of the Supreme Court, posed the problem:

> It is urged by the learned counsel for the petitioners that the individuals belonging to the LGBT group suffers discrimination and abuse throughout their lives due to the existence of sec. 377 IPC which is nothing but a manifestation of societal values prevalent during the Victorian era where sexual activities were considered mainly for procreation. The said community remains in a constant state of fear which is not conducive for their growth. It is contended that they suffer at the hands of law and are also deprived of the citizenry rights which are protected under the Constitution. The law should have treated them as natural victims and sensitized the society towards their plight and laid stress on such victimization' (Navtej Singh: 2018: paragraph 17)

What makes the LGBTQ case striking is that it truly shows the manner in which the subject of the PIL continues to be constituted as the suffering subject. They have suffered at the hands of society and at the hands of the law. Thus, in spite belonging to a global surge of the legalization of rights of the LGBTQs the problem itself is constituted as a token of the type of case that the PIL had come to symbolize. This and other cases show the short forty in which the suffering subject has emerged as a significant marker in Indian jurisprudence.[11]

If Indians were in the historical condition of suffering and that suffering was only being exacerbated by the state then what kind of resolution would that entail? What is the normative condition that the suffering subjects are expected to attain and thus end suffering? This normative condition which was

[11] I will not go into it in detail but all recent constitutional cases on the question of fundamental rights was constituted through the suffering subject. Similar assertions were also made in the case involving the question of transgender identity in India. National Legal Services Association vs. Union of India 2014.

to be attained was the condition of dignity, the a second key concept in PIL jurisprudence.[12] The term can be found in the Preamble to the constitution but is not included anywhere else in the constitution, neither was there a major jurisprudence in India around dignity before the rise of the PIL. With PIL, dignity, emerged as a key element of deliberation. If Indians were suffering at the hands of the Indian State then that condition violated their dignity.

In *Maneka Gandhi* Bhagwati had argued that the Indian Constitution was based on the norms of natural justice, a key turn in Indian jurisprudence. This notion of natural justice implied that every individual had an inviolable core- its dignity and this could not be violated, especially by the arbitrary actions of the state as was seen during the Emergency. This inviolable core would be restored from the conditions of suffering. At this point in time dignity was not recognized as being a right. But a few years later again Bhagwati declared that indeed dignity was a fundamental right, an essential ingredient of the right to life in Article 21.

Bhagwati in *Francis Mullin* noted the following,

> 'We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms…Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights' (Mullin, 1981, paragraph 8).

[12] The Preamble of the Indian Constitution talks about promoting, 'FRATERNITY assuring the dignity of the individual.'

Once enshrined as a fundamental right the notion of dignity would become a critical conceptual resource in subsequent PIL cases. The particular subset of cases in which dignity becomes particularly useful in the 1960s were cases relating to prisoner's rights. In response to numerous complaints regarding the mistreatment and abuse of undertrials, the Supreme Court passed key decisions defining the rights of prisoners and it did so through an invocation of the right to life as dignity. In cases relating to women's rights the restoration of dignity was a critical motif.[13] In *Vishakha vs State of Rajasthan* (1997) the Supreme Court of India declared that the sexual harassment of women at the workplace was a violation of dignity derived from article 21 of the Indian Constitution. The problem was that India at this point in time had no specific laws addressing the problem of sexual harassment in the workplace. The court argued that in the absence of clear guidelines for the preservation of the rights of Indian women in the workplace, international norms and guidelines to which India was a signatory would provide the basis for framing rules in India and went on to lay down those principles in the judgement. These guidelines have subsequently formed the cornerstone of sexual harassment prevention in the workplace. *Vishakha* has been widely celebrated as a landmark decision. It mobilized key principles from the PIL era in creating a framework for the addressing the question of workplace harassment for women and in the process the court also performed a para-legislative function. The court through a PIL had expanded its jurisdiction to the point where it could now perform a legislative function. Recently in three cases relating to gender rights were explicitly decided on the principle of dignity.[14]

The most interesting play on this was seen the right to privacy case in 2018. Emerging in the context of India's biometric laws which sought to collect biometric data from its citizens as a precondition

[13] In *Sunil Batra vs. Union of India* 1980, a person waiting in the death row complained that there had been repeated torture of him.

[14] These were the transgender judgement *NALSAR vs Union of India (2014)*, the Triple Talaq judgement *Shayara Bano vs Union of India & Others* 2017 and Sabarimala Temple Judgement *Indian Young Lawyers Association and Others vs. Union of India and Others* 2017.

and justification for better distribution of public resources- the Supreme Court was confronted with the question whether the collection of biometric data by this law violated the privacy of Indians and thus whether Indians had a fundamental right to privacy.

In his majority opinion, Justice Chandrachud decided that the right to privacy was indeed a constitutionally guaranteed right. His key contention was that right to privacy was a key component of right to dignity and that the state should not have the ability to penetrate the inner dimensions of life. He points out that the 'right to privacy is an element of human dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion…In doing so privacy recognizes that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution' (Para 113, pg 109-110). Chandrachud acknowledges that 'the vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen' (para 116, page 111-112). But theoretically Chandrachud grounded his analysis not on the problem of poverty or destitution but rather on a conception of natural rights. He argued that the rights to 'life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.' Though Chandrachud posed the problem differently but nonetheless he clearly told the story in terms of the transition from suffering to dignity. The exact similar story was told even in the decriminalization of the homosexuality case.

Thus, the story that the PIL tells is one of a tragic transition from the state of suffering to one of dignity and as should be clear by now in this tale the judiciary plays a crucial role in this transition. In the case *People's Union for Democratic Rights and Others vs. Union of India* (1982), Bhagwati wrote that PIL was not about adversarial proceedings, it was not judging over competing claims of contending parties, rather it was about making civil and political rights more meaningful for the poor and the deprived section of the Indian masses. Doing that would entail 'remak(ing) the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights' (1982, para 1:3). The task of this transformation is not merely in the realm of the legislature and the executive but belonged also to the judiciary. For Bhagwati the task of judging in India should not be about upholding the status quo rather it should be about ensuring social justice for India's needy. The judiciary should prime itself for materializing the vision of the Constitution and ushering in 'a new socio-economic order…every word or phrase of the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution.' Bhagwati was invoking the transformative potential of the Constitution. This transition from suffering to dignity was about the potential future to come, dignity of the citizen was tenuously tied to becoming of the nation. There is a vision of transformation in the constitution and the court adopts a vanguardist position in materializing that vision.

Thus, in PIL a story of transition is being constituted, a transition from the state of suffering to one of dignity. In this tragic account of the Indian present, the redemptive role of transformation now lay in the hands of the judiciary. It cannot be done by the subjects who are already too weak and incapable of acting to overcome the structural conditions. Neither can that role be played by the government. In judgement after judgement it was the government which was held responsible for the aggravated misery of the Indian masses either actively or through indifference. If the poorest of the poor cannot act and neither can the state, then it solely leaves the judiciary to take the mantle of

transformation of keeping the promise of the constitution. This was precisely what was being argued by the courts.

Through the last forty years of PIL jurisprudence, scholars have focused on the procedural aspects of the new jurisprudence, identifying the new legal processes as the key distinction in it. But we see here that underlying these crucial judgements and procedural innovations is an particular kind of story with distinctive concepts and markers that underlie it. These judgements are important because they have had immense value as precedents and continue to be widely cited in Indian judgements and through those precedents the story continues to be told. Following Richland, therefore, PIL is a certain *type* of case. One which tells a story of a tragic present, a possible future and the need for a transformation. Individual cases are posed as *tokens* of this type both by lawyers and judges. But what does this story do? By telling this story the judiciary is basically posing the constitutive problem of Indian constitutionalism. The lack of agency for people to act, the incompleteness of the nation state and the need for an actor who could correct this scenario. In these judgements the suffering subject is not a new entity rather it alludes to the persistent problem of poverty in India. But it also goes beyond that in identifying a range of petitioners and groups they represent as suffering, these includes the LGBTQ community, women to name a few. It poses a probable future of redemption when people will re-acquire their dignity and promises to bring about this necessary transition. This is precisely because the right to life signifies the fact that in many of these cases Indian subjects are constituted as entities who cannot act substantively. Requiring another actor to act on their behalf, to save them. But the posing of this problem also has a very substantive impact on the jurisdictional scope of the Indian judiciary and goes on ot significantly alter it as we will see in the next section.

Jurisdictional changes or Modes of argument: This leads us to the second point of analysis. If subject of the injury in the PIL was the suffering subject how did it effect the jurisdictional orderings

of the Indian state? In lieu of the suffering subject and an apathetic state, how did the Indian judiciary, reconstitute the limits of its own powers? A crucial element in the jurisprudence of right to life was obviously the expansive interpretation of Article 32 of the Indian Constitution. Article 32 of the Indian Constitution States the following:

> **Remedies for enforcement of rights conferred by this Part**- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2)- The Supreme Court shall have power to issue directions and orders including writs in the nature of *habeas corpus, mandamus,* prohibition*, quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Article 32 primarily lays down the jurisdiction of the Supreme Court in matters related to fundamental rights. It guarantees citizens the right to approach the courts and enforce their fundamental rights and lays down the writs that the court can issue. But the use of the term *appropriate* both in sub-clause one and two came up for contention. The *Bandhua Mukti* case had started with a letter issued to the court on the state of workers condition in the stone quarries of Haryana. This led the state to challenge the petition on procedural grounds claiming that a mere letter could not be regarded as having sufficient procedural merit to start a proceeding in the court. This the government of Haryana claimed was inappropriate as per Article 32. But what does *appropriate* mean in Article 32? Bhagwati in his judgement contended that it was to be interpreted as per the circumstances and the specificities of a particular case before of the court. Interpretation of Article 32, the judgement claimed, should not be carried out in accordance with the 'formalistic cannons of construction but by the paramount object and purpose for which this Article has been enacted as a Fundamental Right in the Constitution.' Bhagwati reads the word *appropriate* as

empowering the judges to come up with any procedure which might be necessary for the protection of fundamental rights. The contention implied that the discretion to determine these procedures would lie with the judges. Bhagwati asserts that there are indeed rules which guide judicial conduct- the 'formalistic canons of construction' as he calls them. But he reads this assertion as being inept for the times and especially for the Indian conditions as reflected in this particular case. Rules of procedure are important but what if the person whose fundamental rights have been violated is simply incapable of moving the court? Thus, according to Bhagwati,

> 'There is no limitation in regard to the kind of proceeding envisaged in clause (1) of Article 32 except that the proceeding must be "appropriate" and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right. The Constitution makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight jacket formula' (Bandhua, paragraph 16)

If people, whose fundamental rights have been violated are too poor and incapacitated then procedural strictures would not secure such people substantive justice and the court therefore would not need to conform to them. This implied that the higher courts will not be bound by any rules and laws which had guided Supreme Court conduct. Bhagwati claimed that there was a reason that the question of appropriate procedure was not elaborated in the Constitution. This was because according to him the framers of the Constitution did not want the judges to be limited by any procedural concerns when it came to the question of enforcing of the fundamental rights in India. This was especially because they were fully aware of the socioeconomic conditions in India. To limit the enforcement of fundamental rights to procedural concerns in a country like India would turn this right into a 'mere rope of sand' (para 17).

A similar assertion was made regarding the interpretation of *appropriate* in clause (2) of Article 32. The second clause specifies the kinds of writs that can be issued by the court, these writs have evolved historically and carry a semblance of specificity. The clause empowers the Supreme Court to issue appropriate writs. Common English language interpretation would suggest that the clause implies any of the specified writs could be issued, namely, habeas corpus, certiorari, quo warranto and mandamus. Bhagwati however argues that 'even if the conditions for issue of any of these high prerogative writs are not fulfilled, the Supreme Court would have the power to issue any direction, order or writ' (para 18). The power of issuing writs is one of the most instruments in the hands of constitutional courts who follow the English tradition of common law. But the power to issue such writs is limited to specific circumstances determined through precedents and historical development. A habeas corpus writ can be issued only when a person is held in captivity by the state. But Bhagwati claims that those limits do not apply to the court and the court could issue any writ depending on the circumstances. Thus, it is by posing the constitutive aporia of Indian constitutionalism that the judges are claiming the insufficiency of the jurisprudential models of the western normative jurisdictional techniques. The consequence is that this leads to a wider jurisdictional scope for the courts. In claiming the distinction of the Indian condition, he detaches PIL from the long traditions of jurisprudence on which both the Indian constitution and prior jurisprudence had been built. Bhagwati's contention that the framers of the constitution had imagined such powers for the judges is patently incorrect as we saw in the previous chapter. The framers of the constitution certainly did not seek to give judges unlimited powers rather sought to limit it. But the logic through which Bhagwati develops a certain type of case is precisely by posing the problem of the people in Indian constitutionalism.

This imperative to make fundamental rights practicable and real for India's suffering was not merely rhetorical. It also led to the overturning of some of the most key aspects of the modern trial. The

first of these was one of the most fundamental aspects of modern jurisprudence itself, the adversarial trial. Bhagwati says that it was not,

> 'obligatory that an adversarial procedure, where each party produces his own evidence tested by cross examination by the other side and the judge sits like an umpire and decides the case only on the basis of such material as may be produced before him by both parties, must be followed in a proceeding under enforcement of a fundamental right' (para 18).

The court argued that the principle of adversarial adjudication was insufficient for the dispensation of justice in this particular case. In an adversarial proceeding, two sides bring together competing facts and through cross-examination the court has to decide which of the facts have merit. But the argument now was that when a case is brought against the state by poor with very limited resources it could not be expected that the latter could fairly secure justice in these instances. Therefore, the court would not expect them to present facts before the court. In another procedural 'innovation' it was laid down that judges could appoint a fact-finding committee which would be tasked with collecting facts regarding a particular case beyond the scope of the competing parties. The members of such a committee would be determined by the judges and report back facts to the court which the court could accept or reject. A judge's role in an adversarial proceeding is conventionally thought of as one involving passing of judgements based on competing arguments and evidences placed before it. Judges are not expected to collect the facts or arguments in a case and then decide on the outcome. This would affect the impartiality and the objectivity of the judge in the conventional understanding of the adversarial trial. This by itself was a jurisdictional limit on the functioning of judges. But since *Bandhua Mukti* commissions of fact finding have become an unmissable aspect of Indian law along with the notion of the non-adversarial trials. As we will see in the next chapter, in the realm of environmental jurisprudence, judges regularly harp on framing non-adversarial trials as

a necessary precondition. The trial is a formal procedure with certain boundaries regarding the facts which could be presented, the facts which could be contested and the manner in which certain decisions could be taken were changed expanding the jurisdiction of the court but whether these restrictions would be followed or not is a matter of discretion for the judges.

Similar jurisdictional alerations came about in *Hussainara* where the court mandated that in instances where the poor could not manage a lawyer they would have to be provided with a lawyer so that there cases can be properly heard. In both *Hussainara* and *Olga Tellis* the court proposed a continuing oversight of the judicial process. In the latter cases the court did not merely assert that the right to a livelihood was a fundamental aspect of the right to life, but also instructed the petitioners that in instances where the city corporation sought to displace people they should first seek permission from the Supreme Court. In a sense the court was no longer interested in merely settling legal questions brought before it but was rather looking to even enter into the realm of everyday administration. It is widely known today that the judiciary in India not only judges but can also governs- the practice of oversight over governmental functions has only progressively increased. Take for example the Cricket Board case, where the Supreme Court in lieu of the fact that there were administrative misconduct simply took over the governing of the agency. In India the management of cricketing affairs still continues to be subjected to the oversight of the Supreme Court.

Vishakha probably saw the most significant aspect of the judicial overreach since in this instance the courts were willing to go down the path of making laws. In this case the Supreme Court in the absence of set laws actually had laid down the laws which would guide investigation of sexual harassment in India- the court performed here a quasi-legislative function. India's is probably the only judiciary which can exercise such enormous jurisdiction even outside its own realm. In this

judgement the court actually laid down the law which would guide management of sexual and the vishakha guidelines continue to be the broad framework for the management sexual harassment affairs in India. *Vishakha* was the first case where the court actually laid down a law. And this case had all the classical elements of the PIL. The invocation of suffering and misery and the need for a substantive intervention on the part of the judges. Here again law making functions of the court are not uncommon in India.

The significance of the public-spirited individual was going to be short-lived. As Bhuwania notes the role of the petitioner would soon shift from the representative of vulnerable groups to mere informants (2017: 39). Sheela Barse a journalist had filed case on the mistreatment of children instate prisons. After not being satisfied with the approach of the court in the matter, she wanted to withdraw the petition and put an end to the matter. However, the court dismissed her petition for withdrawal. The judge argued that the petitioner in a public interest litigation was not a private litigator rather was tied to public interest. She did not have the wisdom to decide what course of action the court was supposed to take in a particular matter. Thus, she could not withdraw the petition and the matter would continue without her. As Bhuwania notes, the removal of a petitioner from the proceedings of a case has become routine in PIL proceedings. The key element of adversarial proceedings- a petitioner or a complainant seeking a redressal from the court is no longer a necessity. Higher Courts in India now start cases of their own volition and sit on those cases. The petitioners can act as nothing more than an informant to trigger a case.

Let me summarize then some of the jurisdictional alterations that have been brought about in India. Adversarial trials are no longer the norm in the constitutional courts. Courts can gather the evidences through self-appointed committees to gather facts on a particular case. The judges can start a case without petitioners, dismiss the petitioner if they feel the need and sit on judgement on

those. Lastly, they can also make laws. All of these jurisdictional alterations were enabled by the manner in which a particular kind of story was told about the Indian condition by the judges, a story that continues to be affirmed and reaffirmed. Its efficacy was derived from an underlying presumption of Indian constitutionalism the people themselves cannot act because of their economic and social conditions- the continual deferral of the formation of a people. Under these circumstances someone in the intermediate period has to act to protect the people. This acting in name of the people also risks the formation of a jurisdiction that cannot be bound in any manner whatsoever creating the basis for an authority which cannot be limited. This posing of the problem and the parental role that the judiciary says it has to play is crucial to understand the nature of the jurisdiction that was emerging at this particular juncture.

VII. Conclusion

In this chapter I posed the following problem- how have the Supreme Court of India and other state constitutional courts come to exercise such an all expansive power in India? Instead of seeing it through the conventional frame of judicialization, I proposed to look at it through the lens of jurisdiction. I proposed that this jurisdiction is an *absolutist* jurisdiction. It is absolutist in the following sense. The Supreme Court as a consequence of the PIL today can deliberate on practically any matter, private, public, governmental or non-governmental, social, economic say what you may. There is no substantive question of social, political and economic life which the constitutional courts in India cannot deliberate over if they choose to. Besides, Indians through various NGOs, activist lawyers can and do approach the courts on an array of issues which sometimes borders on the comical. This is a limitless substantive jurisdiction as far as subject matter is concerned. But the very act of judging, deliberation and argumentation expected from the constitutional courts are also meant to be bound by certain normative and procedural constraints. In the modern conception of

the trial it is common understanding that a court can decide a particular legal question brought before it by an effected party. In contemporary India, judges can not only decide cases but they can even start cases through *suo moto* action and sit on judgement on those very cases that they have started, overriding the principle that one cannot be a judge in a case in which one is a party. Such a principle can be effectively put aside in India today. Another aspect of the adversarial trial is the presumption that competing parties have the responsibility of bringing contending facts before the court to be verified by set procedures. But here again, in India the court can decided which facts are to submitted and how those facts are to be collected. Thus, the normative procedural limitations-themselves jurisdictional questions have again been set aside. In these two particular ways, the constitutional courts in India exercise an absolutist jurisdiction.

But what explains the efficacy of this jurisdictional expansion, how could the court exercise such enormous powers in India today? The expansion I suggested was made possible by the particular narrative structure of the PIL judgement tells a tragic tale of the Indian present. The contention is that the PIL was not merely about procedural innovation but also about the telling of a particular kind of story through common markers. It is based on a certain mode of emplotment with the idea of the suffering subject as its the starting point. It poses the constitution as a transformative document and the judiciary as the active agent of that transition and the restoration of that subject as a dignified subject. In this timespace logic of this narrative structure however, the suffering subject is too weak and incapacitated to be able to usher in any form of transformation, neither could the government since it has been manifestly led by people of dubious morals. This left only the judiciary as the moral agency which could act lawfully.

The efficacy of this narrative is derived from the constitutive contradiction of Indian constitutionalism. What this story does is that put at the heart of PIL jurisprudence the a crucial

presumption of Indian constitutionalism. This contradiction that was best represented by Ambedkar who saw Indians having a constitution whose spirit they did not embody, a constitution of a nation which had not yet come into being. This was the precisely the gap in which an absolutist state was imagined and which manifested itself in its ugliest manner in the Emergency. But the end of the emergency and the restoration of Indian democracy did not imply that the aporia that lies at the heart of Indian constitutionalism has evaporated. Rather it slowly manifested itself almost immediately in PIL jurisprudence- a jurisprudence which was precisely based on the fundamental question what is the state supposed to do when the people are so poor? The answer inadvertently led to the formation of the jurisdiction that we see in place in contemporary India one where the court can have a say on particularly any matter whether it be an inter-religious marriage or the governance of the cricket board in the country a jurisdiction which is simply absolutist.

In the previous chapter I had contended that the post emergency era marked an end of the absolutism. But this chapter shows that this problem of absolutism that is an unmediated relationship between power and the people that it seeks to represent is a structural feature of the Indian state and it will continue to manifest itself in many directions and in many ways.

Chapter Three

How to do things with Life

Notes from the National Green Tribunal

I. Introduction

In 2010 the Indian Parliament passed the National Green Tribunal Act setting up a new tribunal in India with exclusive jurisdiction over environmental matters. More specifically cases relating to laws which broadly regulate the environmental realm in India would now be adjudicated in this new tribunal. Since the middle of the 1980s there has been an explosion of cases related to environmental laws in India and the higher courts in the country had specially constituted benches known as green benches which would deal with these cases (Sahu). The judiciary in India is today widely regarded as the most crucial actor in determining a significant of environmental matters. Every major developmental project is challenged in the court on its environmental impact. The National Green Tribunal (NGT) was conceived as an institution which would ease the burden on the higher courts and also streamline the process of adjudication on pressing environmental questions. The NGT Act however invokes only one constitutional principle namely, Article 21 or the right to life. The Act states, 'the right to healthy environment has been construed as a part of the right to life under art. 21 of the Indian Constitution.' Those familiar with environmental jurisprudence in India would hardly find this surprising. The last 30 to 40 years of environmental jurisprudence has hinged on this fundamental assumption- that to be deprived of a healthy environment is to violate one's right to life. Major judgements and working precedents in India relating to pollution, development have leaned on this proposition and the singularity of it shows, its centrality in matters relating to the environment. In this chapter I wish to do two things. Firstly, if right to life frames the broad contours of environmental jurisprudence in India, then how do lawyers, judges and activists talk

about life in general proceedings in the court? What is the form that the notion of life has to take for it to be most legible in the courts in India? I will answer this question through a brief ethnographic account from my time at the NGT. In doing so I will try to show what I found to be the most central paradox on environmental law in contemporary India viz. the staggering proliferation of formal laws and regulations relating to the environment and persistent failure of this regulatory framework to contain tide environmental degradation in India.[1] My objective in this chapter is to propose a working conjecture of the underlying sources of power of the modern court in environmental law. Scholars like Usha Ramanath (2014) and Amita Baviskar (2012) have argued that in India courts have more often than not upheld the interests of the Indian middle class rather than protect the interests of the most vulnerable in the country, that they are driven more by the interests of class and not by the realities of the poor. I partly agree with this argument, but instead of situating the problem in the class position of the judges I will show how power works through life in Indian environmental jurisprudence in a different manner. I will show how administrative impasses repeatedly emerge in the realm of environmental jurisprudence due to the competing sensibilities that structure it and how the conditions of possibility for decision making emerges from such an impasse. The first part of the paper will provide a background to the problem space of environmentalism in India, its emergence and conceptual distinction, the subsequent sections will focus ethnographically and historically on the sensibilities that structure the environmental discourse and the conflicts that emerge from the tussle centering on the demolition of a government building.

II. Background to Environmental Jurisprudence in India

[1] There is an extensive account on the problem of environmentalism both in colonial and postcolonial India. For colonial India *see* Sivaramakrishnan 1999, Rangarajan 2012, Arnold and Guha 1995, Guha 2000. For the debates in postcolonial India *see* Rangarajan 2015, Guha and Gadgil 1992, Baviskar 1995, Mathur 2016.

The Indian judiciary has had an oversized impact on Indian environmental policy and the debate on environmental conservation and management in India. The question of environment has been determined and overdetermined in the realm of Indian law, judiciary and jurisprudence which has created, authorized and mapped the broad contours legal environmental argumentation. The best demonstration of this fact is that in India there is a separate legal institution, the National Green Tribunal with jurisdiction over matters which are covered by the major environmental laws in India. This makes India one of the very few countries in the world which has such an institutional structure.[2] The importance of the NGT is also demonstrated by the fact that unlike other tribunals, by law, NGT can only be presided over by former Supreme Court justices and Chief Justices of the state High Court. The best demonstration of the absolutist jurisdiction is in the realm of environmental law since these institutions exercise immense control over the environmental question in India.[3] All major environmental disputes in the last quarter of a century has reached the doors of the judiciary and it has had a lasting impact on their ir/resolution. It was the Supreme Court which first came up with the idea of having a separate institution to deal with environmental issues.

Environmental jurisprudence in India emerged as a key subgenre of the Public Interest Litigation movement (Dembowski 1999, Sivaramakrishnan 2011, Rosencranz and Divan 2002, Sahu 2014). Starting from the 1980s India saw the rise of specialized lawyers and NGOs who used the eased procedural standards of the Supreme Court to bring a series of litigations which sharply created the contours of environmental jurisprudence and jurisdiction in India.[4] The most evident point of

[2] The two other countries are Australia and New Zealand (Gill 2014)

[3] Two instances of this absolutism would be the Delhi pollution cases from the late 1990s and 2000s when the Supreme Court arbitrarily ordered the removal of transport vehicles off the roads of Delhi (Bhuwania 2017. Ghertner 2016). The second would be Forests management case. India's forests are by and large being managed by the judiciary- a startling instance of judicial governance.

[4] Arguably the first case on environment decided by the court was *Ratlam Municipal Corporation vs. Varadiraj* 1980

overlap between the PIL and environmental jurisprudence was the mobilization of Article 21 and the use of the language of right to life.[5] The court not only asserted that a clean pollution free environment was an essential ingredient of life, but even upheld it as a right.[6] The daily interactions in environments court are populated with claims and counterclaims on the right to life. As we will see later, *life* becomes legible in the everyday interactions of the court not on the register of rights or in any other abstract manner, but rather on the affective register through the sense of an endangerment. This sense of endangerment around questions of pollution and environmental destruction in India has played a critical role in the formation of an expansive role for the Indian judiciary (Bhuwania 2017).

The institutional and jurisdictional question in environmental law however is not exclusive and it is important to understand that they are tied to some of the foundational questions of Indian law- how the environmental question has also been a national question. To understand why the courts have come to play such a critical role in the determining the scope of state action within the realm of the environmental justice and how the NGT as an institution came about, it important to understand two related phenomena. First, how the question of environmentalism in India has been posed and secondly, the institutional history which led to the formation of the National Green Tribunal in the first place.

III. The Problem Space of Indian Environmentalism

Both in lawmaking, judicial pronouncements and in thinking about the environment, the higher courts and the government have resorted to a set of concepts and ideas through which they have attempted to grasp the problems that *environment* poses for the Indian state and how to resolve it. At

[5] In MC Mehta vs Union of India the court couched the language of violation of rights of individuals in the language of life and in the subsequent period they also showed the importance of this realm.
[6] Virender Gaur vs Union of India. *See* Rosencranz and Divan 2001.

the heart of the problem was a concern with an elusive balance. In India, environmental thinking it is not merely about protecting the environment, but is also linked to crucial anxieties about poverty and state building. Indian state's discourse on environmentalism has been framed by a distinctive paradox, viz. the continual tension between development and ecology. The path of aggressive development would lead to destruction of natural resources, destroying lifeworlds, impacting communities and effecting the wellbeing of Indians. On the contrary not pursuing growth would impede the fight against poverty. In the early years of the republic natural resources were regarded as a prime resource for developmental purposes and Nehru called the newly build dams the temples of new India. In Nehru's vision an untrammelled developmentalist state would be facilitated by exploitation of natural resources. But Nehru's daughter was more circumspect given the growth of environmental protests in India as well as the rise of the global movement for environmental protection. A good instantiation of this paradox can be seen Indira Gandhi's speech 'Man and Environment' at the Plenary Session of the United Nations Conference on Human Environment in Stockholm on 14th June 1972, Indira Gandhi raised the following perplexing problem that is confronted by the Indian nation state.

> On the one hand the rich look askance at our continuing poverty- on the other, they warn us against their own methods. We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Are poverty and need the greatest polluters? For instance, unless we are in a position to provide employment and purchasing power for the daily necessities of the tribal people and those who live in or around our jungles, we cannot prevent them from combing the forest for food and livelihood; from poaching and from despoiling the vegetation. When they themselves feel deprived, how can we urge the preservation of animals? How can we speak to those who live in the villages and in slums about keeping the oceans, the rivers and the air

> clean when their own lives are contaminated at the source? The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.

There are two things that Indira Gandhi is doing here. She shows that in India the anxiety about environmental degradation did not stand on its own, rather it was intimately tied to India's underdevelopment and poverty. The problem was the ecological costs of India's pursuit of economic development- pollution, deforestation and environmental decay. Secondly, Mrs. Gandhi implies that poverty itself was a form of pollution- an odd but a historically persistent formulation of state environmentalism in India. Oddly enough she seems to imply that the poor and the marginal people are somehow responsible for environmental decay. This according to Gandhi has been caused by necessity- poaching and despoiling of vegetation has been carried out by people in need. This assertion is false, but what it shows is that the Prime Minister did not necessarily see these constituents as being active agents in ecological preservation.

In Gandhi's vision at this juncture the sole way forward would be through the path of science and technology. Gandhi was conscious of the particular historical situation within which she was speaking. As she pointed out, that the progress attained by the 'advanced countries' often came at the cost of 'other races and other countries…They got a head start through the sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality or justice.' But the conditions of decolonization meant that the new nation states will no longer have similar luxuries because, '(w)e are bound by our own ideals. We owe allegiance to the principles of the rights to workers and the norms enshrined in the charters of international organizations. Above all we are answerable to the millions of politically awakened citizens in our countries. All these make progress costlier and more complicated.' In a sense the conditions of representative democracy necessitates

both that India pursues the path of development but it will have to do so by remaining faithful to the ideas of equity that was so critical in the foundation of the nation state.

In spite the platitudes to the postcolonial consciousness, the state in Gandhi's articulation would remain supreme. Gandhi noted that the Indian state had been engaged in the task of providing the basic needs of the one-sixth of humanity since Independence. And in this regard planning and the mixed economy would be essential. 'The need to improve the conditions of our people was pressing. Planning and action, the improvement of data leading to better planning and better action, all this was a continuous and overlapping process.' Gandhi affirmed that the persistent global inequality in terms of resources was no longer tolerable.

> 'We have to prove to the disinherited majority of the world that ecology and conservation will not work against their interest but will bring an improvement in their lives. To withhold technology from them would deprive them of vast resources of energy and knowledge. This is no longer feasible nor will it be acceptable.'

Indira Gandhi's speech at the UN showed the manner in which the question of environmentalism in India has been primarily posed. The question of environmentalism is closely tied to the problem of state building and the problem of state building was crucially tied to the problem of poverty. But such a promise had not come to fruition and neither had the Indian state shown the caution that was necessary to take into account the adverse effects of its developmental projects. Indian scholarship has incisively criticized the manner in which the Indian state has repeatedly destroyed natural resources in the name of development (Guha). The optimism of the early Indian republic expressed by Nehru soon turned more skeptical as the adverse effects of state led development and its impact on the Indian habitat started to become clearer and as more and more popular movements rose in

the country resisting state led developmental projects.[7] By the 1970s India saw a significant uptick in the number of popular movements against large developmental projects. Though these movements were not always successful they brought forth a set of complexities for which the Indian state had no easy answers. These included questions of compensation, rehabilitation and rights over land and natural resources. Obviously that has not eroded the pursuit of big projects by the Indian state but most them are based on dubious legitimacy. The rise of these popular movements however was a critical aspect of the rise of environmental jurisprudence in India.

The 1980s marked an intersection of a large number of the factors which established the legal sphere as the authoritative domain to carry out environmental disputes. The post-emergency state's crisis of legitimacy (Baxi 1985) was compounded by the rise of popular movements against large developmental projects and the displacements they caused. In addition, environmental lawyers cum activists like M. C. Mehta started bringing cases to the court which showed the impunity with which state and non-state actors had continued to cause environmental damage recklessly. One of the principle reasons for the authority of the courts was that it had eased the access to the courts and that it was more responsive to these cases when other governmental institution failed to take them seriously.

The Supreme Court also couched the question of environmentalism within the fold of poverty, suffering and destitution in India.[8] Some of the major cases in the 1980s have confronted with the question of poverty and its extension by virtue of environmental degradation. When inhabitants in Delhi exposed to a toxic gas leak in a neighborhood in Delhi approached the Supreme Court, the

[7] Two movements deserve special mention here. One was the Chipcko movement in the northern Indian state of Himachal Pradesh and second was the opposition to the silent valley dam in the southern state of Kerala (Gadgil and Guha 1995).
[8] In M. C. Mehta vs. Union of Indian 1986 the court mentioned the state of poor and how they were being adversely affected by corporate greed.

court declared that the court has the power to penalize private organizations. In 1986 a chemical plant in Bichhri village caused toxic pollution in Rajasthan the court said that the companies bore full responsibility for polluting the water reservoirs in Delhi. When the court was approached to protect forest land in Kerala, the court expanded its jurisdiction to cover all forests in India. In all of these cases the claims of the court was couched and questioned through the lens of poverty and suffering in India. It also developed key institutional innovations to deal with questions which were at times beyond its immediate competence. This involved developing institutional mechanisms to maintain continuing court oversight over the governments and creating innovations which would give the court greater powers to play and effective role. The courts formed expert committees to assess the environmental impact of developmental projects and issue orders which were scientifically sound. The court pushed more strongly to materialize the provisions of the Environmental Protection Act. The courts also resorted to concepts developed in international environmental contexts in its judgements. This period also saw the rise of key concepts which guided court action on environment. Drawn mostly from developments in the global environmental movement these included key ideas like sustainable development, inter-generational equity, polluter's pay among others. Activists, lawyers and judges gained fame and notoriety by becoming key players in deciding major policy decisions in the environmental realm. Supreme Court judges even started making site visits to get a better sense of what was the nature of the problem that was being deliberated over firsthand (Sahu 2014).

But as Sahu notes that these interventions have not necessarily meant that the court had acted in favor of the poor. At times the court was more than willing to accept the developmental narrative of the state. As a matter of fact, by the 2000s the courts have been willing to accommodate large developmental projects of the state against the advice of the opinion of expert committees that it

had formed to study the situation.[9] In the Delhi pollution case, the court in the name of controlling the pollution in the capital city ordered the removal of all small industries from the city limits which led to the job losses of thousands of people as well their displacement from the city (Bhuwania 2017, Ramanathan 2014). Baviskar has been especially critical of the role of the judiciary arguing that the courts have really not been keen on protecting the rights of India's most vulnerable. Rather, driven as they are by distinctive middle-class sensibilities, they have applied those sensibilities in their decision-making approach, erasing thousands of people from their ability from having the capacity to make a representation before the court and causing widespread displacements and economic hardships for the most vulnerable.

To understand the formation of the environment courts in India we have to understand two additional problems which necessitated an institutional response. The first problem was temporal in nature. Environmental concerns as we will see have an underlying sense crisis- requiring an immediacy which neither the courts nor the activists bringing the cases thought the state had the capacity or intention to respond to. The urgency of these matters was one of the reasons why the court was open to hearing a large number of cases relating to the environment. But through the 1980s across the higher courts in India, as the scope of its jurisdiction increased so did the number of cases being deliberated over and less was the capacity of the courts to promptly deal with these matters. Besides some of these cases were becoming immense in scope covering staggering areas.[10] As the burden increased the court created separate benches to deal with environmental matters. The Supreme Court reserved the second half of Fridays to exclusively attend to matters relating to

[9] This experience in the cases of all the major dam cases that came to the courts, whether it be the Tehri dam or the Sardar Sarovar dam.
[10] The Forest Management case is a good example of this phenomenon. This case determines almost all environmental matters in India.

environment. But the burden was also excessive and the courts time and again asserted the need for a separate institutional structure to address the matters.

There was a second problem which the court confronted which had an epistemic dimension, the problem of insufficient knowledge and mechanism in determining the specificities of the environmental crises. Courts, litigators, activists and the state were repeatedly confronted with situations where it could not determine exactly the nature of the damage done- with certainty and with precision. If a hydrochloric acid plant, dumps toxic chemicals carelessly in a village, what is extent of the damage done to the water source or to the health of the people living in the area. Whereas law requires an extent of precision to work properly, the Court was confronted repeatedly with situations where it was unable to exactly determine the extent of the damage precisely. From the early 1980s the court had been complaining about this lack of exactitude and seeking answers to this problem. This however is a global problem that environmental jurisprudence has been repeatedly confronted with. The courts would form expert committees to deliberate on such matters. But such committees would not always issue non-contentious resolutions, nor did the courts accept their assertions at face value. The Court proposed the formation of a new bench with expert members with background in environmental sciences to help the judges navigate these questions.

In 1995 based on these problems and the repeated assertions of the court for the formation of such institutions, the Parliament of India passed the National Environment Tribunal Act. However, the Act remained on paper and the tribunal never came into being. In 1997 another law was passed by the Parliament- the National Environmental Appellate Authority Act (NEAA) which would review

challenges to environmental clearances.[11] This body also remained ineffective as the necessary appointments were not made after the first term (Gill: 2014).

In 2003 the Law Commission of India issued its annual report on the subject of forming a National Court system for these purposes. The Commission's report put the uncertainties of scientific data as the main crux of the problem. Some of the considerations included the following:

a. The uncertainties of scientific conclusions and the need to provide, not only expert advice from the bar but also a system of independent expert advice to the Bench itself.
b. The present inadequacy of the knowledge of Judges on the scientific and technical aspects of environmental issues, such as, whether the levels of pollution in a local area are within permissible limits or whether higher standards of permissible limits of pollution require to be set up.

The question measuring environmental effects and the ability of scientific disciplines to make a timely intervention was one of the primary concerns recognized committee as necessitating a specialized institution to address this. They argued that the Supreme Court and the High Courts were institutionally not well structured to address these issues comprehensively. Thus, a new body with a better mechanism to incorporate expert knowledge was needed to address environmental degradation in India. The report proposed the formation of panels including judicial and technical experts capable of understanding the technical issues at hand.

Eventually after another seven years in 2010, the Indian Parliament passed the National Green Tribunal. The Act provided for multiple branches of the court. Presently the NGT main branch is

[11] This is a provision in the Environment Protection Act of 1986. Every major development project has to undergo an environment impact assessment by an independent body based on which it may or may not receive approval for the project from the government. Appeals to these reports were usually addressed to the state high court or Supreme Court. The new body was created to facilitate this review (Gill 2014:).

based in Delhi and there are five regional branches based in other parts of the country zoned as East, West, North, Central and South. The Bill in its preface proclaimed to fulfill India's commitment to some of the international treaties that it was a signatory to. The National Green Tribunal was formed through an intervention of the courts, the state and activists who sought to create this institution to address some of the pressing environmental issues facing the country.

The story of the formation of the environmental courts in India shows some of the techno-legal-scientific imaginaries that are at play here. In this section I pointed out three of those concerns specifically. I showed how the question of environment was always intimately tied with the problem of nation-building, especially with the idea that environmental resources was seen as key elements in India's battle against poverty and underdevelopment. Through the articulation of Indira Gandhi to the expansion of judicial jurisdiction over the matter this has remained a persistent concern. However, that has not implied that the courts have been favorably disposed towards the poor. As recent scholarship and my own experiences at the NGT have shown, the courts sometimes have also taken a harsh view on the situation of the poor in India.

The second aspect that has contributed to the rise of judicial authority in the realm of environmentalism has been the crisis of legitimacy that the Indian state faced in the 1980s. The post-emergency era was also the time when environmental cases started reaching the courts and it was in this period that the higher courts in India iteratively constituted a broad jurisdiction for itself. In the everyday interactions in the court I found that the realm of the political and governmental was often portrayed as corrupt, lethargic and incompetent. Bureaucrats and politicians were often regarded as being too uncaring to take seriously the urgency of environmental degradation. The judges sometimes asserted that the democratic dividend implied that politicians were more concerned with the immediate relief coming from developmental activities rather than calculating the long-term

impacts of such developmental projects. Sections of activists have also long distrusted the political actors and the state. But there also remains a vivid tension when it comes to major developmental projects in India. As scholars have pointed out (Sahu 2014, Bhushan 2009) judges now seem to be open to be lenient when it comes to assessing the impact of large developmental projects.

The techno-scientific dimension of this imaginary has also been crucial. The courts have been repeatedly confronted with conundrums of epistemic uncertainty; it has been confronted with questions regarding how to determine certain metrics with an exactitude which is a predisposition of the law. The way that this problem was eventually resolved, institutionally, was by creating a bench with a judicial member and an expert in environmental sciences. Thus, instead of depending on court appointed committees to make scientific determinations on its behalf, the court integrated the scientist in the judicial process. This however did not resolve the problems. My experiences at the NGT indicated that the problem was not always enough science but what kind of science was authorized as legitimate. I found that there was separate realm which could described as state science- meaning scientific reports generated by state institutions. In several instances, both the court and the petitioners expressed doubt about the legitimacy of state science. The validity of reports prepared by state scientific agencies would often be put under question mark regarding their fairness. As if the suspicion of the state extended to the science that it produced. Even in the realm of state science there was a hierarchy. Scientific data published by the state government of West Bengal would be more critically assessed compared to those produced by the Central government. I will not go deeply into this problem but what seemed evident was that in spite the best efforts the question of expertise and authority, which one was legitimate and which one was not continued to be raised and debated in the everyday course of the courts in the National Green Tribunal.

I want to turn now to some of the more ethnographic specificities of the problem of environmental law in India.

IV. Saving the Forest

In August 2016 Siddhartha Roy the Chief Secretary (CS) of the Ministry of Environment in the Government of West Bengal was scheduled to make an appearance at the Eastern Bench of the National Green Tribunal in Kolkata. The Eastern Branch started its operations in 2014 in Kolkata. The previous day the lawyer for the Government Mr. Chatterjee (name changed) sounded cautiously optimistic about the appearance of the Chief Secretary. He was a decent man and had been a forest officer in the past, also a scientist by training, the lawyer told me. The propriety of his disposition and his erudition, he hoped would help contain the torrent of derision that had been directed at the state government from the two member bench, especially from the judicial member.[12] In my almost yearlong ethnography at the NGT I had learnt to sympathize with Mr. Chatterjee the counsel for the Govt. of West Bengal (GoWB). His official position was a double-edged sword. Being the main counsel for the Government meant that he commanded the respect of his colleagues. However, that also meant that he was indeed the representative of the government, the man who stood for the Government of West Bengal- incompetent, inept and continually failing in the discharge of its duties as the bench would have you believe. On most days, Mr. Chatterjee had to bear the brunt for some error from the government, it could be as minor as having failed to file an affidavit on time or more something more serious, like the repeated non-compliance with a direction/order from the bench. The disposition of the bench especially the judicial member, who had a long career as a judge in a state High Court was that of a school headmaster who was trying to discipline the recalcitrant ward

[12] The NGT Act that every bench have two members, a judicial member and an expert member. The judicial member could be a former judge on the High Court or Supreme Court. The expert member would have to be someone with an advanced degree in the environmental sciences and some background in law (National Green Tribunal Act 2010).

– the state government. This, rather injudicious treatment of the state government was not limited to the representative of the GoWB but would extend to lawyers from the other states and other government agencies as well. A common refrain from a lawyer representing a state in the Eastern region was '*Aj abar boka khete hobe'* – today I will again get a scolding.

Mr. Chatterjee thus hoped that the CS would be better able to explain the difficulties that had confronted the government so far in this particular matter namely, *The Tribunal on its own motion (regarding Sundarbans) vs. The Union of India and Ors* one of the earlier cases filed in the court. The next day the CS arrived and stood at the bar along with the state lawyer and the representative of the Ministry of Environment and Forestry- on behalf of the Union of India. On the other side was Mr. Subhas Dutta, one of the noted environmental activists in India. If the state lawyer was the callous child then Mr. Subhas Dutta was the model school ward. He was the *amicus curiae* in this particular matter- a friend of the court and had been assisting the court by preparing field reports based on his visits to the Sundarbans. Mr. Dutta an independent accountant by profession was a model citizen in the eyes of the court. Honest, upright and single handedly capable of straightening the ills of the government through petitions countering the claims made by the government and bringing to the notice of the court several major environmental concerns. He had gained fame/notoriety in 2005 when based on a petition filed by him in the Calcutta High Court the Kolkata Book Fair was ordered to shift its venue from Park Street Maidan to a new fair compound along the Eastern Metropolitan Bypass. 'I have never been to the book fair since,' Mr. Dutta said 'Amae pelei petabe'- I am sure to get beaten up if I go there. This figure of the activist litigant is a unique species in India's legal landscape and I will talk about it later in the paper.

The Bench invited Mr. Dutta to make the opening remarks- note Mr. Dutta was not a trained lawyer and represents himself in all these court matters.[13] Mr. Dutta launched himself into a passionate account of the ecological disaster that the Sundarbans were faced with. The capacity of the Sundarbans as a carbon sink was two to three times the capacity of the Amazon he said. However, rising global temperatures and the rise of sea levels was destroying the forests and was slowly eroding the capacity of the mangrove forests to act as the sink. He moved on to the threat of what he described as population explosion and illegal migration from neighboring Bangladesh and the threat that it posed to the sensitive ecology of the region. The only register on which Subhas Datta could speak was that of an impending crisis- and he would mobilize this affect in court often breaking down when he was emotionally overwhelmed or getting angry. This was best represented in a phrase that Mr. Dutta would use very often in his petitions and his accounts in court, viz. 'my lord, geography will soon become history.' Meaning if the court allowed things to continue the way it was environmental damage could not be recovered from. Crisis was the key not only in the language of Mr. Dutta but for petitioners who moved the court. The forest, the tiger, the wildlife were all going to be destroyed due to the callousness of the government, pleaded Datta, only the judiciary could save it.

The two judges on the bench were always favorably disposed towards statements made by Mr. Dutta. He could never be wrong. Through his statements the judge kept berating the government. 'If the government is trying to fool us then there will be a problem. They are trying to escape. We will take serious view of this. Just take a note. This is a clear violation…if you are placing this (an affidavit requesting a stay on a court order) just to get rid of the matter then there can be

[13] In his prolific activist career of close to twenty years Mr. Dutta told me that he had filed more than eighty cases in the High Court of Calcutta and the Supreme Court and had lost only in one of these cases. The latter being the Metro extension project in Kolkata.

consequences.' By the end of the session, the Secretary had hardly gotten a chance to speak but had been several insinuations made against him. The judge instructed him to submit written notes by the next day. This was another bad day for the state lawyer. The CS despite being scientist did not even get a chance to make his case- but as a government officer he did get an earful from the bench.

This motion had been initiated after the Calcutta edition of the Times of India and other English dailies had published a series of reports on the state of the Sundarbans. The stories relayed here were nothing new- 'Rising levels of CO2 in Sunderbans', 'Sundarban Mangrove trees losing capacity to absorb CO2', 'Ignore forests at your peril.'

In its order of August 29th, 2014 initiating the case the judge wrote in his order,

> It is seen from the records that the Sunderbans is the world's largest ecosystem which is rich in bio-diversity. Loss of mangroves in the Sunderbans is a serious environmental concern. Indian Sunderbans are facing degradation mainly due to anthropogenic pressure wherein the mangroves are exploited as fodder, fuel, timber and areas are converted for aquaculture. Intensive agriculture practices also contribute to water pollution. Therefore, immediate efforts are required to protect these critical habitats.
>
> Accordingly, on the basis of the newspaper reports which have been consistently appearing in the leading newspapers and also the research papers which are published by eminent scientists and having taken note of the fact that a serious environmental issue is involved in this case, we have suo moto take the matter of the Sunderbans.

The Sundarbans are situated at the southern edge of the Indian state of West Bengal and Bangladesh and is known to be one of the most biodiverse regions in the state with dense mangrove forests and one of the natural habitats of the Royal Bengal Tiger. In its initial petition the Tribunal did not lay the specific laws and violations which had been violated in the Sundarbans. The court claimed that it

could open such inquiries in cases where it determines that the state and its agencies have failed to discharge their responsibilities.

The case started in 2014 and its points of emphasis changed from time to time. What had begun as a suo moto case by the NGT eventually focused on ordering the different government agencies to discharge their duties in a proper manner. The court had given a long list of instructions to the state government and the state Pollution Control Board from inspecting illegal constructions in the Sunderbans to controlling the use of plastic in the region. The judiciary had taken over itself what in other legal systems would have been the exclusive jurisdiction of the government and the executive. The proceedings no longer seem to be on the matter of law rather it has become a matter of governance through the judiciary.

This case showed some of the patterns of concerns and anxieties that I had come to see in the National Green Tribunal and environmental jurisprudence in India.

Firstly, it showed the grave imbalance of power between the judiciary and executive in India especially on the question of environmental jurisprudence. Much has been written about it. This was clearly instanced by the title of the case under consideration viz. The Tribunal on its own motion (regarding Sundarban) vs. Union of India and others. As the title suggests this case was not filed by any particular injured party but was filed by the Tribunal itself against the Government. This was a clear demonstration of the absolutist jurisdiction of the Indian judiciary and the dilution of the basic rules of the trial. There were even no specific violations of statute which were noted in the initial petition. The fact that a judicial tribunal could initiate a motion against the government and then sit on judgement over it is an indication of the extent of judicial power that it has acquired in the last two decades. And to keep in mind that this is not the High Court or the Supreme Court, rather a tribunal dealing with environmental matters.

Secondly, it showed the deep suspicion of the government that affects the space of the NGT. Whether it be the counsel for West Bengal or for any of the other states in the Eastern Zone, it most matters the actions of the government itself were marked by a deep suspicion and anger. It almost seemed that there was never a way by which the government could do the right thing.

Thirdly, it showed how crucial the theme of endangerment was in the proceedings in the National Green Tribunal. In environmental studies the question of endangerment has been crucial. As Timothy Choy (2011: 26) has argued endangerment is the key trope in environmental politics. It structures 'images of simultaneous tenuousness, rarity and value. To speak of an endangered species is to speak of a form of life that threatens to become extinct in the near future; it is to raise the stakes in a controversy so that certain actions carry the consequences of destroying the possibility of life's continued existence.' Choy adds that the 'discourses of endangerment have come to structure not only narrowly construed environmental politics, but also politics of cultural survival.' Subhas Datta signified this modality of litigation most clearly. He was the one who rarely ever turned to questions of the specific violation of law. But Datta had clearly been one of the most effective litigators at the National Green Tribunal in the Eastern Zone. It is true that Datta had a public profile even before the rise of the NGT. But they key to his effectiveness lay in his ability to generate the affective anxiety related to endangerment. When it came to this endangerment even the court itself was not following the procedures laid down in the code. This lack of focus on the specificities of law showed the way life in the NGT could become legible. The only form in which life was legible in the court was as an endangered life.

V. Endangerment

In this section I wish to provide an account of what I regard are the key sensibilities that structure the discourse on environmental law in India. Since the rise of environmental law and the proximate

anxieties that in generated in India since the 1980s, a curious thing has happened. That is the remarkable and unrelenting proliferation of new laws and institution for dealing with the environmental degradation and pollution but its simultaneous failure to stem the tide of environmental degradation.

In the early 1980s India had two laws for dealing with environmental pollution- the Air Act and the Water Act. In 1986 the Indian Parliament passed the comprehensive Environmental Protection Act. This particular law gave the government of India and state governments the power to make wide ranging regulations to protect the environment. This was also the period of time when environmental jurisprudence in India in general was taking shape under the guidance of P. N. Bhagawati and the lawyer M. C. Mehta who brought numerous cases to the court. Since then India has seen a remarkable proliferation of environmental laws and institutions for regulating and enforcing these laws. Initially the Supreme Court was in charge of overseeing the cases relating to environmental laws. The Supreme Court was not only hearing cases but was inviting lawyers to file cases relating to environmental degradation (Bhuwania 2017) easing the rules on filing cases in the courts. It came up with a string of judicial principles and methodologies through late 1980s and 90s which it used to oversee the environmental cases in this period of time.[14] Eventually this oversight mechanism was institutionalized within the Supreme Court and the state High Courts themselves with the formation of the Green Benches. These benches would meet at a specified time in the week and hear environmental matters. Most often middle class activists keen on bypassing the political procedures would approach these benches to secure favorable orders from the bench.[15] The green

[14] Among the principles that were introduced in this period included ideas like inter-generational equity, polluters pay principle, sustainable development and non-adversarial proceedings. It also produced independent fact finding committees to gather data. Some these arose more significantly with the rise of the PIL. I will come back to some of these ideas later in the chapter.

[15] This was period in the mid to late 1990s that the Delhi High Court and the Supreme Court would pass an array of judgements with the express purpose of regulating polluting small industries inside and in Delhi's adjacent regions. However, as Baviskar (2011) and Bhan (2016) have shown, these judgements led to mass displacement of India's poor.

bench which adjudicated scores of cases and was eventually replaced by the National Green Tribunal. The purpose for this was to streamline and centralize the adjudicatory procedures.[16] At the central and state levels there are individual Pollution Control Boards created by the Environmental Protection Act of 1986. In the meantime India created an exclusive Ministry of Environment, which recently was rechristened as the Ministry of Environment and Climate Change (MoEFCC). Every Indian state also has a ministry of environment. In addition, there are biodiversity boards, forest protection boards and innumerable other overlapping agencies which are working simultaneously and in sometimes in contradiction to each other.

In addition to these institutional proliferation newer and newer laws have been promulgated at striking frequency. Under the powers issued under the Environment Protection Act, laws and regulations at both the state and the central levels have proliferated. The Government of India has issued The Manufacture, Storage and Import of Hazardous Chemical Rules in 1989, The Biomedical Waste (Management and Handling Rules in 1998, The Noise Pollution (Regulation and Control) Rules in 200, The Ozone Depleting Substance Rules in 2000, The Municipal Solid Waste Rules in 2000, The Wetlands Rules in 2011, The Plastic Waste Rules in 2011. Beyond these complex set of rules there have also been independent laws promulgated by the Parliament and state legislatures. In the last twenty years or so, India's forest laws have been amended, Coastal Areas Regulatory Notification has been issued, there is the Bio-Diversity Act. At the state level in West Bengal there is also laws for regulating the felling of trees, the regulation of wetlands etc. The list is quite long.

The curious thing is that in spite of this remarkable proliferation of laws and institutions, environmental degradation in India has been relentless. There are almost daily reports of the extent

[16] The National Green Tribunal Act as a matter of fact allows for the adjudication of all matters relating to the four laws in these courts with the principal bench in New Delhi and the Supreme Court acting as appellate authority. As some lawyers at the Kolkata NGT pointed out to me, this was unconstitutional because the NGT Act, did not allow the state High Courts any role in this adjudication creating some confusion.

of devastation of natural resources, wildlife habitat in India today, along with rising pollution making India one of the most polluted countries in the world. Why is that the case? One pertinent explanation for the proliferation of laws would be that over the years there has been a greater awareness of the state of environmental degradation in India, that scientists, scholars and activists have effectively pushed for these regulatory changes so as to better protect the environment from the barrage of assault from the state on the one hand and big capital on the other. But as critics like Rosencranz and other activists have pointed out, India's regulatory regime has been more often than not ineffective in its task. What I am keen on is understanding the underlying impulses and sensibilities which has led to such a remarkable proliferation of laws and institutions in spite of their proven in effectivity. I will show that two key sensibilities underlie the environmental discourse as well as environmental jurisprudence in India. These are a sense of crisis and *endangerment* emerging from the sense of proliferating environmental decay on the one hand and on the other a deep seated sense of *suspicion* directed especially at governmental agencies and their perceived lack of care. The latter being more of a feature of modern law itself. I got an intimate demonstration of these sensibilities during my ethnography at the National Green Tribunal. Following Masco and Agrama, I will show the manner this sense of suspicion and endangerment has led not only to the significant expansion of state powers in the realm of the environment but has also led to a form of judicial governance which results in repeated impasses and this ends up focusing more on institutional stabilization rather than on substantive questions of environmental protection.

VI. Environmental Crisis

In 1984 India was struck by one of the worst recorded industrial disasters in human history. On 2nd December, methyl isocyanate leaked from the Union Carbide factory in the Indian city of Bhopal killing hundreds of people in their sleep. Many thousands have been killed due to its long term

effects since. The Bhopal gas tragedy of 1984 showed how vulnerable India's poor and weak were to industrial capitalism (Fortun 2011). The leakage from the plant and the death of hundreds of people was the background in which one of India's most comprehensive environmental law was introduced and passed by the Parliament in 1986, the Environmental Protection Act. This law, the manner in which it was grounded and the scope that it created for governmental intervention showed the emergent logic of environmental discourse in India. On the one hand it showed the sense of endangerment that necessitated its formulation and how this sense of endangerment subsequently leads to the expansion of the state.

The Statement of Objects and Reasons of the Environment Protection Act states the following,

> 'the decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems.'[17]

It acknowledges that laws were already in force which dealt with more specific areas like air and water pollution. However, what was the needed at this juncture was a more comprehensive and overarching law which would give the government wider authority to combat this expanding state of environmental degradation. Besides some crucial areas relating to industrial and environmental safety had remained uncovered. Based on these premises the Environment Protection Act primarily imagined a new authority which would

[17] The law explicitly cites the commitments that the Government of India had made at the 1972 UN sponsored Conference on Human Values which was one of the first international conferences in the post World War II era which dealt with the question of environmental degradation. Indira Gandhi was the only head of state who gave a speech at that conference. This law however is not the only law wherein India's commitments for global environment, the 2010 National Green Tribunal Act also makes a similar invocation. I will return to Indira Gandhi's speech at this conference later in the chapter (National Green Tribunal Act 2010).

> 'assume the lead role for studying, planning and implementing long term requirements of environmental safety and to give direction to, and co-ordinate a system of speedy and adequate response to emergency situations threatening the environment.'

The Environmental Protection Act gives the government of India powers to enforce new regulations necessary for the protection of the environment. It also sets up state level and central level pollution control boards with wide ranging powers. The way the Environmental Protection Act gets enframed at this particular moment shows the distinctive sense of endangerment that framed the understanding of environment. The sense that India's environment is facing unalterable devastation due to the unmitigated actions of the state and big capital. Though India's comprehensive environmental regulation came in the aftermath of the disastrous Bhopal gas tragedy of 1984, Bhopal was hardly the last event of its kind and India has seen since then massive exploitation of natural resources at different levels.

My ethnographic research showed that this particular sensibility has been the predominant in the everyday practices in the courts- in the ways in which environmental problems were thought about and presented. Subhas Dutta was the perfect distillation of this mode of argumentation. He was the most prolific petitioner in the NGT and every case was presented and argued passionately by him on the grounds that it posed an almost existential crisis. In the next section I want to show how this sense of crisis collides with the vigilance and suspicion of modern law to create an impasse in India's environmental protection regime. How the attempt to break this impasse expands the regulatory power of the state but the substantive question of environmental degradation remains unaddressed. I will give a tentative and historically situated answer to this question through a further account of the Sundarban case, especially of a tourist lodge which emerged as highly contentious in the course of the case.

VII. The Story of a Tourist Lodge

After the *Sundarban* case had been filed in 2014, the basic terms of the case were wide. As with many of such cases, there were very little specifications regarding what were the specific correctives measures that needed to be adopted by the state. Rather as was the tendency of these cases, once a broad scope of threat and endangerment was identified, the bench would subsequently look for more specific things to fix. The initial petition only marginally raised these questions. To determine the course of action, the court appointed Mr. Subhas Dutta as an *amicus curiae*, a friend of the court to carry out investigations as to what might be done to improve the situation in Sundarban. One of the reasons that Mr. Dutta was preferred by the court for doing these fieldwork investigations had to do with the fact that he signified a kind of sincerity which had a particular currency within the realm of the court. Mr. Dutta promptly filed a report in the court after a field visit to the region. Mr. Dutta usually made these trips by himself but in this particular instance he was assisted in his report by the head of a non-governmental organization. The report went into the details of livelihood, population and migration and other matters. Mr. Dutta often seemed to emphasize on the restoration of pristine environmental conditions devoid of the people living in the region. Many of his assessments seemed to target the poor and marginalized people living in the Sundarbans. He took a particularly harsh view of the local fishing community in the local villages in Sundarban who depended on prawn cultivation which were known to have an adverse effect on the mangrove forests in the region.

Crucially, the report also alleged that the Government of West Bengal had built a tourist lodge in the Sundarban area on a river bed. According to Dutta this was a violation of the Coastal Regulatory Zone Notification of 1991. In 1991 the Government of India had issued this notification to protect India's coast from further erosion due to human and developmental activities, the CRZ line was

supposed to be enforced all through India's coast. The Notification had laid down strict restrictions on human activities in area marked as CRZ I and more limited activities in areas marked CRZ II and III.[18] The 1991 notification had prohibited the construction of any new building in the coast or river banks and had prohibited all forms of human activity in these parts. Limited human activity could be carried out in the CRZ II and III areas. Dutta alleged that the state government under the auspices of its Tourism Department had not only built the Lodge within the CRZ I line but on the river bed itself. Of all the litany of allegations that Mr. Dutta had filed in his report, the judicial member got fixated on this particular structure. Demolishing the building became the prime objective of the court. The case which had begun as a wide ranging effort to fix the problems in Sundarbans over the next one year would devolve into whether the structure should be demolished or not.

The bench in its first set of orders asked the state government to explain why the building should not be demolished since it was in clear violation of the 1991 notification. The state government looking to fend off this destruction, pleaded to the bench that demolishing the building would cost the state exchequer two crore rupees[19] and pleaded to the bench to withdraw its demolition order. Besides, the state argued, the lodge was generating revenue and providing ancillary employment in the region. The court however was unwilling to relent. In a long order in April 2016, the court argued that not demolishing the building would amount to its regularization and would encourage of future governments to avoid performing their constitutional duties. Regularization was a problem that emerged very often in the proceedings of the court. In a large number of cases, people accused of violating environmental norms were simply unaware of the plethora of regulations that they were supposed to follow. This has been another visible effect of the proliferation of environmental rules and regulations- people simply did not know that they were in violation of particular laws in the

[18] This notification was issued by the government from powers derived from the Environment Protection Act.
[19] Around a quarter million USD.

running of their small businesses. However, once notified of their violations they would often plead to the court that a fine be imposed on them so that they could carry on with their livelihood and that henceforth they would follow all the norms- this is in short was what regularization meant. However, the government, whose responsibility was enforcing the law could not make such an argument. The bench reaffirmed that nothing less than the demolition of the building would suffice insofar as the preservation of the rule of law was concerned. The state government through 2015-16 repeatedly failed to comply with the order. In an uncharacteristic outburst in April 2016, the judicial member said that enforcing the law was the duty of the judiciary and if the need arose they would not hesitate to bring the Army to carry out the demolition if the state government was unwilling to do the needful.

The state government in a last ditch effort filed an affidavit arguing that the new 2011 notification of the Government of India, a newer updated regulatory framework of the CRZ by the Ministry of Environment had allowed certain exceptions, one of which was a desalination plant. The state government argued that it had decided to convert this tourist lodge into a desalination plant and thereby avoid a heavy loss for the exchequer. The bench again refused to take the submission and said that the submission of the state government was a violation of its previous order because it had failed to carry out a standing order and had instead pleaded to convert a structure whose demolition had been ordered by the NGT. The court issued a show cause order against the state and the Chief Secretary.

What was about this structure that made it take such a central position in the course of the court proceedings? Why did the court and Subhas Dutta both insist that this structure signified something so egregious that its demolition acquired such a deep immediacy and seemed to determine the course of the case? Clearly the scope that the court and Subhas Dutta had imagined for the case at

its start would not be fulfilled by the demolition of the structure, the threat of global warming or growing population would not in anyways be mitigated by the structure. What had started as a wide case, somehow got fixated on this structure. To understand this we need to understand the second key sensibility that seemed to underline the proceedings in the environment court, viz suspicion.

Suspicion and vigilance are a characteristic feature of modern law. This suspicion is simultaneously a feature of modern law (Asad 2004, Agrama 2012) and also has a specific historical significance in the manner in which it structured judicial sensibilities in India. As Asad has pointed out, 'all judicial and policing systems of the modern state presuppose organized suspicion, incorporate margins of uncertainty…Suspicion is like an animal, "aroused" in the subject, it covers an object (a representation or a person) that comes under it.' The court in its insistence on the demolition of the structure emphasized the fact that it was acting as a check against executive authority and angry at the government for not carrying out its orders. The deep suspicion of the government that the bench would regularly express, sometimes bordered on disgust. As I noted before, the sight of a state government lawyer being reprimanded (more like scolding) was a very common in the NGT. This was not just limited to the representative of West Bengal. During my fieldwork in the NGT I saw every single lawyer from the state governments being verbally heckled in the court by the bench. There are historical reasons for this. The rise of judicial power in India since the 1980s has been intimately related to a crisis of authority that marked the end of the Emergency a point a discussed in detail in chapter one and two. One of the grounds on which the judiciary based its authority in the late 1970s and 1980s was an expression of the suspicion of government. Justice Bhagwati had repeatedly emphasized on the corruption of governance and its incompetence and thus the

responsibility of the judiciary in protecting the rights of the people.[20] The Delhi pollution cases which has been the basis for so much critique of the higher judiciary in India was precisely grounded on the vigilance of the judiciary against a recalcitrant state.[21] The significance of the tourist lodge and the attention that it generated in the course of the case precisely was a distillation of the suspicion that encompassed the judicial space and grounded its authority. What made the construction so egregious was the fact that government which ought to have been protecting the natural resources was precisely the institution that had led an assault on it. Going by the judge's account it showed the abrasive and callous attitude of the government towards his very immediate and important issue. Not only that the government by its reluctance to demolish the structure, was precisely undermining the rule of law.

Besides the NGT was a relatively new court, it was not uncommon for bureaucrats to sometimes ignore the summons from this court. However, the court itself was presided by judges who previously had acted as the Chief Justice of state High Courts and thus habituated to a certain deference from the state governments and particularly sensitive when their summons or orders would go unaddressed. The judge in the court was fond of repeating a line when a summon would go unheeded. He would say that in India no matter how powerful you were you had to obey the orders of the court. Even if a mofussil (district) court issued a notice against the President of India, the latter was bound to honor it.

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[20] This was precisely the underlying thematic in this period in time. In *Ratlam* (1981) and *M.C. Mehta* (1986), the Supreme Court disparaged the governments of the day and argued that if the government did not discharge its responsibilities properly then it would not hesitate to do the same.

[21] But as scholars have pointed out that this gesture of the court is precisely what makes it so anti-democratic and anti-political (Baviskar, Ramanathan 2014). The court in vilifying the government and its various agencies undercuts the messy democratic and deliberative features of postcolonial governance. I acknowledge this critique but I want to push it further to show that the suspicion that the court shows towards the government and executive agencies is also at the same time the encompasses the judicial realm and results not necessarily in the expansive powers of the judiciary but rather in certain impasses.

As the case moved on there would be more surprises in store for the case. A young lawyer with whom I had become good friends with had pointed out to me that he doubted whether the CRZ line had at all been drawn in the state of West Bengal or anywhere else. There was also supposed to be a concurrent agency overseeing the implementation of the line as per the 1991 notification, but he told me that the line did not exist even after twenty-five years. Unsurprisingly, on the next hearing of the case, the government of West Bengal precisely raised this point. The CRZ line, which the Government of India needed to have been drawn sometime around 1991 and was to be the basis for ecological protection along India's coasts had not been drawn, it simply did not exist. The GoWB argued that the necessary responsibility of drawing the line lay with the Central government, the latter had charged a government technical institution in Chennai to draw the map for the purpose, but the latter had failed to provide further instruction to the West Bengal government on the matter. Could the bench order the demolition of a structure based on the violation of a protective line which had not been drawn yet? The lawyer for the state again made the case that the order to demolish the structure had no basis. When the government lawyer made this point expert member, with a slight grin on his face noted that if that indeed was the case then there was no basis for issuing the demolition order. Meaning that the whole kerfuffle over the last one year finally yielded a central fact that the main object of contention simply did not exist.

The question then was, who was to be blamed for this inaction? As was to be expected the state and the central governments filed petitions blaming each other for the state of affairs. Central government blamed the state government saying that clear instructions had been given to it on how to draw the line. But the state government said that the central agency which was in charge of mapping the line had not discharged its duties. In its December 15th 2016 order the judge wrote, 'both sides are blaming each other.' Even after more than twenty five years of issuance of the CRZ

notification in 1991, neither the state of the central governments had carried out the necessary planning for executing the map.

The controversy over the map showed three forms of dispute that was repeatedly seen in the environment courts of India.

First, it highlighted the jurisdictional problem. As the state formulates more and more of these expansive over-arching laws, one unavoidable consequence was that it creates persistent jurisdictional problems. Take for example the CRZ line issue. The 1991 notification stated that the responsibility of drawing the line would lie with the Central government. Since the line was to be drawn through state limits it is not implausible to think that state government would have some sort of role in the drawing of this line, it would require a certain clear distribution of responsibilities. In the absence of such clear stated responsibilities bureaucrats are unwilling to use their discretion. Which inadvertently led to some form jurisdictional problems or the other. When it came to the different governmental agencies which had to make their case before the NGT there was a persistent reluctance to engage in discretionary actions. There was the constant fear to act discretionally when the judges exercised such wide powers. Besides this jurisdictional question was embedded in how NGT Act had been framed. The act gave the newly formed NGT the powers to adjudicate on matters relating to four broad environmental laws in India. The appellate authority would lie with the Principal Bench in New Delhi and finally the Supreme Court. However, under the Constitution of India under Article 226 the powers of adjudication on state matters (and one assumes that includes environmental matters) lies with the state High Courts. If there is a project which one wishes to challenge in court based on violation of environmental laws, which court should one approach, who exactly had the authority to adjudicate environmental matters. If there was a conflict which ruling would have standing? This jurisdictional confusion was alluded to by

many lawyers and was an obvious contradiction that showed the jurisdictional overlaps in the realm of environmental law in India.

Secondly, the laws and regulations of the government and the decisions of the judges are often not in correspondence with realities on the ground. For example, the Sundarban a coastal area was not just under the jurisdiction of the CRZ notification, but another notification of the Government of India in 2011 classified it as a critically vulnerable ecological zone which imposed another set of regulations on it on questions of human activity in the coastal region. This set of regulations came with their own complications which further muddled their enforcement. When I met the Chief Secretary of the Department of Environment, the same official who received the tongue lashing from the judge, he told me about the difficulties which came with the competing rules, as well as the their impracticalities. Sitting in his offices he pulled a map of the Sundarban. He showed that there were innumerable small holdings of land in these regions near the coast. These holdings were cultivated lands which belonged to small farmers and in many instances their source of livelihood. Some of which were falling clearly in the zone marked CRZ I. This meant that if the CRZ lines were enforced, many of these people would lose their livelihoods, since the regulation clearly mandated the stoppage of all human activities in the region. The secretary looked at me and asked whether I thought that would be feasible and whether any government would risk depriving people of their livelihood. Even if the lines had been drawn hypothetically, they would remain impossible to enforce. The Sundarbans were a rather small section of India's coast, if one were to expect the same scenario for the whole of India's coastal regions then one could imagine the complications that would result in. These expansive regulations were drawn quite often without factoring in the practicalities of their implementation which often resulted in such matters reaching the courts.

Lastly, there is a continual tussle between the immediacy that marks environmental discourse in India and the vigilance, caution and suspicion that is the mark of the bureaucratic state. As we saw so far, a sense of crisis has led to wide ranging laws made by the Parliament as well as wide interventions made by the judiciary. The Sundarbans case was initially marked by the urgency of global climate conditions leading to a case which was wide in scope but lacking in details. But this urgency is continually coming up against judicial and bureaucratic vigilance and suspicion that is a distinctive feature of modern law. This was the underlying tension with the tourist lodge. The judiciary wanted the tourist lodge demolished because it displayed an abrasive violation by the state government based on the CRZ regulations. But what was entailed in the decisions to draw such a line in the first place, it was perception of the ecological dangers faced by India's coastal areas and the need to promptly protect it, without taking into account the complexities that might be entailed in drawing such an expansive on such a diverse landmass. But the line did not exist because of bureaucratic conflicts between the states and also because of the conflicts among the different government agencies themselves. The CRZ line did not exist, not because of the incompetence of the government or because of its mendacity. Rather because of a lack of jurisdictional boundaries and how the work was to be divided. Bureaucrats from the state and the central government refused to do the work to avoid being on the wrong side of the law or they would prefer to shift the burden onto other agencies. Thus, in this instance the Ministry of Environment of the central government blamed the state government in West Bengal and vice versa. But since the line did not exist the court and the government failed to demolish the structure. What it led to was an impasse, a sense of irresolution where the court could not determine what to do. Such impasses were a common feature in the National Green Tribunal. Cases big and small would often get mired in bureaucratic minutiae leading to non-execution of ambitious plans.

The Sundarbans case began with a distinctive sense of a crisis, a sense of immediacy which led the court to start an open-ended case. It moved through a series of dramatic orders asking the government to take an array of steps. One such crucial step was the destruction of the building, they threatened to call in the army if the need arose. However, the premise on which these dramatic pronouncements were uttered, namely the CRZ line, it turned out did not exist, which made any attempt to demolish the building futile. This impasse was not unique to this particular case but was repeated in several other cases as well.

Eventually it was reported to the bench that the principal bench in Delhi in a separate case had taken over the drawing of the CRZ line. Since the same question was under adjudication by the superior court, the case was transferred to the Principal Bench. It eventually ended with shifting the decision to the higher court which would then monitor the drawing of the CRZ line by the appropriate authority. The question of the status of the tourist lodge was sidelined at least for the time being. The case ended in an impasse. But before its closure the court ordered a set of instructions to the state government. Such as:

1. Stringent measure be imposed to restrict entry and exit of people from outside the area to and from the Sundarban.
2. The entry and exit of vehicles in Sundarban area shall be restricted and in order to take effective measures in this direction, the District Magistrates and Superintendents of Police shall be vested with special powers.
3. Tourism activities shall be regulated in such a manner so that there is no rush of tourists at any given time in order to ensure effective management with regard to pollution and disposal of municipal solid waste.

On the face of it these orders are extremely broad and vague. What would be the 'stringent' measures that the government could impose to regulate the flow of people into and out of these regions? How were the entry and exit of vehicles in the region to be regulated and what would be the criteria as they related to this particular case? Sundarbans are at the same time towns, villages, dense mangrove forests which is inhabited by millions of people. Besides such an attempt to regulate the movement of people would be of questionable legality. The court does not specify any laws under which these regulations could be authorized. These orders are wide and expansive and certainly increases the regulatory powers of the state. But in their vagueness they were also almost pointless. Curiously enough the central question on which the case had started in the first place, namely the adverse effects of climate change and growing pollution remained completely unaddressed. If the reality is climate change, then that is hardly going to be mitigated by the control on the movement of people in the Sundarbans. But the structural questions underlying growing emissions and rising sea levels were completely sidelined.

The order also noted,

> 'Having regard to the fact that the above matters fall within the jurisdiction of different departments, viz. Home Department, Forest Department, Department of Environment, Department of Tourism, Department of Municipal Affairs and Panchayats etc, the Secretaries of these departments shall take note of the above directions.
>
> A committee be set up with the secretaries of these Departments as well as the DGP, WB, for coordination with regard to the implementation of the above directions. The Committee shall be headed by the Chief Secretary, Govt. of West Bengal.'

What the court proposed was the creation of a governing agency, a committee for the implementation of the orders. A new committee made up of various heads of different agencies in

the state. This agency had to implement orders which as I noted were extremely vague and unlikely to make a dent in the substantive question of environmental pollution. They would report back to the court at regular intervals. Subhas Dutta had all along argued something similar. He had said that the eventual task would be to form a new authority which would have the powers to coordinate the activities of the different governmental agencies which seemed to work without any coordination among themselves. What we had therefore was an impasse, which led not to the resolution of the substantive issues of climate change and environmental degradation but rather to the expansion of state power. Nothing in the directions of the court or in the actions of the new committee is going to resolve any of the substantive issues that Sundarban faces. Hypothetically, a few years down the line as the situation is likely to worsen someone could again bring a case to the court and the same matter would again have to addressed from the scratch. The structural questions underlying the causes for the rise of global warming, or poverty in the region or even mass migration remained well outside the scope of the considerations of the court.

Suspicion

Endangerment and crisis on the one hand and suspicion and vigilance on other are the two sensibilities that structure the environmental discourse in contemporary India. The question of crisis has been crucial in structuring the global environmental discourse (Choy 2011, Zeiderman 2016). As Joe Masco has argued that all this crisis talk has been a disabling rather than an enabling condition. Masco argues that contemporary American capitalism is marked by a condition which he described by a *crisis in crisis*. Meaning that crisis itself has become a counter-revolutionary scenario. Instead of leading to a situation of collective security and improvement what it has leads to is a scenario which fears the future and rejects

> 'the power of human agency to modulate even those systems crafted by industry, finance, or the security state. This marks the arrival of a new kind of governance, one based not on eliminating fears through the protective actions of the security apparatus but rather on the amplification of public dangers through inaction…The affective circuit of the counterterror state, for example, privileges images of catastrophic future events over such everyday violences, multiplying fears of the future while allowing everyday structural insecurities to remain unaddressed.'

Masco argues that crisis instead to leading to utopia leads to a sense of paralysis. In the US in spite of being the most powerful nation in the world, its citizens feel broadly disempowered to make any substantive changes in their world. Masco work focuses particularly on how in the debate around nuclear weapons on the one hand and climate change on the other, a sense of crisis has led not towards addressing some of the underlying structural issues in these situations but rather a focus is on how the system could be stabilized.

> 'Crisis talk today seeks to stabilize an institution, practice, or reality rather than interrogate the historical conditions of possibility for that endangerment to occur…crisis blocks thought by evoking the need for an emergency response to the potential loss of a status quo, emphasizing urgency and restoration over a review of first principles and historical ontologies.'

I take Masco's points on how crisis talk often leads to an incapacity to understand structural conditions on the one hand and a greater focus on institutional stabilization on the other as being particularly instructive in understanding Indian environmental discourse. The Sundarban case was marked by a sense of crisis. But rarely did I see during the proceedings substantive questions being raised about the causes of global warming in India in the first place, even when raised the focus

quickly returned to the mundane bureaucratic matters. Led by the amicus curiae, the focus was predominantly on daily livelihood issues of impoverished people living in the Sundarbans, about restricting the movement of people and vehicles and of course the tourist lodge. The sense of urgency that has historically marked the environmental discourse in India has often led to marginalization of structural questions and a greater focus on immediate observable issues, especially in the state led discourses. This was certainly the case in the Delhi Pollution case when in the late 1990s through the first decade of the 2000s the Delhi High Court in the name of curbing pollution led the closure of hundreds of small factories in Delhi and its vicinity. The question of loss of livelihood and other sources of vehicular pollution where simply sidelined or willfully ignored. Delhi's pollution continues to be the worst in the world after a decade of that case. This has also led to the state, especially the court posing itself as the sole institution which can address these environmental question. This has also taken a significant portion of the environmental question outside the realm of political deliberation with courts being the prime movers. As courts have concentrated more power in their own hands it has also led to a condition when the court confronted with recurrent impasses, are keener on securing its institutional groundings rather than interrogate difficult questions. The order at the end of the Sundarban case was vacuous to say the least and not likely to yield much change in the situation in Sundarban, but nonetheless the court kept its firm grip on the matter, the court expanded its own powers and those of the state. Even though the court formed a new committee they were meant to report back to the court. It a moment of impasse the way out always is greater concentration of powers in the hands of the state.

This impasse has been particularly ushered in by a second sensibility underlying the state. Hussein Agrama in his study of secularism in Egypt has proposed what he describes as the looping effect of the law and suspicion. He points out that suspicion has been integral to the manner in which modern law operates in its different modalities. Suspicion is not something that ends with the

settlement of a legal question, rather, it infuses every aspect of law. This suspicion however undermines trust in the legal process and the courts themselves. But this mistrust and the general sense of the law's manipulability spurns attempts to fix it and thus leads to more laws and reforms which brings more and more aspects of social life under the vigilance of the law and spurns greater suspicion and undermines all form of authority- 'law becomes everywhere entrenched even as it is everywhere distrusted' (141). The premise of the argument is based Foucault's claim that liberalism is based on a constant vigilance against the abuse of power which renders all kinds of authority suspect. This constant suspicion and the expansion of laws is what Agrama calls the looping effect of the law. In India we see the operation of this looping effect in a particular manner. The underlying sensibility in the green court and surrounding environmentalism in India is of course one of endangerment but alongside this endangerment lies the strong sense of suspicion of courts against the government. But the suspicion is not only an aspect of judicial deliberations but also an aspect of the manner in which different agencies of the government at different levels viewed and interacted with each other. The historically structured suspicion of the government leads the courts to focus much more on the failures of the government rather than some of the more structural questions. But it also leads to failures of execution of critical policy endeavors. The best example of this was the CRZ, a policy thought of to protect India's coasts but not executed because of jurisdictional conflicts. What we see in India is the constant proliferation of laws but incapacity of the government to limit wide environmental degradation. This is because of the continual impasses that the crisis of the environment and the suspicion of modern law brings about. These impasses then leads to the creation of more laws and institutions and creates the possibility of greater impasses in the future. Thus the proliferation of laws and the failure of the regulatory framework that we see in India is a combination of the key sensibilities that structures the environmental discourse in India.

VII. Conclusion

In this section I proposed that the key aspect of India's environmental discourse has been the massive proliferation of laws and institution but the growing reality that these regulatory mechanisms have failed and continue to fail. Instead of focusing on the incompetence of the government or the class biases of judges, I proposed to interrogate some of the structural aspects of India's environmental discourse. I showed that there were two critical sensibilities that structure the environmental discourse in India- endangerment and suspicion. Through a detailed analysis of the Sundarban case, I showed how historically the sense of endangerment leads to a judicial pronouncements which are wide and all-encompassing and which often bypass some of the key procedural questions of law. However this sense of endangerment is always up against legal and bureaucratic vigilance. Many of these expansive policies of the government and orders passed by the judges are un-executable because of a jurisdictional doubts and limits. Agencies of the government do not execute expansive policies not because of their incompetence but because of the non-clarity of rules and jurisdictions. Though there seems to be overwhelming consensus in Indian legal scholarship that procedural norms have been weakened in Indian law but suspicion is an inherent aspect of modern law. What I have shown is that even if procedural norms have weakened, suspicion and vigilance has proliferated in different ways. This sense of crisis and suspicion creates persistent impasses that has become an unavoidable feature of contemporary Indian law. Once this situation is reached what is spurs is more laws and institutions whereas the substantive question environmental degradation remains unaddressed.

What does all of this have to do with Article 21 and the right to life? Article 21 nicely encompasses this tension nicely. The invocation right to life in Indian environmental discourse precisely signifies the sense of endangerment and the expansive powers of the court and the state. Once invoked the

powers of the court would know no limits when it comes to regulating environmental norms. But another crucial aspect of Article 21 is the procedural consideration. Procedure is the central expression of the vigilance against power that marks liberalism. Power is divested from people and situated in norms. One of the persistent complaints against India's environmental law has been the dilution of procedural norms. However, as I have shown in this section, even if environmental norms have been diluted, suspicion and vigilance has pervaded through other means and with endangerment has led to the undermining of substantive action on environmental degradation in India.

Chapter Four

Rituals of Indistinction

Hunger strike, Ordinariness and Irom Sharmila's Failure

I. The Ordinary Bomb Blasts

In 2013 a bomb went off outside the Chief Minister of Manipur's residential compound in Imphal. It was not very far from where I was staying. This was 14th of August, the eve India's Independence Day and this news momentarily even made a news flash on a national English news channels, though no casualties were reported. In most other states, a bomb blast in such a sensitive area, would have serious implications. But on that day Imphal's quite evening remained sullen. On the next day, India's Independence Day I was scheduled to meet Mr. Yambem Laba a special correspondent for The Statesman newspaper and also a former member of the now defunct Manipur Human Rights Commission. In his one room office in a deserted Paona Bazar, the city's main market, I asked him about the bomb blast the day before. He laughed and said that three bomb blasts are always guaranteed in Manipur on three days, one would be around 15th August, the other around 26th January, the Republic Day and lastly around 15th October the date of annexation of Manipur into the Indian union in 1949. This blast was as per the calendar. Laba was not surprised by the blast; as Laba saw it, such blasts were ritualistic and everyone seemed to know who did it. He claimed that people also know that it will probably happen again and hopefully the intensity will remain low. A blast outside the house of the chief executive in an otherwise highly securitized area, in an otherwise highly securitized state, ought to have generated a little more consternation- but as it turned out in the larger scheme of things it was an ordinary event. The *blast* did not unsettle the regularity of the everyday life, it was integrated into such a life.

That was 2013. In August 2016, I was again waiting outside the security ward of the Jawaharlal Nehru Institute of Medical Sciences, Imphal's main government Hospital. Irom Sharmila the forty three old human rights activist, had finally broken her sixteen years long hunger strike the day before. She was to be released but her medical supervisors had advised her to stay for a few more days in the hospital so that they could overlook her transition into a normal diet- there were no known instances of such a long hunger strike. A local journalist Mr. LK Singh the chief correspondent for a national news agency told me that there had been a bomb blast outside the Manipur University. Singh joked that nothing has happened to anyone and no one has claimed responsibility. Who might have done it? Police or the UGs?[1] Did not matter. This event was not worthy enough for Singh. Aisa hi blast hota hae, he told me in Hindi- these are the kinds of blasts that happen here. As a matter of fact there had been two bomb blasts in the vicinity of Imphal that day and in one of them a young girl was critically injured. However, such a bomb blast was not news for Singh, they were too regular and marginal in the scheme of things. He was staying put outside the hospital and wait for his chance to meet Sharmila in the hospital instead.

My fieldwork in Imphal Manipur were parenthesized by these two bomb blasts- the ordinary ones. The first in 2013 and the last in 2016. The first when Irom Sharmila was continuing her hunger strike and the last after the day she broke her sixteen year-long hunger strike. And there had been quite a few bomb blasts in between.[2] When do bombings become ordinary? Manipur is not unfamiliar with violence and such bomb blasts existed beside the recursive political upheavals in the

[1] UG is the acronym for underground, meaning the militant organizations in Manipur. Some of these organizations are directly organized against the Indian state, however there are several ethnic militant organizations also and there is known to be several interorganizational strife among these groups.

[2] The more notable of these in a roadside hotel in 2013 which had allegedly been serving alcohol to its patrons. Again no one died but the group that carried out the blast claimed that this a warning to the hotel owners against serving alcohol. The owners denied this and the media speculated that this was more likely to the consequence of the refusal of payment of money.

state, a common reminder that things were out of the ordinary in the state.[3] But this intimacy between the ordinary and the exception, the-exception-becoming-the-ordinary was a reality that I was confronted with repeatedly. This attention to the ordinary however emerged from an insistence of the subject of research. Irom Sharmila who had spent ten plus years on a hunger strike would insist that her enduring hunger strike did not change who she was- she was an ordinary woman. Her protest was the most obvious response to the violence of the state according to her. It was her insistence on her own ordinariness that vividly showed the intersection of the ordinary and exceptional in Manipur.

Irom Sharmila began her hunger strike in Manipur in November 2000. The trigger for the hunger strike was a mass shooting by the Assam Rifles in Malom in the outskirts of Imphal killing ten civilians including children. No one was subsequently punished. The security forces could carry out this operation because the state was under the Armed Forces Special Powers Act or AFSPA- a classic exceptional law. A colonial vestige, the law allowed the Indian Army to kill anyone on the mere suspicion that they were a terrorist or insurgent. The heavy military presence in the state and the imposition of AFSPA were the Indian state's response to the prolonged insurgency in the region by armed groups who claimed that Manipur was not a part of the Indian republic. The militancy and the Indian states violent response has led to the death of more than fifteen hundred people in the state under questionable circumstances according to a recent lawsuit filed in the Supreme Court of India. Sharmila's hunger strike represented most blatantly the conundrum of law and life in India. The Indian state had enforced AFSPA in Manipur and killed scores of people. Irom Sharmila said that if this law was not withdrawn and abolished she would continue her hunger strike not eating or

[3] Since 2013 one of the major sources of strife in the state has been over the Inner Line Permit system. Native inhabitants of the region have been demanding the enforcement of this colonial law to restrict the entry of 'non-locals' into the state.

drinking anything. Whereas the state had killed many arbitrarily, the state responded by deeply investing itself in Sharmila's life and keeping her alive primarily through force feeding. It organized an elaborate legal ritual which kept the appearance of its own legality in dealing with the protest faster, it posed a legal question but never resolved it.

I had begun my fieldwork in Manipur with a certain image of the state in mind- a violent borderland marked by state and ethnic violence[4], a state which has been under the Armed Forces Special Powers Act for more than fifty years.[5] A violent law and a fearless resister- that was the dramatic scene that I had wished to analyze. My presumption was that there would be an atmospheric of terror in this borderland (Luna 2018, Anderson 2009). But what should have been a space of exceptionality repeatedly affirmed a distinct sense of ordinariness and regularity which I found perplexing. In this chapter I wish to provide an account of the haunting remnants of the ordinary in the space of legal exception. To show how under the conditions of exception the state keeps producing an ordinariness and try making sense of it. To do this I will ask a simple question. When Irom Sharmila broke her hunger strike in 2016 in front of a bevy of journalists she said that she wanted to adopt a different means for continuing her struggle against the Armed Forces Special Powers Act as her hunger strike had not yielded the desired results, her hunger strike had been a failure in her eyes. What did Irom Sharmila mean when she said her hunger strike had failed and how do we account for that failure? What does it mean for a hunger strike to succeed and what are the conditions under which that potentiality gets negated?

I want to use this question of failure and Sharmila's realization as a fulcrum to understand the ways in which she perceived her own hunger strike, the sympathies, misconceptions and suspicions that the hunger strike generated and how various crucial actors responded to it. Through an account on

[4] On the history of ethnic violence in the state *see* Koirang Singh.
[5] On AFSPA *see* Macduie-Ra

the one hand of the personal and the intimate and on the other more structural, I will try to explore some of the complications that are involved political action in a state like Manipur. I will also show how Sharmila's firm belief that she was an ordinary woman proved not only to be true but tragically true. In this chapter I will make two primary arguments. Firstly, I will show following Nayan Shah that the problem of the hunger striker is not so much a question of life and death, but that it is primarily an act of incitement. It provokes and agitates and seeks to move an audience, it posits an affective problem for the state. This precisely what Sharmila wished to do but could not do. I will show that legal ritual that the Indian state responded with, sought, not to answer a legal question but rather to diffuse the political affective potentiality of the hunger striker. By doing this I will show the limits of an agitational politics which is so singularly hinged on the singularity of life. Secondly, I will argue that a crucial modality of politics in Manipur is based on drawing a line between the inside and the outside. The AFSPA is a violent law and has marginalized regions of the Indian state. But at the same time it has also marked a political distinction what is on the inside and what is outside Manipur. One of the reasons for Sharmila's eventual failure was not only the state response, but was because of her refusal to subscribe to this fundamental structure of politics in Manipur.

This chapter enters the third situation that I think is critical in understanding the normative and pragmatic functioning of the principle of right to life in India- the *exceptional* situation. Manipur is a state where the AFSPA has been imposed and effectively the right to life has been eliminated. The state has the authority to kill anyone that it wishes with impunity. Though the jurisdiction of AFSPA has varied, the effective power of the state has remained unquestioned. In this situation though the right to life has been suspended, the politics of life and its intersection with the law manifests itself in a distinctive manner showing how the state seeks to manage suffering body of the hunger striker through a unique ritual. The minutae of legal activities in such a state reveals that any legal order is not merely destroyed as a consequence of exception, rather attending to the daily intercations show

the ways in which state power manifests beyond brute power and how resistances to such power occurs.

II. Theories of hunger strike

Contemporary theorizations on the hunger strike have focused on questions life and death and on the biopolitical dimensions of the protest faster. One such biopolitical account of the hunger strike has been offered by Banu Bargu (2014) who in her study of hunger striking in Turkey has argued that it is form of weaponization of life against a political situation which she describes as necropolitical- marked by sovereign power ruling through death.[6] Framed broadly within an Agambenian framework she contends that bareness of life is not a limiting condition but can also be a grounds for resisting the state. Taking cue from Bargu, Jinee Lokneeta (2016) writing specifically about Irom Sharmila has argued along similar lines, 'even as the state forced Sharmila to live (in true biopolitical form) her resistance continued in repeatedly claiming her right to die, an operationalization of bare life that Agamben may not anticipate. And then by deciding to break her fast…she reasserts her power over both life and death.' Concepts of bare life and state of exception Lokneeta argues is what exemplifies the life and struggles of Sharmila- her struggle is about her right to die. However, Lokneeta's assertion that Sharmila's struggle was about the right to die is a description that Sharmila would have strongly objected to. Sharmila had always insisted that she had no desire to die and that her objective was to keep living and to keep fasting. At the Jawaharlal Nehru Institute of Medical Sciences where she was kept incarcerated and under medical supervision, Sharmila once pointed to the ceiling fan and said that if her intention was to die she could have easily hung herself a long time back. Her point was not to die but to make possible through her

[6] Bargu's persuasively has shown the shortcoming of an Agambenian (1998) analysis of hunger strike which reduces the hunger striker to bare life, waiting to die. The most persuasive of Bargu's intervention has precisely been showing the agential capacities of hunger strikers in Turkey (2013) and elsewhere (2016).

suffering a popular revolt against the imposition of the Armed Forces Special Powers Act. If one were to seriously take this argument then one could say that in Manipur under the sword of AFSPA everyone except Sharmila was a bare life, it was only Sharmila with the political charge that she possessed who was not. Lokneeta's assertion limits protest fasting as merely an interaction between an unjust state on the one hand and the protest faster on the other. In doing so she misses the third key element and also the register on which the hunger strike was being carried out, certainly in this particular instance namely its affective potential. Sharmila saw her failure as a failure for her people to respond to her suffering and act against the state. Which raises the question, what is the hunger strike about?

Nayan Shah (2014) has pointed out that one of underlying promises of a hunger strike is the possibility of the formation of an emotional community around the suffering body of the hunger striker. The hunger striker hopes that s/he will be able to mobilize 'the sympathy of followers and the broader public, which focused on the suffering body and amplified, within an emotional community, feelings of outrage, sadness, or anxiety for the leader's health and well-being' (241). This is the greatest threat that a hunger strike poses for the sovereign state. Protest fasting, as Shah shows is intimately tied with a moral community and operates on an affective register, the potential anger that it can unleash against the powers that be. Hunger strikers like Gandhi and Chavez in California mobilized a certain sense of fearlessness in the face of adversity to inspire their supporters and to urge them to act. The protest fast therefore is not merely a contention between the state and the hunger strike, but operates in a field of injustice, an injustice of which he or she is not the necessarily sole victim. The hunger strike is not merely a protest against the state but is also an act of incitement. Through a display of suffering, the hunger striker seeks to turn itself into an icon that can spark the collective anger of the masses. Though the hunger strike of Sharmila and the IRA in the 1980s was fundamentally different in so far as Sharmila claimed that her protest was non-violent,

they sought similar goals on an affective level. The hunger strikes of the IRA were meant to be a continuation of the broad warfare against the British state. As Allen Feldman argued, 'The logic of political violence and that of the Hunger Strike were united in their attempt to produce catharsis through alterity' (1991: 255). The IRA prison deaths were meant to provoke violence against the state. Sharmila similarly wanted her protest to lead to an uprising though a nonviolent one.

What Sharmila has lamented as the *failure* of her movement precisely lay in this inability of the formation of the moral community and the opposition to state violence to appear as a consequence. Whereas she was often portrayed as an unrelenting warrior against an insensitive state, in Imphal except a very small group of activists, her struggle against the AFSPA simply failed to generate much excitement and at times even sympathy. By the time I arrived in Imphal to carry out my fieldwork, Sharmila seemed completely alienated from the political imagination of the valley. Contrary to the image of restless heroism that I had in my mind, what I found was a political activist who was repeatedly exhorting her people to rise up in protest- an appeal that always seemed to fall in deaf ears. The extraordinariness of her struggle really led to nothing- this has been her lament for the last sixteen years especially when she broke her hunger strike in August 2016. How did this turn out to be the case?

The central objective of this paper is to explore the affective dimensions of the hunger strike. Affect as Mazzarella tells us (2009) is that 'pre-subjective but not pre-social' (291) domain of 'intensity, indeterminacy and above all potentiality' (292). Affect and its uncertainties is what the modern bureaucratic rational state seeks to sideline in the creation of a non-affective state guided by reason and not the fulminations of the crowd. But this is a conceit and that affect has remained at the heart the heart of effective state management of populations. Sharmila's hunger strike was primarily a question of affect, the energies and the intensities that the suffering bodies of the hunger striker

could generate and how the state through its ritualized response to the hunger strike managed to control and negate that potentiality. But such an effective management as I will show is not the end of the story. Whereas the state could manage a certain kind of affects others could be well beyond its control.

III. The Legal Ritual

Sharmila's prolonged hunger strike posed a legal problem for the state. How do you deal with a person who refuses to eat anything? Hunger strike is not an uncommon phenomenon in India and the conventional response of the state has been to criminally charge hunger strikers under section 309 of the Indian Penal Code which till recently criminalized the attempt to commit suicide. Sec 309 of the IPC says the following:

> **Attempt to commit suicide**: Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

The charge and the trial that ensued over the next sixteen years was the way that the state managed and finally negated Irom Sharmila's political charge. The trial was a non-trial. It was presence through its absence. The repetitive trial was also the site where the charge of Sharmila's hunger strike was defused, reduced, turned from what was to be a spectacle onto something which was mundane.

A day in court

In June 2013, I arrived in Manipur with some questions but slight trepidation. Irom Sharmila was India's most well-known political prisoner and from previous accounts I was wary whether any attempts to meet her or even attend her trial would be possible or not.

On the fourth day of my first visit to Imphal- the state capital of Manipur I got the opportunity to attend a hearing in the Lamphel court. The Lamphel court house is one of the two main court compounds in the city and serves both the Imphal East and West districts. It is located in the outskirts of the city with limited access by public transportation. The Lamphel Court had no sign and is a large compound with rectangular building blocks spread over a large area. One could often see cows grazing in the field. My informant Sushant and I waited under the arches of an older building and chatted with the two local journalists who had gathered there to cover the news. After waiting for almost around 20 minutes I saw an ambulance approaching the court compound. The ambulance was part of a convoy, it was accompanied by a police jeep with heavily armed police guards. By then the journalists, anticipating her arrival and familiar with the routine had already moved to the back of the court compound. On seeing the vehicles, we also moved to the empty space between two court buildings where the convoy parked itself. I caught a glimpse of Sharmila sitting inside the ambulance. Armed-guards stepped out of the waiting vehicles. There were two armed Manipur Police personnel on the jeep with automatic guns and two unarmed female guards sitting beside Sharmila in the ambulance. The door of the ambulance was opened and Irom slowly stepped off. She was wearing a green *phanek* the traditional Manipuri wrap-around that Meetei women wear and a round neck t-shirt. The Ryles tube dangled from her nose and she occasionally fixed it behind her ear. In the local press she is often referred to as *Mengoubi*- the fair one. The cameraman from ISTV had started filming her, no attempts were made by the journalists at this point of time to interact with her.

She initially was taken to one of the adjacent court house, a one storied building which housed the court of the Judicial Magistrate of Imphal West First Class. None of the journalists try to go inside and wary, I also waited outside with them. In a short while she came out with the female guards. She was taken to a second court in the next building. Before she entered I come face to face with her,

she gives me a bright smile and I awkwardly greet her. Over time after attending several more hearings, I realize that she was scheduled appear in the first court house, however, the bench in that court had been temporarily empty and a new judge was yet to be assigned. So, her case for the time being was being heard by the bench of the Judicial Magistrate, First Class of the Imphal East district. As usual there are many people already sitting inside the courthouse awaiting their turn to be heard. An air of boredom hung in the air, the judge was not on his bench. As I will later realize he often is not, the volume of cases tends to be less in the lower courts of Imphal. The police take Irom into the magistrate's chamber. I was under the impression that this trial was meant to be carried out in open court but that clearly was not the case. I waited outside. The journalists no longer interested had moved outside, the news for them did not lie in what happened inside the court room, the trial was not the news. After a while Irom is taken out of the court house and back to the ambulance. She is frail but looks calm and relaxed. Along with the two female constables she boards the ambulance and a plain clothes policeman who had accompanied her leaves one of the doors slightly ajar. One of the journalist goes up to her and asks her a few questions. The topic of discussion? The adverse effects of mobile phones on the youth in Manipur.

So what happened that day? Whatever happened, happened inside the magistrate's office. The magistrate kept a record of the proceedings that day which stated the following.

> The court in its order of 11th July 2013 noted,
>
> Accused Irom Sharmila Chanu produced before me. She stated that she has no medical problems. A medical certificate is also issued by the Sr. Resident, Dept. of Medicine, JNIMS certifying that the accused who has been admitted in Special Security Ward under Hospital no. 12/30/7241 is examined by him and that she is fit to be produced in the court.

LAC (Legal Aid Counsel) on behalf of the accused state that the donation of books by the accused, as allowed by the order of the court dated 30.06.2013, is still not yet carried our and prays the same may be carried out today at JN Security Ward in presence of the following persons:-

-redacted-

With permission for media coverage for the said donation. Accused further stated sometime may be given for media coverage and interaction.

I have already indicated in my order dated 30.06.2013 that said donation will be for the general welfare of the public. As such, the aforementioned prayers are allowed. Authorities concerned are directed to allow the accused to carry out said donation with media coverage for about an hour at the JN Security Ward where the accused is lodged. Send a copy of the order to the SP Manipur Central Jail and the LAC.

Remand her till 23.07.2013

This short order is called a daily order. Meaning a record kept by the judge of daily hearings. For each appearance in court, the judge keeps a record of the proceedings and the statements made. Curiously enough the judge makes no mention of the status of the case except the fact that she has been brought before him. What are the charges against her? Has the police filed a charge sheet against her? Has the trial proceeded? None of these questions were answered. Rather it tells a story that her health is well, that a doctor in the court certifies her fitness. Then it narrates the story of the book donation. Her request and his approval of the request and orders her to be brought back to court in another fifteen days.

The narrative of the law

Sharmila's legal struggle has been marked by her repeated arrival in the court. By the time she had made her final appearance in court in 2016 she had probably made over five hundred appearances in court. A single court appearance rarely lasted more than ten to fifteen minutes. On the several occasions before 2014 when I attended her hearings hardly much was said in court.[7] She would come to court, sit on a chair, the judge would quickly write an order and she was sent back to the hospital. However each appearance resulted in a court record being generated it was a record prepared by the sitting judge. Much of the records prepared from 2000 have been destroyed but I was able to go through a set of them from the year 2011. When I asked the judge for permission to go through these documents, he willingly agreed, contrary to my expectations. This was not what I had expected since I anticipated that Sharmila was a 'political prisoner,' of some due concern for the state. But the ease with which I could indeed access those files clearly indicated that this image of Sharmila had somehow been misplaced, the state clearly did not see Sharmila as a 'dangerous' political prisoner.

Most of these records were handwritten notes written on thin legal paper by the magistrate him/her self. I could access records for the years 2011, 2012 and 2013. Let me give an account from the 2011-2012 case.

The 11th March 2011 record of Sharmila noted the following.

> Accused namely Irom Sharmila Chanu is produced before me today at 4:00 pm by the I.O. (Investigating Officer) c/w (case with) the above referred FIR case, woman police accompanied the accused.

[7] In 2014 she was finally acquitted though the process was reconstituted in a different way.

Heard the I.O. of the case and the accused person. Perused the materials on record.

The FIR case in brief is that on 10/3/11 at 1 pm, O.C. (Officer in Charge) PRT-PS (Porompat Police Station) received information that one Miss Irom Chanu Sharmila is staging protest at the roadside of Khurai Ayangpalli road near PDA Complex by fasting unto death against the state government for removal of Armed Forces Special Powers Act.

Hence the FIR case suo moto. I have considered both sides (sic) submission and on perusal of all this materials on record, I find that the alleged offence under section 309 IPC is bailable offence and hence accused maybe released on bail on her execution of P/R bond of Rs. 10,000. Bail order is explained to the accused. The accused may be release (sic) on bail on her execution of P/R bond of Rs. 10,000. The accused refused to furnish P/R bond.

Hence accused is remanded to 15 days judicial custody.

Produces accused on 25/3/11.

Signed.

This order marks a fresh start and a new case. There is no reference made to the fact that her hunger strike has been continuing for the last eleven years, that she had been released just two days earlier. There are no details if any of the previous case. Section 309 of the Indian Penal Code is a bailable offence. The judge therefore offers Sharmila the chance to take bail. Had she done so, she would have to be released. But she refuses and she will do so over the next one year. This act of refusal on her part sets the grounds for the repetitive ritual that will continue for the next one year over another twenty or more appearances before the same magistrate. This 'no' on the part of Sharmila is quite significant. This no means that she will not be released and will be kept in prison.

After fifteen days Sharmila is again brought back to the court. In his order of 25th March 2011, the magistrate notes that the Sharmila had complained about 'physical discomfort due to the long use of the nose feeding pipes and uneasiness in and around the throat area etc.' The concerned doctor is told by the magistrate to look into the matter and to provide her with the required treatment. It also notes that she had again refused to execute the P.R. bond and the accused gets remanded to further fifteen days.

This sets up the repetitive practice for Sharmila. Over the next dates the judge will keep recording the appearances by Sharmila over and over again. On 12th April the judge in a less than fifty word order recorded that Sharmila had been produced before him-that he perused all the materials on file, that no Final Form (the police document listing the charges against her) had yet been submitted by the police and that the accused is further sent to fifteen days of judicial custody. On 26th April the judge recorded that the bail bond had been explained to Sharmila but she refused to furnish the bond. The accused was 'further remanded to fifteen days judicial custody.'

There are some days when some additional requests are made. On 10th May 2011 the Chief Editor of the North eastern Literary Organization along with her associates requested the magistrate to meet her. On the same day a laptop send by Desmond Coutinho, her fiancé, as a gift for Sharmila was received by the court. 'The parcel is sent by name in the court's address. Thus, on opening the parcel one laptop and one letter written by the said Oliver Rathzene is found in the parcel.' The magistrate allows the said laptop to be handed over to her 'after proper scanning and as per the law.' The magistrate notes that she had again explained the bail order but Sharmila again refused to furnish the P/R bond. The Final Form still has not been submitted.

Usually Sharmila is unable to secure a lawyer for herself, she has no modes of making a living. Under these circumstances the court as per the decision of the Supreme Court secures a lawyer for her

from the Legal Aid Clinic- a lawyer paid for by the state. There are days when the Legal Aid Counsel assigned to her is absent like on 24th May. But mostly the pattern of coming and going continued. But every time, at least in the records, the magistrate made the effort to explain that she had the option of taking the bail which she persistently refused to do.

On 30th August a New York Times reporter sought permission from the magistrate to speak with Sharmila and she was given 'two minutes' to speak with her. The magistrate occasionally notes that no Final Form for the accused had been noted. The usual explanation for this delay is that the investigation has not been completed. The magistrate noted 'ask the O/C (officer in charge) to submit the FF.'

In the year 2011-12 the judge asked Sharmila eighteen times to furnish her PR bond and asked the police fifteen times to submit the Final Form i.e. the document listing the charges against her and the results of the investigation that they had been carrying out. Both sides failed to comply with the orders of the judge.

As the year wore on the orders of the judge became shorter. On 11th January he wrote, 'The accused Irom Sharmila Chanu 34 years…is produced before me by the Jail authorities. The accused has not yet submitted her personal bond. Hence, the accused is hereby remanded into the judicial custody for 15 days till 25.1.2012.' Even the enthusiasm of the magistrate through the period of this order seemed to wane if there was any in the first place.

Finally after twenty eight appearances the judge on 12 March 2012 recounted the charges on which she had been arrested. He noted that,

> 'she has not executed her PR Bond and as such she has been remanded to 15 days judicial custody and extended time to time. The offence is punishable with simple imprisonment of one yeas, or fine or both. But, judicial custody of the accused has completed one year as on

> 10.3.2012…Moreover, O.C. Porompat PS has not submitted chargesheet against the accused. Since she has been in the judicial custody for more than one year which is the maximum punishment provided by the law, this court has no other options except to discharge her from the present FIR case.'

Sharmila was thus released immediately on this date after having spent a year in judicial custody.

She was re-arrested in 13th March 2012, just one day later on a fresh FIR.

The case therefore ends with an indecision. There has been no determination of the fact whether Sharmila has broken the sec. 309 of the Indian Penal Code. The trial ideal should have resolved that question. In the face of it the effort was made. Sharmila made no less than twenty-eight appearances before the magistrate. Lawyers were assigned, daily orders written, even bail was offered regularly to her and a few questions were asked here and there. But no trial eventually emerged. The trial required a formal charge made by the police after the completion of the investigation, but there was neither an investigation and nor a charge sheet. How then do we make sense of this indecision? On the one hand it could be seen as an assertion of the rule of law. The law prescribes that Sharmila's offence is a bailable offence and she was offered bail on multiple occasions. The law also prescribes that Sharmila could be kept in jail for no more than a period of one years, and indeed she was released as soon as that period of time had been completed. The procedure reigned supreme. The reason that the trial could not proceed was that the police, the enforcement agency of the state, in its words had failed to complete the required investigation the period of one year. They had insufficient time to collect the evidence, interrogate the witnesses and make a case against her or say they said. This argument is a well-known conceit. The fact of the matter is that there is not a whole lot if anything to investigate. After each release, she goes to a little shack made by some of her supporters a few hundred feet from the hospital gate and continues her fasting, till the police come and rearrest

her. There is nothing eventful happening at this site and neither is there anything to investigate by the police. Before 2011 this had happened for more than ten times. Thus, the state does not fail to collect evidence, there is a concerted effort made on the part of the state to keep this matter hanging. The police had a clear intent when it refuses to do its job.

A trial seeks to resolve a legal question or at least that is what its normative purpose is. In that sense of resolution, the act is unsuccessful, because the legal question does not get resolved in this particular sense i.e. the determination of guilt. As a matter of fact the question does not get raised since the charge sheet needed to begin the trial never gets framed. But this trial has a ritual form, a regular coming and going, the preparation of court documents, the eventual release at a certain anytime only to re-arrested. I will call this a *ritual of indistinction*. The hunger striker poses a particular threat to the state of exception in Manipur which is the volatility, uncertainty and the unrest that her suffering might cause. Her hunger strike separates her from everything else but at the same time it illustrates the state of violence in the state. Her force feeding negates the possibility of death. Her trial operates on her distinction and separation from the body politic. Whereas anyone could be killed by the state, she is the one who has embarked on a path of self-harm- but it is not an act of self-harm which is contained in itself but rather is meant to be an act of incitement. Hunger strike and the suffering that it entails therefore has a sense of immediacy and urgency. It is situated in a zone of liminality which seeks a radical transition. However, through this coming and going from the court, over and over again she loses the distinction and the charge that she carried and gets entangled in the logic of the state. The state seeks through this ritual to control the affective potential of such a strike. Instead of seeing the trial as merely being an independent mechanism to resolve a legal question it is intimately tied to the question of state power. By entangling Sharmila in the legal process and effectively keeping her out of the public view and prolonging her incarceration

without any effective charge, the immediacy of Sharmila's hunger strike and its effects are thoroughly neutralized.

This ritual is performed by the state in all its seriousness. There is a set script and there are rules which all the actors have to play by. Through this regular requirement of appearance, the state maintains its own legitimacy. It can show itself as being a law-abiding body and not being arbitrary. But what is important to note are the effects of this trial. Through this repeated coming and going Sharmila becomes entangled in the logic of the law. The charge of the hunger strike was directed at the unjust state. She moved from being a non-violent hunger striker to a mere criminal. But through the trial the question turns to whether Sharmila has broken the law or not through her hunger strike. But nothing happens. She becomes ordinary.

In his classic work on rituals and ritualization, Roy Rappaport (1999) defined ritual as 'the performance of more or less invariant sequences of formal acts and utterances not entirely encoded by the performers' (24). Ritual has a performative dimension and the formal actors in the ritual are not necessarily the authors of the act. The formal trial of Sharmila in this sense has certain ritualized components. The non-trial has an underlying performative dimension, there is a time and date when she has to come, she has to act in particular manner and sit in a particular place, occasionally have very brief interaction with the judge before being taken away. With minor changes the script for the performance is set and it will be repeated every fifteen days. This repetition is not necessarily authored by the participants in this performance. Its roots lie in the formal tenets of law and requirements of the bureaucratic state. But as I argued in the above section, this performance does not intend to fulfill the normative objectives of the trial, namely the settlement of a legal question through evidence, deliberation and argumentation. In this trial these key elements remained persistently absent. There was no evidence, the lawyers did not deliberate and the judge never settle

the legal question in hand. The objective of this performance was clearly not directed towards securing but towards something else.

Durkheim had identified the emergence of collective effervescence as one of the key components of ritual life. 'Once the individuals are gathered together a sort of electricity is generated from their closeness and quickly launches them into an extraordinary height of exaltation.' Sharmila saw the virtue of her hunger strike in this potential uprising, a collective effervescence which would lead to a popular movement leading to the overthrow of the Armed Forces Special Powers Act. As we will see later, she saw herself as an intermediary in securing this objective. The police and state action suggest that their objective was precisely to contain and diminish this potentiality in Sharmila. Whereas the police remained broadly indifferent to filing a charge sheet, in spite of the requests of the magistrate, they were far more prompt when it came to arresting her after her release. More often than not the police re-arrested Sharmila before the passage of twenty four hours. What makes sense of this promptness of action?

When Sharmila would be released at the end of a year, she immediately resumed her hunger strike. Sitting in the small shack a few hundred feet away from the hospital she sat with her supporters but refused to eat. It is at this moment that, outside the control of the state she could potentially re-activate the consequences of the hunger strike through a vivid display of her suffering and the possibility that such a suffering could potentially unleash discontent against the state. Sharmila sometimes would express her desire to carry out her hunger strike in a more public space like the center of the city. Her hunger strike was an act of both showing and doing. The venue of her hunger strike was a shack. The front was uncovered and it opened onto the street. She was putting her hunger strike on display- it was not merely a protest against state atrocities, it was at the same time a demonstration whose object were the people. It was this precise demonstration that could initiate a

potent threat for the state and the thing that the police were most wary of. Every occasion she was in the public domain she was heavily guarded and the attempt was made to prevent her from speaking to the public. In private under the confines of the hospital, people were allowed to see her quite frequently and at a regular interval but it was in the realm of domain of public incarceration that she posed a threat. One activist regretfully told me once that he knew of people who felt only her death at that point in time could re-energize the movement against AFSPA. The logic of this ritual this- 'less invariant sequences of formal acts and utterances' was therefore not so much to create a logic of sociality but to prevent kind a sociality from coming into being- a sociality which would be moved by the suffering of the state and a sociality which would put the authority of the state in crisis.

But following Asad (1993) I do not think of ritual as solely having a symbolic dimension. It is not an event merely to be interpreted through its symbolic variants. Rather the ritual of indistinction also creates certain dispositions through bodily acts. The objective of a ritual is not merely as a commentary about larger social forces, but the act itself has a purpose. In the Christian tradition it was meant to create certain bodily dispositions. When thinking about hunger strike, the question of the body becomes a critical question. As Bargu has noted that in a necropolitical state of exception, the body becomes a weapon against the state. While theorists have talked significantly about how the hunger striker mobilizes her own body, little attention has been paid so far as to what the state can do in these circumstances. In Sharmila's instance the state forces her to eat and thus stay alive, keeps her under medical surveillance and finally ensures that she be made to be present regularly before the state. Keeping her alive and keeping her from the public domain were the two primary objectives of the state. But this coming and going created not so much a bodily disposition but rather an affective disposition. Rituals are marked by distinctive affective structures, sentiments and

moods that they generate. In Durkheim's rendering a ritual is the expression of a collective effervescence. Through the coming together of bodies a charge is created.

In this instance the state is precisely trying to avoid this coming together of the bodies. It attempts to create an affective disposition through the management of the body of the hunger striker, to ensure that it does not inspire or motivate. To be clear that Sharmila's iconicity, in spite of her denials had immense potentiality. NGOs and other civil society organizations had used her hunger strike to draw attention to the continued violation of rights in Manipur. There was nothing equivalent to Sharmila's hunger strike in bringing attention to the reality of AFSPA in Manipur. Her struggle was iconic in this regard. But in the immediate surrounding of Sharmila and in terms of her own desire for the movement as she saw it yielded very little. This was one of the critical aspects of a ritual of indistinction. It minimizes and contains the excitable potential of the hunger striker and seeks to assert the control of the state.

As Mazzarella notes, to be effective any form of state action simultaneously needs to be reasonable as well as affective- state power can be effective not through greater rationalizations but through the management of intensities inherent in human sociality. Ritual action is actually one of the more effective ways by which institutions could try to control the potentialities of entities that are unwilling to bow to the effective powers of the state- institutions are durable which are able to slow down the crowd events (Canetti quoted in Mazzarella 298). Affect as Sharmila's case shows is also a site of critical public efficacy and the police well understood that. The ability of the police in Imphal to manage the potentiality of Sharmila shows that affect is not outside the reason of the state rather it is tied intimately with it in every moment. Nor does it show the supremacy of the biopolitical state manifesting itself through an economy of killing (Mbembe). Rather this power to kill, to maim and murder creates the simultaneous possibility of the release of those energies which it might very well

find difficult to contain. It is precisely that vulnerability that makes such a condition more vulnerable to affective fulminations and requires the institutions to more cautious about the steps that it might to take to contain such situations. That the institutions still have to pay attention to the energies and understand the need to control obviously does not imply that they are always capable of effectively managing it.

This however is one part of the story. Even if we were to take this claim seriously this raises two questions. First, why exactly did Sharmila's people not see the suffering that she is confronted with? Why did this ritual of indistinction prove so effective? Second, did Sharmila herself not see the hopelessness of the situation? Let me first turn to the second question.

IV. What does Sharmila do?

In spite of the repetitions, persistent irresolution and the lack of enthusiasm in Manipur, Sharmila persisted. I had come to Manipur with the image of heroism but that image soon turned into one of hopeless despair and naïve intransigence as Sharmila kept hoping against hope that a popular movement would be coming soon. But I also began to wonder could Sharmila not break this cycle of coming and going from the courts somehow? Why had she been so subservient to the will and procedures of the state and still kept hoping somehow that in the end there would be justice for her? Having spent a few months in Imphal and having seen the situation, the recurrence of coming and going from the court- it was obvious that this was nothing but a stalemate, a hopeless situation that was unlikely to change soon. The script was set and even on her release it was a forgone conclusion that she would be re-arrested and that she would also 'surrender' without any resistance. If her objective was the abolition of the Armed Forces Special Powers Act, there was no possibility of that materializing as things stood. The state had figured out a way to resolve the problem of Irom Sharmila.

The problem of Sharmila for the state was not one of illegality- it was a problem both symbolic and affective. Through her refusal to eat, she had vividly put on display what she thought was the injustice faced by the people of Manipur under AFSPA, a throbbing, lively reminder of the decades long violence in the state. At the same time, she was also an affective problem- with potentiality to put the state under severe stress. But none of those potentialities finally yielded her goals. Just as the previous section provided an account of how the state *acts*, in this section I will explore how Sharmila saw her own struggle, what she herself was doing.

From 2013 till 2016 I spoke with Sharmila with permission of the judge in the court premises. Sometimes I spoke with her on the days when she was released from prison. On other occasions I listened in carefully as she spoke with journalists outside the courthouse. Sharmila was incarcerated in the security ward of the Jawaharlal Nehru Institute of Medical Sciences (JNIMS) in Imphal. Here she was kept under medical supervision and also fed through a nasal tube three times a day. She had a small room to herself filled with gifts, books and letters that she received from around the world. There is very little to distinguish the ward from the rest of the otherwise busy hospital, one of the two major government run hospitals in the city. Though people did not usually frequent her part of the hospital, there were no security guards outside this section, it was lightly attended by the hospital staff.

Sharmila was always insistent that neither was she attempting to commit suicide nor did she have any desire to die. Pointing to a ceiling fan she once told me that if she had wished to die, she could have easily hung herself from the ceiling and there was nothing anyone could do about it. No, death was not her objective, rather she was seeking to continue her fasting in the hope for repeal of AFSPA through a popular movement. A theme that ran constantly through our conversation since 2013 was her ordinariness and her anticipation. She was deeply annoyed at attempts to put her on a

pedestal. She talked about expectations from the 'people' and her deep lament that they had not acted in the way she had hoped and anticipated. What she wanted to do was to inspire her people into an uprising against the violent state but one which was nonviolent. She lamented that hardly anyone came to see her during the appearances in court. She was in an anticipatory state, expecting a time when the people would rise up and join her in her struggle. Her fasting was not exceptional, she believe but normal, actions she had undertaken 'just as a human being' in the times of grave and unbearable injustice. All she wanted to live with 'good connection' to the world- 'life with dignity, with self-determination, without depending on others for our livelihood- living with some respect'- but a kind of living made impossible under AFSPA.

Life in Manipur was broken according to Sharmila. During the time that we spoke, Imphal was seeing another major roadblock which had jeopardized economic life in the state. She believed that economic blockades, a common feature of life in the Imphal city was an instance of the shared helplessness.[8] She lamented that that once 'they' do blockade people suffer so much because 'we depend on the outside for our life…There is some hollowness at the root cause of our lawlessness, our helplessness, our insecurity. There is unnecessary evil which is created by our so-called guardians. I think we need to awaken fast.' Her forefathers were not like that. Though they lived in simpler times and were simpler people they were at least self-dependent. But, '(p)eople now believed in poppy planting or marijuana planting are more efficient, more productive and more suitable with our soil…there are lots of corruption, downfall of the mentality of the youth with half dead brains.' She saw her protest in terms of a deep shortcoming in contemporary Manipur. It was based on a

[8] Economic blockades are predominantly a consequence between the different communities in Manipur, especially between Kukis and Nagas- tribes who live on the hills on one side and the Meeteis- the predominant majoritarian group living in the valley. On issues varied from economic disparity, government and migration policies certain groups impose an economic blockade in the region stopping the flow of basic economic goods into the valley. The worst shortages that such blockades usually lead to are those in fuel. Long lines for fuel early in the morning outside petrol pumps is a common sight in Imphal.

romance of the past and an anticipation of a better future. But she was clear that she was not the one to bring about that change. Instead, she saw herself as being one among the many. This was one of reasons why she was always deeply annoyed by her own iconicity, the fact that she was the face of the anti-AFSPA movement in India. She had been awarded the Guangzou peace award in 2014, a recognition of her prolonged hunger strike. But she was not interested in recognition.

> 'Really I don't bother, I have no interest thinking about fruits. What I am just doing is as a citizen what I can do, as rational beings living with consciousness within society is the main thing. (W)ithout the security of life what is the meaning of living? I feel they have changed. In the beginning when my protests started at the very site of Malom. My protest began there. By the time people there look at me like young mad woman, a young mad woman. It was harvesting time in November. Everybody was busy with their harvest so at the night time they all gathered in the streets to see what I was doing and they spoke. They talked a lot behind me with some mockery… lots of things. What sort of girl is this? (Laughs)With mess up hair, mad girl. Who brought her here? Throw her out. In the next morning…in the next morning the Imphal West Police pick up me (sic). Few hours just ahead of my arrest those people of the night were gathered again. They talked like yesterday- their remaining talks. I sat with my backs on them and wrote a poem. And the title of the poem was (thinks) 'A Gift of a Lunatic.' Angoubagi-khudai. Angouba- mad or lunatic, khudol means gift or present.

She felt that people failed to share her sense of commitment. 'Why do they remain distant from what I am doing? (They say) Sharmila is doing that and this. Just identifying me, just pinpointing me. It is not right.' There was a need to recognize how AFSPA was affecting everyone. People needed to have a sense of the shared pain.

In my conversations with Sharmila the notion of the people was repeatedly invoked. When she spoke of the people, she rarely used community or other identity markers as in Nagas, Kukis or the Meeteis. The sense of the people that she had was one that was conceived through the shared feeling of suffering. The people were united by their collective suffering and ought to act collectively to put an end to that suffering. Whether it be through history or state violence, her sense of the people were those who had suffered. In the public sphere in Manipur the conflict was persistently one between the different groups among themselves or with the state. Communal identity markers have carried a charge- but these were the markers which Sharmila always disavowed. She was not naïve to be unaware of those potentiality but her politics or vision of the future was not based on those markers. There was a *grammar of incitement* in Manipur, one as we will see later Sharmila wanted no part of. She had an affective understanding of the people.

> 'We naturally want living in society, sharing out happiness and suffering, bearing our burden with equal weight. What I expect from them is their voice of unity in favour of my demand. I am just pioneering the struggle it is for all the masses' cause. Gandhiji's struggle, all the people felt the belongingness in the cause and voluntarily joining hands with him to strengthen the voice to steer the concerned British govt. They automatically went away…In my case people keep themselves distant, they remain in criticism. I do not want them to put me on a pedestal to make a statue of me without a voice. One sculptor tried to build a statue of me on wood. I objected to it. Why? Right now I am living, they should take permission from me. Once I am dead that is upto them what they want. They can do everything that they want. While I am living they should take my permission, why should they make a statue of mine without knowing my ideology. I don't want others to worship me like a god. We are all relative, there are good sides and bad sides. When they worship me with the sense of good my bad side will also be worshipped and be transferred to them and I do not want that.

> What I want from them is their joining hands- not idolizing me. The main problem is their mindset, once their mentality is changed…it is so achievable what I am doing-it is not grabbing for the moon-most of the people are affected with this violent thing. There are lots of victims. They remain contended with the compensation, how should they be so cheap, just selling their value of the human being.'

Thus Gandhi's struggle was an exemplar for Sharmila because he was able to mobilize the people around him, form an emotional community and lead to freedom. But not only did such a reality not form around her, some people who were the direct victims of the state were making comprises with state. Sharmila's disappointment with these settlements emerged from the fact that these did not address the conditions of violence which made these deaths possible in the first place. Sharmila was in this anticipatory place with her hunger strike, she was waiting for a possible uprising, situated as she was in a liminal space.

This metaphor- *awakening*- was often used by Sharmila. Her people were in a state of sleep. Inspite of the grave injustices of the state against them they had not reacted against it sufficiently. It did not seem that she was merely interested in the legal consequence of her trial, she was not waiting for the courts to declare that she was innocent, that her struggle was legitimate. But as she told me in 2014, 'this was a critical period.' This was the time immediately after a judge had decided that Sharmila could not be charged under section 309 of the Indian Penal Code. She felt that as the case moved, 'from the local court, sessions court, high court and the Supreme Court, the issue will spark a big bang.' An explosion which would awaken her people, see the morbidity of the current situation and thus create the basis for an uprising. When I asked her whether she expected to see a big bang, she was more circumspect, 'maybe.'

Sharmila was not uninterested in her trial. It was important for her to prove the fact that she was not guilty. But the trial or non-trial was a staging ground. A stage from which she could wait and hope for a mass uprising, something that unfortunately never came through.

Though situated in Manipur, Sharmila has been insistent that she will break her strike when AFSPA was repealed from the whole of India. Following the protests of 2006, the government of India had withdrawn AFSPA from two districts of the Imphal Valley[9]. Sharmila had been urged then by several of her associates to break her strike, but she refused- insisting that an end to her struggle will come when AFSPA is fully repealed from the state and from the country. This was a crucial and sometimes perplexing aspect of Sharmila's fast- the insistence that AFSPA has to be erased in its totality. The Indian state has been tactical and strategic in its use of AFSPA.[10] In 2006, the then government of India removed two districts of the valley from the jurisdiction of the law. After the withdrawal, some, including the Chief Minister had visited her and had advised her to break her fast, but she refused. She wanted the complete repeal of AFSPA as a precondition to end her fast. The only way I could make sense of this was that Sharmila was insistent on a concept of the people which was based not on historical or identarian, but an emotive, affective notion of the people. People suffering under AFSPA were not just the Manipuris but also included other parts of the North East as well as in Kashmir. Her idea of the people disavowed nationalism and because it was such emotive conception she found the non-responsiveness of her people all the more perplexing. But this conception of the people also meant that it was not in correspondence with the grammar of incitement that was common in Manipur. The image of Manipur as a non-responsive subjugated

[9] These protests were sparked by the rape and murder or Thangjom Manorama.
[10] The continuation of AFSPA requires a request made by the state legislature which the Manipur legislature has made regularly.

state was far from the truth. In fact Manipur was volatile, restive and it had a grammar of incitement which Sharmila was kept disavowing.

In the next section I want to turn my attention to the formation of publics in Manipur and why in spite of Sharmila's contention there have been repeated uprisings against the state and why Sharmila could never emerge as a fulcrum around which such an uprising could happen.

V. The Manipur Situation

The heart of the contention which led to the imposition of AFSPA in 1958 and subsequently Sharmila's hunger strike lies in how Manipur became a part of India and has remained so. Manipur had entered into the British Empire as a protectorate when the British wanted to use the state as a buffer against the Burmese kingdom (Meetei: 2016, 150, Noni:2016, 19). Under British rule the king of Manipur remained the figurehead sovereign but the relationship remained highly antagonistic. Post 1947 the contentious question of the status of Manipur vis-à-vis the Indian republic arose and the then Dominion of India and the Kingdom of Manipur entered into a standstill agreement to defer the question temporarily while allowing the former to direct the foreign relations on its behalf (Sanatomba: 2016). In this brief period of 1947-49 Manipur went on to form a new Constitution and have an elected representative government with the king as the symbolic figurehead who was to work under the guidance of an elected Cabinet, the Indian Union was bent on integrating these states into the republic. Manipur's brief tryst with a written constitution made it the first of its kind in South Asia.

As the story goes, a story deeply etched in the Manipuri popular imagination (especially among the Meeteis the dominant group), the King of Manipur was invited to Shillong, a hill station then under Assam for talks on a potential unification. This was in 1949, the Indian government had already made its intention clear of taking over the state. The king was put under house arrest and then

forced to sign the Merger Agreement on 21st September 1949. Akoijam (2004) has pointed out that the king under the then Constitution of Manipur did not even have the authority to sign this treaty, it was the Legislature which had the authority to carry out such an action and the king had tried to explain the Indian representative about the situation. However, such legalese never got in the way of the Indian action. A battalion of the Indian Army was dispatched to the state capital Imphal on 12th October 1949 and the Legislative Assembly of the state subsequently dissolved on 15th October, making Manipur a state under India.

Writing in his memoir, this is what V. P. Menon (1956), the chief architect of the reorganization of the states had to say about the integration Manipur into the Indian union.

> 'In view of its position as a border State and its undeveloped character, it was decided to take over Manipur as a Chief Commissioner's province. The merger agreement was signed by the Maharajah on 21 September and the State was taken over by the Government of India on 15 October 1948' (303).

Menon did not spare more than a few paragraphs in providing an account of the annexation of Manipur. In his otherwise heroic account of the organization of the Indian nation spanning more than five hundred pages that was all the attention that this action was deemed worthy of. Manipur remained nothing but a marginal concern. That Manipur was an independent entity, the first of its kind till 1949 was conveniently elided in this account.

As Akoijam points out this argument premised on the lack of development and the status as a border state would persist as the key trope for the policies that subsequent governments of India would adopt towards the north-east of the country.[11] The imposition of AFSPA in the state would

[11] The recent decision by the Indian Parliament to abrogate Article 370 from the Indian Constitution which gave special rights to the state of Jammu and Kashmir also was based on the supposed lack of development in the Indian state.

come in 1958 following the first Naga uprising and in 1980 the whole of Manipur was brought under the law. The subsequent violence that the state saw, especially the militancy which emerged, dominated by the armed revolutionary groups against Indian forces and the response of the Indian Army has continued endlessly for the last sixty years. In the Indian narrative Manipur has remained a borderland, a place of constant threat of cessations and violence, place which continues to have a heavy military presence. Part of the nation-state but not really so. Sardar Patel the Deputy Prime Minister of India in a letter to Nehru expressed his suspicion that people of the North-East were more likely to be faithful to their Chinese counterparts than really to India.[12]

In that sense Manipur and the northeast in general were never really *inside* the nation, they physically were within the boundaries of the country but the rule of law manifested in a distinctively different manner than the rest of India. Here the normal laws would be repeatedly suspended, and martial law would be in force. Marred by suspicion and violence it was always different and not part of the Indian mainstream. The imposition of AFSPA in Manipur in 1958 and its continuing presence in the state has meant that the people of Manipur have been deprived from the most basic right of life, possessing a status less than that of a citizen. This inside/outside division remains a part of the everyday lives of Manipuris in India through the everyday racisms that they confront in the mainland India. The continued extension of the Armed Forces Special Powers Act is the most vivid sign of this inside outside division. What needs to understood is how deeply constitutive, this inside-outside division has become in Manipur.

Inner Line Permit

[12] Sardar Patel wrote, 'The people inhabiting these portions have no established loyalty or devotion to India…Even the Darjeeling and Kalimpong areas are not free from pro-Mongoloid prejudices' (quoted in Akoijam: 486).

Reading Sharmila's disappointments about how her people have insufficiently responded to her hunger strike, one might get the impression that the people of the state are docile who had chosen not to respond to Sharmila's pleadings out of fear or out of hubris, something that resonated with the sense of decay that Sharmila so often spoke about. But such an image would be very far from the truth and misleading. The Indian state's claim to sovereign power in the region has repeatedly been put under question through popular uprisings in the state. Public life in the state also gets disrupted due to the flare-up of deep seated inter-communal strife among the various communities, especially the people living in the valley and those living in the hills. It is a state that is in a constant state of turmoil. My stay in Manipur was marked by the rise of the movement demanding the Inner Line Permit (ILP) system which kept the state on edge from 2012-16. In 2013 I saw occasional roadblocks here and there demanding the ILP. But by 2014 when I returned again there was full blown movement for the introduction of the Inner Line Permit System, with regular general strikes which completely shut down the Imphal Valley.

Politics in Manipur framed through AFSPA and inter-communal conflict structurally has had an outside-inside dimension with questions continually being provoked as to who is in the nation and who is outside. Inner Line was a colonial innovation to mark the administrative limit of the colonial state in north-east India. The line marked the extent to which British administration extended in the valleys in Assam. The hills which were inhabited by the the tribes which the British found much more difficult to control were beyond this line.[13] But in contemporary Manipur it reflected the xenophobia of the majority Meeteis. Since the early 2010s the dominant Meeitei community which controls the economic and political life in Manipur expressed fears that the sharp influx of 'outsiders' into the state would destabilize the demographic balance of the state and thus weakening

[13] But as Kar shows this was an ever shifting line determined by intertwining of law and capital (2009).

the people. The fear of demographic change has been a crucial characteristic of politics in north-east and the experience of the state of Tripura is held to be an exemplar in that regard. Following heavy Bengali migration into the state of Tripura, the Bengali speaking community is now a majority and the native speakers in the state have been reduced to a minority. In Manipur, ILPS was demanded so that the movement of outsiders moving into the state could be restricted. The migrant population in Manipur usually came from neighboring north-eastern states seeking employment and from the state of Bihar. From my experiences, the latter were primarily daily laborers.

But the other communities in Manipur, especially those who live in the hills were suspicious of the move. They saw this as another attempt being made by the Meeiteis to expand their power. They feared that the movement of people from their own tribes who are sometimes spread over adjacent states would be hampered and they opposed any such measure by the state government. The protests by tribes like the Kukis and the Nagas aggravated with the passage of the ILP laws in 2015. The embers of civil unrest were visible from 2013, but 2014 was the turning point when a series of general strikes in Imphal brought life to a standstill in the valley putting immense pressure on the state government to pass legislation on the matter. At the forefront of the civil unrest were often school children. Sixteen to eighteen-year old school children blockading roads and highways was a common sight in Imphal at this point in time. The police often responded violently, killing at least one high school student in 2014. One activist pointed out to me that ILPS was necessary to ensure that the state of Manipur did not face the same consequence as the other North-Eastern state especially Tripura. This demographic anxiety was indicative of the fraught place of Manipur within the Indian Union where the mainstream still looks suspiciously at the borderland and that gaze is eventually returned through the demand for laws like these.

The then Ibobi Singh government under immense pressure eventually proposed legislation to restrict the movement of outsiders. The proposed legislative reform received wide support among the Meeiteis but was roundly rejected by the hill communities of Manipur like the Nagas and the Kukis. The Manipur State Legislative Assembly passed three bills in 2015 in response to the popular movement in the valley against the growing influx of non-Manipuris into the state viz. The Protection of Manipur People Bill (no. 16 of 2015 introduced on 28th August 2015), The Manipur Shops and Establishments (2nd Amendment) Bill (no. 18 0f 2015) and the Manipur Land Revenue and Land Reforms (7th Amendment) Bill, 2015. There was an element of haste with which the bills were passed. As a matter of fact no discussion was carried out in the legislative assembly before the passage of these bills, the assembly merely put its stamp of approval once the bill had been placed on the floor of the house. The first bill stated in its purpose that it was a bill

> 'to provide protection, maintenance of socio-economic and cultural balance of the Manipur People and for maintenance of peace and public order in the State of Manipur and regulation of entry into and exit from Manipur for Non-Manipur persons and tenants in the interest of general and for matter connected therewith and incidental hereto' (Manipur Legislative Assembly 2015)

The law laid down two standards for who was a resident of the state. Clause 2(b) stated 'Manipur people' means Persons of Manipur whose name are in the National Register of Citizens, 1951 Census Report 1951 and the Village Directory of 1951 and their descendants who have contributed to the collective social, cultural and economic life of Manipur; clause (c) of the same article stated 'Non-Manipur' person means a person who is not covered by Clause (b) of Section 2, and who intends to visit the State of Manipur with a Pass issued under sub-section (4) of section 4.

The law proposed to set up a regulatory body the Directorate of Registration of Non-Manipur Persons and Tenants which would oversee the entry of 'Non-Manipur persons' into the state. At the commencement of the Act all non-Manipuris entering the state 'shall register himself with the registration authority designated under sub-section (3) of this section…' Citizens of India would have to secure such a pass 'specifying his place of origin and the period of stay which shall not be more than six months from the dates of issue.'

A person would be regarded a citizen when s/he is able to produce a voter ID card.

So, there is a clear attempt being made to define the Manipuri people and the threat that they are under. What struck me were the modes of protests which occurred during this period. By 2015 there was more specific targeting of *outsiders*. Unfortunately, the brunt of this campaign was borne by poor day laborers from Bihar and Assam, the most precarious migrants in the Imphal valley. They were regularly harassed and asked to produce ID cards which many of them did not have. Richer establishments run by Punjabi or Marwari traders in Imphal were rarely targeted. Targeting migrant workers very often mimicked the Indian state- especially that state which operated under the garb of the AFSPA. An oft-repeated practice involved raids led by female Manipuri traders in areas which were known to be inhabited by day laborers from outside the state. These *outsiders* would be made to stand in line and asked to provide valid ID proof. If they failed to produce such IDs they would immediately be handed over to the police force. However, there was no action that the police could take against them- there are no laws in India mandating individuals to carry their IDs with them- they would be released. At the height of militancy in Imphal, but even now occasionally, the police and army would make young men in a locality stand in line and produce their identifications as means of flushing the area of alleged militants in an area. It is practice common across the north-east and also in Kashmir. Then there were house arrests of non-locals whereby 'non-Manipuris' would

be instructed not to leave their houses on certain days, an enforced strike on certain groups of people. Interstate buses carrying migrant day laborers would often be stopped in the outskirts of Imphal and made to undergo an ID check by local ILP activists. Such vigilantism mimicking the state obviously came from a certain sense of endangerment that such communities imagined, but importantly reflected the drawing of a line between the nation and Manipur.

Both the Bills enacted by the Manipur state legislature and the reproduction of the state actions by Manipuri ILP activists alludes very distinctly to the inside/outside division that has marked the relationship of the Indian state with Manipur. The Biharis, the Assamese (and also some Burmese) were identified as migrants which were disturbing the body polity in Manipur. The fear of outsiders is nothing new in Manipur but it sparked off an unprecedented rage in the valley. Sharmila's prolonged hunger strike rarely garnered such support and mobilization.

The 2015 Bills required the assent of the Government of India as per the Constitutional structure in India. However, the President rejected both the Bills on the grounds of constitutionality. Since the constitution allowed the free movement of people imposing the restrictions framed by the bills would not hold ground in a court of law. After the rejection of ILP Bill by the Central Government, a renewed effort was made to control the borders and it remains one of the volatile issues of the day.

Sharmila also commented on the matter. During her court appearances Sharmila would often be asked what she thought about the recent flare ups and unrest surrounding ILP. Sharmila more often than not would show her support to the movement and condemn the violence that the state government resorted to while dealing with the protestors. During her stipulated release in 2014 I visited her in her shack near the hospital. There were a handful of supporters and civil rights activists who had gathered to meet her. One of the activists kept persuading her to speak about the ILP issue along with the question of AFSPA. There was unanimity among her supporters that she

needed to keep the ILP front and center of the conversation. Sharmila though not unwilling to speak about the question of ILP was always more focused on the question of AFSPA and the need for the people to speak up in her favor. But what it showed was that instead of forming a community of supporters, certain groups expected Sharmila to be the vessel which would carry the message on their behalf. Sharmila was relevant as long as she was willing to serve these interests. But it also added to Sharmila's frustration that the question of AFSPA was being sidelined. The ILP movement structurally was in consonance with previous grievances in the state in Manipur, upheavals which sought to draw a line between the inside and the outside in the state. This form of politics demonstrated the tenuous nature of the state's relation with the Indian state and was rooted in the incorporation of the state into the Indian union. There could be moments when there were overlaps as was certainly the case in the aftermath of the death of Thangjom Manoram when Sharmila received national recognition for the first time.

It is interesting to think of these two narratives of endangerment. While the Meeiteis see the outsider as the potent threat to their community, Sharmila sees the danger from AFSPA. The public expression of anger and frustration in Manipur is crucially linked to this very question of endangerment. AFSPA no longer seems to pose a threat in the Manipuri imagination, certainly not in the period of time I was in Manipur. Associates of Sharmila were always willing to remind people of the dangers of the exceptional law that AFSPA in Manipur was like a sleeping tiger. The law was withdrawn from the two districts in the Imphal valley after massive public protests in Imphal. From early 2010s there has been a sharp decline in military action in the state and the number of extra judicial killings. From my three years in Imphal one thing that was clear was that the question of AFSPA and threat that the law posed for the people of Manipur had subsided from the popular imagination. But AFSPA was a symptom of the inside/outside relationship that has long haunted the region. Whereas the threat of AFSPA had subsided the inside/outside relationship now

manifested itself through the ILP movement. But Sharmila's politics was completely opposed to such a division, it was a radical embrace of humanity but precisely because of its lack of specificity it had limited potency and had been so from the very beginning. Unable to mobilize the imagination of the people of Manipur Sharmila was reduced to a marginal figure.

To come back to the question of failure. Sharmila broke her hunger strike claiming that her people had failed her. What this shows however is the fraught nature of politics in a state like Manipur and the complications involved in hunger strike as political action. It was certainly not the case that people in Manipur are docile subjects bound by state power. On multiple occasions popular uprisings have demonstrated the ability to bring the powers that be to their knees, but it would repeatedly reassert this inside/outside division.

In Manipur, for people living their lives are drawn by some narratives of endangerment. Places like Manipur, marked by a violent state are constantly develop these narratives of endangerment, narratives which are not necessarily controlled or even controllable by the state authorities. These narratives create the basis for creation of moral communities. Irom Sharmila also had a narrative of such endangerment, but at this point of time there were not many takers for this narrative. As a consequence, she was left as a hunger striker, fighting for the well-being of her people but a sense of endangerment that was not shared by those very same people. Thus, the affective possibilities that such a movement might have generated, the threats to state sovereignty that might have come about simply remained unrealized. When Sharmila finally broke her hunger strike in August 2016 she promised to run for the upcoming state election of 2017. She promised that she would challenge the then Chief Minister Ibobi Singh from his constituency in the Thoubal district. The national media was gung-ho about her turn to electoral politics and most of the election coverage from the state centered around the purported contest between Ibobi Singh and Sharmila. Even the name of her

party, People's Resurgence and Justice Alliance had the acronym PRJA- meaning the people. However, when the votes for the fateful election were counted, after the all the media excitement about her candidacy, her vote count stood at a meagre 90. Ibobi Singh had defeated Sharmila by around fifteen votes, a staggering rebuke to Sharmila from the people for whom she thought she had fought for over the last sixteen years. Immediately after the results a disappointed Sharmila declared that she would quit electoral politics and seek other means to fight against AFSPA. She also added that the people of the state were misguided by the power of the politicians and could not see what she stood for and what she was fighting for. Not only that she got married and decided to leave Manipur settling down in Tamil Nadu. The ninety votes that she received in the election showed that her claim that she was an ordinary was not true but tragically true.

VI. Conclusion:

In this chapter I turned my attention to a situation marked by the suspension of the right to life, a state of prolonged exception where the basic rights of Indian citizens stand effectively suspended. Though the right to life was suspended, life and law were intertwined in a unique way. I interrogated Irom Sharmila's hunger strike, how she put her own life in danger to protests the condition of endangerment in Manipur. More importantly I focused on how Sharmila understood her hunger strike to be a failure. Instead of trying to see her hunger strike through the lens of exception and bare life I tried to pose two broad reasons for the failed efficacy of her political struggle. Firstly, I showed that the hunger strike is broadly an act of incitement which seeks to form a moral community through the suffering body of the hunger striker and seeks to create a popular revolt. Modern social life in spite of its attempts to banish the affective from its realms but it remains deeply embedded in affective concerns. The exceptional condition is a particular affective, where a sense of fear, danger and injustice is ever present, always with the risk of spilling over.

Sharmila's hunger strike was not just a protest against the state but crucially it was act of affective distinction. The police and the state machinery recognized that and responded with a ritualized performance seeking to undermine her potentiality and making her indistinct. Through a supposed trial which never settled any legal question, she was repeatedly brought back and forth from the court and kept in an incarcerated the passions that the suffering body of the hunger striker could generate were effectively dimmed. She became entangled in the logic of the law and eventually became ordinary, a person whose singular potentiality was minimized through state action. Sharmila who sought to inspire her people into nonviolent action against the state was left lamenting that her hunger strike had effectively failed. It showed the importance of attending to the affective atmospherics when studying exceptional politics.

Secondly, I pointed out the key structural nature of popular protest in Manipur and its relation to India. Manipur was perceived as within the body polity, but also always outside because of ethnic suspicions and because of the perceived lack of integration with the national mainstream. Sharmila persistently refused to subscribe to this inside/outside distinction. Her hunger strike demanded the abolition of AFSPA not only from Imphal but from the whole of India. As violence in the region has eased a little over the last decade, the sense of endangerment that the AFSPA posed has also shifted. The contemporary reproduction of the inside/outside debate has been in the form the Inner Line Permit system which has even more forcefully posed the question in contemporary Manipur. But Sharmila has always avoided posing her politics on this register. In doing so though her protest lost the resonance and the sympathies that her protest had sought to generate and she tragically became ordinary.

Chapter Five

Confronting Suicide in Indian Law

Agency, Authorization and Public Affect

I. Introduction

In 2017 the Indian Parliament passed the Mental Health Act. One of the crucial sections of the Act decriminalized suicide and attempt to suicide. As I noted in the previous chapter, under Indian Penal Code, section 309, the act of committing suicide is a punishable offence with penalty of up to one year of imprisonment along with fine. The Indian Penal Code and this particular code is a colonial vestige and the provision of punishing the attempt to commit suicide has been the subject of much debate in India, both in the courts and in the public domain, as there was a debate in colonial India. As early as 1971, the Law Commission of India had proposed that the provision be abolished, Britain by then had already abolished the crime of suicide. The passage of this act by the Parliament was a culmination of process of decriminalizing suicide which had progressed at a snail's pace over five decades. The Courts in India have had to grapple with this question over and over again in the last fifty years. The question has been raised in the context of suicide protest like hunger strike, in the cases of religious practice like the Jain practice of Santhara, euthanasia and also in the case of common suicides or attempts to commit suicide. Article 21 has been at the heart of this debate since around the middle of the 1990s when the question of the constitutionality of section 309 started being questioned. In this chapter, I will trace the manner in which the Indian state has grappled with the question of suicide through Article 21 and right to life.

In a recent essay Anita Hannig (2019) has pointed out that the debate over suicide is primarily a debate about the author and authorization- meaning who is carrying out the suicide and whether it is legitimate or not and how the line between the two gets easily muddled.[1] The object of Hannig's paper is the legalization of practice of aid-in-dying for patients suffering from terminal medical conditions in the US state of Oregon. The person who is carrying out the act of suicide, the act of self-harm- s/he is the author. But is it legitimate? Does the state allow this to be carried out? Hannig shows how the question of end of life practices for terminal patients are often conflated with suicide though the advocates firmly assert that there cannot be a link between the two. Suicide can be interpreted 'as a radical act of free will' (55), but when it comes to aid-in-dying, agency is much more diffused since this act depends for its access on authorization on a number of key actors like doctors and the state. Hannig is keen on uncovering the dialectics of authorship and authorization. As she points out though the act of suicide is regarded as an intentional act, it is never regarded as fully intentional since an act of suicide is also attributed to external agents ranging from mental health to social pressures (57, *see* Munster and Broz 2015). The legal question of suicide in India has not been interrogated anthropologically. I am keen on doing that by making a comparison between two instances where the question of suicide has been framed through the notion of right to life. These two are the characterization of Irom Sharmila's hunger strike as an attempt to commit suicide and on the other hand the conundrum over the Jain practice of Santhara in Rajasthan.

The act of suicide protest follows a different mode of authorization from the act of *Santhara* whereby a person from the Jain community would embrace death. Whereas Sharmila claimed that she was representing the people of Manipur subjugated by the Indian state-a claim which was

[1] The study of suicide in anthropology starts with Durkheim. Contemporary anthropologists like Hannig have pushed the 'deterministic' tendencies of Durkheim to show the contingencies of the practice *see* Asad 2007, Willerslev 2009, Livingston 2009. For anthropological study of suicide in India *see* Staples 2012, Chua 2011, Parry 2012.

nonetheless problematic as we saw in the last chapter, the practice of Santhara operates on a different register. This chapter interrogates how does the state problematizes the notion of suicide in law, how is the practice of political suicide designed to make the state react.

Suicide is a highly slippery concept. As Ian Hacking has noted, 'it is hard to define suicide as being in anyways being one thing' (Hacking quoted in Hannig 58). Different judgements from different periods of time have continually grappled with this uncertainty of suicide and the necessary categories to comprehend it. There are two things that I want to do in this chapter. Though suicide remains a highly slippery conception, the Indian state nonetheless has tried to grapple with the concept through the legal framework of right to life. Across an array of situations, the state has attempted to confront the question of suicide through right to life. In the previous chapter I had attempted to argue the emotive potentiality of a hunger strike and how that potentiality comes to be diffused. I want to expand this argument to the broader scope of Indian jurisprudence through an analysis of two specific cases where the state tried to restrict the potential implications emerging from the suicide or intentional death. The deaths state seeks to limit the fallout from intentional deaths by banning it or by limiting its emotive potentialities through greater ritualization and also through silences performed by the court.

II. Irom Sharmila and the Legal Fight against Suicide

In the previous chapter I had given an account of the legal response of the state to Sharmila's hunger strike. It was a ritualized response which did not seek to settle a legal question, namely whether Sharmila had committed a crime or not. Rather it sought to manage the affective potential of Irom Sharmila's hunger strike- through a ritualized performance of indistinction. The police, the judiciary and the state tried to limit her potentiality by entangling her in the legal performance. Through a continual deferral of the question of legality of her hunger strike, Sharmila became more

and more entwined in the legal logic of her hunger strike. In the process the immediacy of her protest, her attempt to incite her people and therefore to put an end to the continued violence of AFSPA was rendered inconsequential.

This might imply a triumph of the law and technicalities which are solely in the hands of the state. A triumph of the state in successfully containing a threat to its authority. But as legal anthropologists working on the minutiae of legal proceedings have effectively shown that technicalities of the law can effectively be used to undermine the authority of the law (Agrama 2012, Kahn 2018). Lawyers and activists can work around and with these technicalities to gain temporary reliefs or something more. When I was working in Manipur such an effort was slowly materializing.

This effort was led by Mr. Khaidem Mani. Mr. Mani was arguably the best-known lawyer in the state and in 2014 was the President of the All Manipur Bar Association. As a consequence, he was one of the most powerful legal personalities in the state. Sharmila, as I noted in the previous chapter was usually represented by the lawyers from the state bar association. These lawyers were often less than enthused about the proceedings and insufficiently motivated to defend Sharmila. Sharmila complained that at times the lawyers hardly ever consulted with her regarding the proceedings. Rarely did I see these lawyers pressuring the judge to force the police to file a report on her hunger strike or to push the judge to create the conditions for a trial. These lawyers also did not have substantive standing which limited their ability to influence the judges or the police. Sharmila did not have any such resource available for her. It seemed as if in the legal arena there was very little to no chance for her to get a substantive hearing.

Around 2014 Khaidem Mani decided to step in and take over Sharmila's case and represent her in the case. Mr. Mani told me that he had been sympathetic to the Communist Party of India and in spite of having been offered tickets to fight the elections on various party's behalf, he had always

refused to join politics, instead focusing on his legal profession. He had been a vocal critic of the AFSPA and the continuing violence in the state and spoke against the actions of the state government. He was also a regular fixture on the local TV channels giving his opinions on political and legal issues. His stature was derived from his seniority, his success as a lawyer in the state and from his position as the President of the Manipur Bar Association. I was never sure as to why it took Mr. Mani to take up the case for such a long period of time. Sharmila at the start of her campaign had briefly been represented by human rights lawyers in the state. However, subsequently those lawyers stepped aside and she had to be represented by lawyers from the legal aid.

Mr. Mani's representation of Sharmila immediately had an effect. The police filed an investigative report on her hunger strike and charged her with an attempt to commit suicide under section 309 of the Indian Penal Code. Though the substance of the case remained by and large the same, this was the first occasion in 2014 when the police had filed a charge sheet on time so that the trial could begin. It is fair to assume that it was Mr. Mani's representation and the weight that he carried that made this intervention possible in the first place.

As soon as the charge sheet was filed Mr. Mani challenged the charge saying that the police had insufficient grounds to charge her under section 309. The material ingredients necessary to charge a person under section 309 did not exist in Sharmila's case, thus, he claimed that the judge should dismiss the case and immediately release Sharmila. Mani's arguments were two-fold. He argued that Irom Sharmila had never claimed that it was her intention to commit suicide- she was carrying out a prolonged fasting to protest the injustices of the state and the fasting would continue till the AFSPA was repealed in its entirety. Mani's argument hinged on the question of intention. The long jurisprudence on the question of suicide in India has involved a key question- did a person intend to cause self-harm and death. Mani argued that the state had not established that she ever tried to kill

herself, it was mere speculation and obfuscation not a substantiated claim on their part. On the contrary whenever the police came to arrest Sharmila during her protests, she would voluntarily surrender to the police. Every year once released at the end of her detention for one year, she would sit with her supporters in a shack and continue with her strike. When the police came to arrest her Mani claimed that neither she nor her supporters resisted the arrest and Sharmila would go along with the police. Also, when incarcerated she was fed with a tube through her nose, here again, Sharmila did not resist and accepted the feeding. Thus, whether it be the protest itself, or her acceptance of tube feeding, both aspects clearly demonstrated that there was no intention on her part to commit suicide- she was by no means trying to kill herself. The charge of attempt to commit suicide did not apply in her case. Secondly, Mani argued that she had a constitutionally guaranteed right to protest the violence of the state. Her protest against state violence belonged to a long tradition of such protests and was in line with the actions of Mahatma Gandhi. Manipur was under the violent regime of the Armed Forces Special Powers Act. The state national and local government and its various armed agencies had made violence an unmistakable aspect of everyday life. Her struggle therefore was not a struggle for death, it was a fast for the restoration of life in Manipur- it was a conscientious faster which made her a political prisoner. This act of continual force feeding constituted a violation of her right to life.

The presiding judge Notuneshwari Devi of the Judicial Magistrate First Class Imphal East heard the case but was not persuaded by the arguments. Contrary to Mani's arguments she held that there were sufficient grounds to charge her under section 309 for the attempt to commit suicide. She noted that the doctors who were in charge of caring for her had given written testimonies where they claimed that the 'accused sometimes refused to take food through nose feeding thus, they have given her nose feeding by force with the help of security forces in order to save the life of the accused.' She was not always subservient to the medical staff at the hospital. This showed that she

wanted to cause self-harm and terminate her life but the doctors and security personnel through their intervention saved it.

She recognized that her hunger strike was an unconventional act of suicide which may be caused by 'frustration of life, insecurity, non-attainment goals.' But Sharmila had made it clear that '(t)he act of the accused (sic) is staging hunger strike by fasting unto death till the repealment of the Armed Forces Special Powers Act, 1955. In other words, the demand of the accused is that until and unless the said (Act) is not repealed she will not take any food' (Devi 2014, 9). Judge Devi dismissed the distinction that Sharmila had drawn between hunger strike and fasting. She was not merely fasting but rather had the full intention of sacrificing her life if the AFSPA was not withdrawn. For Judge Devi, the act and the intent of the agent were very clear. Her refusal and her continued hunger strike showed that she was an intentional subject, she was not being influenced, she herself had adopted this path and mode of protest without any externalities involved. The grounds of her hunger strike viz. her protest against AFSPA had no legal merit in this scheme.

Khaidem Mani however did not relent. After the judge dismissed his petition, he immediately filed an appeal against the order in the district sessions court. I was in Manipur during the time in 2015 when the appeal was being heard. Sharmila's appearance during the trial was relatively irregular during this period of time and the early stages of the appeal showed the complete apathy towards Sharmila. The proceeding moved at a snail's pace through the court. In one of the first days of the hearing after Sharmila had arrived in the court premises there was a confusion as to which judge would hear her case. The judge who was scheduled to hear her case was on leave and no one had communicated the information to the jailor. In his absence it was not clear who was going to hear the matter and decide the date for the next day's proceeding. After having spent a couple of hours we were sent to another courthouse in another part of town. The judge on this bench was also late.

Eventually he arrived in late afternoon and asked Sharmila to come to his office with a lawyer only and was given a date for a hearing. Sharmila did not invoke any sense of urgency among the judiciary.

Later, upon the request of Khaidem Mani, the court agreed that there would be no need for Sharmila to make regular appearances as the hearing on the charge proceeded. Eventually a date was set aside for the hearing and Khaidem Mani personally appeared and forcefully argued that the charge under sec. 309 was unjustified in her case. He reiterated the previous argument of the lack of intention on Sharmila's part to commit suicide, the fact that she had cooperated with the state on several occasions and that the right to protest in India was guaranteed. In addition, he placed her hunger strike in the long tradition of hunger strikes in India especially the hunger strikes led by Mahatma Gandhi. The judge heard intently. On the prosecution's side the lawyer just submitted her written arguments and did not make much of a case. The judge declared that he would give his final judgement on the matter soon.

The judge, A. Guneswar Sharma was a former lawyer of the Supreme Court and most of his practice had been carried out in Delhi before he returned to Imphal to take up the position of Additional District judge. My initial impressions did not incline me to believe that Judge Sharma was one who was particularly inclined to break the status quo. The case had a set script and to rule against the state might open a Pandora's Box. Besides, there was also no possibility whatsoever that the Indian Government was planning to either repeal AFSPA or even withdraw it in its entirety from the state of Manipur.

On 19th August 2015, I arrived in the court early and chatted with Khaidem Mani as we waited and hoped that the judgement will be delivered. The judgement had already been delayed by a week. There was not any anticipation for the judgement as Judge Sharma took his seat, eyed Khaidem

Mani who stood up the bar. Judge Sharma had a copy of the judgement in his hand. He turned to the last page and said that she cannot be charged under section 309 and should be released immediately. He handed over the copy to Khaidem Mani. This was an unexpected turnaround. Over the last fourteen years the actions of the state had fundamentally hinged on the assumption that Sharmila was trying to kill herself and thus the state had to intervene in trying to save her life. This implied that she had to be arrested, force fed and thus kept alive. Then how did Judge Sharma overturn this basic premise?

Mani in his petition to the court had posed the following problem:

> 'The petitioner has been fasting for only 24 hours when she was arrested. A period of fasting for twenty-four hours cannot be construed as fasting till death by any stretch of the imagination, when the medical opinion, even if considered, clearly stated that a person may survive up to 20 days without taking any food' (Sharma 2015, 4).

Sharma opened his judgement with a statement of the facts of the case and a close reading of the statute. He concluded that to charge a person under section 309 three ingredients needed to be fulfilled:

1. The intention to commit suicide.
2. Doing acts towards the commission of such an offence.
3. Such an act being sufficient to cause the death of the person.

Both Mani and Sharma set aside the substantive question of her fast, its cause and what motivates it. They focus on a narrowed set of criteria that is whether there was sufficient evidence to establish whether she had intention in killing herself or not. They also limited the scope of the question to this specific round of arrest and force feeding.

Sharma writes,

> 'Suicide is never to be presumed. Intention is the essential ingredient. Therefore, the word 'suicide' in plain English language would mean a person voluntarily putting an end to his life. The causes and circumstances leading one to take such a decision is wholly irrelevant for deciding the question as to whether the death was a suicide or not' (5)

Sharma then proceeds through a detailed analysis of precedence in colonial and postcolonial law dating all the way back to 1878, to show that to prosecute under the said section of the Indian Penal Code, the prosecution needed to establish that not only intention on the part of the hunger striker but in addition they had to prove that the accused had sufficiently acted on the said intention. He cites the case of *Ram Sundar Dubey vs State of UP from 1962*. Ram Sundar Dubey had sat on a hunger strike outside a government office before being removed and force fed. The Allahabad High Court had to decide whether Ram Sundar's act amounted to committing suicide or not. The court argued that what needed to be established was whether there was clear intention on the part of Ram Sundar to act to cause his death. The Allahabad High Court stated that at the time of state action it was not clear beyond doubt that Dubey wanted to die as he might have later decided to stop the strike. This would at least open the possibility that the striker never wished to die in the first place and the court had to factor in that consideration. Thus, the mere declarative act of announcing a hunger strike was insufficient to establish whether a person had indeed sought to kill himself- the sufficiency of the act was the burden of the state to establish. If there was insufficient evidence to establish that fact then the charge could not be justified. In Dubey's case the court ruled that at the time of his arrest this premise had only been insufficiently established.

Sharma argued that,

> '(I)n the case record, there is no material to establish that Irom Chanu Sharmila has ever stated she is/was fasting unto death, except for the mere allegation contained in the FIR and the charge sheet and the uncorroborated news reports. Neither a single newspaper clipping nor press statement/release issued by the petitioner for her decision to fast unto death is filed along with the charge sheet…The allegation of fast unto death is a mere conjecture mentioned in the FIR and the charge sheet and is not supported by any material' (14).

Sharma went on to argue that the prosecution had 'miserably failed to establish the intention of the petitioner to commit suicide by fasting unto death. Thus, the first ingredient of the offence punishable under section 309 IPC, i.e. to commit suicide is lacking.' The first critical ingredient to establish an attempt to commit suicide was not sufficiently proven.

In previous cases the presumption, that Sharmila was attempting to kill herself was never under question. When the police came and arrested her, the objective was to avoid any further decline in her health by her hunger strike. But the judge seemed to be contending in this judgement that their quick response undermined the very case that the police had be trying to build so far. Having argued that the intention to commit suicide had not been proven by the police, the judge argued that the second ingredient for deciding attempt to commit suicide had become redundant. The third ingredient of the sufficiency of the act could not be established either. Sharmila was arrested in this particular instance in about twenty-four hours after her release. A twenty-four fasting, the judge argued could hardly be regarded as posing a danger to anybody's life- thereby agree with Mani. There were religious fasting which was longer than this. Those could not be regarded as an attempt to suicide. Besides, unlike Devi the district judge, Sharma was more positively disposed towards Sharmila's cooperation with the police and the medical professionals. Sharma argued that she clearly wanted to live and 'continue her mission of repealing the AFSPA to reach its logical conclusion.'

The judge concluded that the most important ingredient did not exist. He declared that the framing of the charge was incorrect. He also opined that the Chief Justice in her previous decision had been 'heavily influenced by the fact of fasting continuously for 14 years.' Instead of looking at it as a fourteen year-long hunger strike, Judge Sharma focused on the singularity of the specific single instance of the hunger strike from 2014, how and under what circumstances she was arrested by the police and whether those actions were and based on the some fundamental criteria in establishing a charge under section 309. He made the determination that the charge of attempt to commit suicide was not applicable in this particular instance. But in spite his sympathetic reading to Sharmila's condition, he made a critical observation right at the end of the opinion.

Judge Sharma at the second last paragraph of his judgement noted the following:

> 'Before concluding, I am making some observations. The agitation of Irom Sharmila Chanu is a political demand. Through a lawful means of repealing a valid statute. From her past conduct, it seems that she may continue with the fast till her demand is met politically by the Government. In the circumstances, the state government may take up appropriate measure for her health and safety, such as, nose feeding, etc. in case she decides to continue with her fast' (16).

Judge Sharma cleared her of the charge of section 309. But by doing so, he undermined the precise legal logic through which the state had dealt with her hunger strike. Only by arguing that she was trying to kill herself could the state then intervene, stop her hunger strike and force feed her. But if the judge argues she was not attempting to kill herself, then what exactly would be the grounds for the state to intervene. Sharma here gives a leeway to the state. He says that both her hunger strike is

legal and so is the law that she wanted repealed.[2] It was likely that she would continue with her fasting which would endanger her health and well-being. This could precisely create the conditions that the government of Manipur had dreaded the most- that of a dying Sharmila. Sharma was thus well aware of the underlying risks of acquitting her. The judgement itself was bound by the strictures of law. He sets a precise question that needs to be answered, sets clear parameters through which those questions are to be determined and finally through a detailed analysis of the materials at hand decides that the case to charge her under section 309 of the Indian Penal Code could not be made. This makes the concluding section authorizing the state government to take appropriate actions in the case of growing danger to her health seem out of place. This was not a question that was posed in this case. Indian judges have habitually spoken on matters and given judgements on matters well beyond their powers and limits of a case (Bhuwania 2017, Bhan 2016). But Sharma for the large part of the judgement avoided doing that. But at the end of the judgement he authorizes the police to make an intervention in an act which he himself had declared was otherwise legal. Section 309 gave the police the ability to stop Sharmila's hunger strike, but this judgement would undermine the ability of the police to act effectively and neither could she be force fed. The way that this additional direction from Sharma could be made sense of is if we understand the potent and implicit potentiality of Sharmila's struggle and the implications that it might have if it ever reached its logical conclusion. Sharma wanted to a create a mechanism by which the potential suffering of Sharmila did not lead to the consequences that the state had precisely feared.

The larger point that I wish to make here is to show how the problem of suicide is framed in the Indian context. How it bound by two concerns, on the one hand the problem of agency and intent. One the other hand the implicit potentiality of the consequences of the suffering body of the hunger

[2] The constitutionality of the AFSPA was settled by the Supreme Court in 1997 when it decided that the law was within constitutional bounds in the case Naga People's Association vs The Union of India.

striker and the powers that it could release if not rightly contained. Whereas anthropologists have rightly addressed the agential aspect of the hunger strike they have failed to address the other side of the problem. I want to show how the judiciary continue to address this problem over the next few years.

Release and the circumstances after

On 20th of August 2014, Irom Sharmila was set to be released. Her acquittal in the case mobilized sharp interest from the national media. Major news channels who did not have regular correspondents in the state had reporters sent to Imphal to cover the event. After prolonged confusion about when she was to be released, under the glare of the media spotlight, Irom Sharmila was released in the evening. A group of Meira Peibeis had helped her prepare for her release. Sharmila was lit up in the flashlight from the cameras outside her hospital ward. Making her way through the melee of reporters, answering a few questions as she moved, Sharmila eventually made her way to the shack. The shack, which was situated a few hundred feet away from the main gates of the hospital was cleaned in the morning. Two members Sharmila Apunba Lup[3] cleaned the space and strung up banners and prepared it for her return. Surrounded by her followers Sharmila arrived at the site and a small ritual was carried out before she stepped on the slightly raised platform and sat down. After answering a few questions separately from the English media and then the local Manipuri media, Sharmila made consultations with her associates. There was moderate presence of security forces in the vicinity guarding the place, but they also kept their distance. The shack itself is on a busy road in Manipur so the police had to ensure the smooth flow of traffic. She resumed her hunger strike.

[3] The Free Sharmila Campaign.

Though her associates were happy and commended the judge for passing the judgement, there was confusion as to what ought to be the course of action, there was confusion as well about what the police might do- were they going to arrest her and then on what basis? The only thing that was certain was that the hunger strike would continue and Sharmila would remain steadfast on the grounds of its withdrawal. Some of her supporters urged her to speak up on the issue of ILPS,[4] others said that she should shift her hunger strike to the city center to gain greater visibility. Visibility and the necessity of being close to the public was a persistent problem for Sharmila. On the second day of the fast, her associates decided that they will hold a mass rally in the heart of the Imphal near the women's market. The police tried briefly to stop her from leaving the site but they had no authority to do so. The rally saw an outpouring of support in the heart of the city as she slowly led a rally through the market. With the help of the powerful of the mother's organization hundreds of women gathered in the city center for the rally. *Save Sharmila's Life*, *Repeal AFSPA* the crowd of protesters chanted. At the end of the rally she held a press conference at the Manipur Press Club and returned to the shack.

After a few hours, early in the evening an officer from the local police station came to the shack along with a young physician from the hospital. The officer requested her to undergo a quick medical checkup. Sharmila firmly refuse. She said that the court had acquitted her, she was free to do what she wanted. Her mothers (meaning the Meira Paibis) were with her, but she said she was only answerable to God and no one else. There was no reason for her to submit to the orders of the state and asked them to leave. The police and doctor turned around and left. The police presence meanwhile had increased quiet significantly. There was a sinking feeling among her supporters that Sharmila's arrest was inevitable. It was also evident that this arrest would be unlike previous arrests.

[4] *See* previous chapter.

It would not happen peacefully as Sharmila was in no mood to relent. The presence of the elderly Meira Paibis also made any potential police action fairly risky as there were questions of the optics of police personnel getting into a fist fight with elderly women.

The police made their first attempt to arrest her on the second day of her hunger strike while it was still dark, but they retreated without making the arrest. The next morning around 10 am they made a second attempt. This time a troupe of female constables came in to arrest but were fended off by the Meira Peibis. Another hour or two passed before the police returned with an even bigger contingent of female police personnel. Sharmila was speaking with a reporter when a constable came and said, 'are you done talking' and went on to grab her arms. Immediately the Meira Paibis surrounded and everyone was on their feet. After a scuffle and a spirited resistance, Sharmila was dragged on to a police jeep and rushed off to the hospital before the activists could block it.

Her release and her rearrest her showed two things. First it marked a break in the ritual process of taming her appeal. It reactivated the potentiality of hunger striker- she was in the process of re-emerging in the Manipuri public sphere- at least through the coverage in the local news media. Secondly, the state could not afford this potentiality to materialize, thus, the prompt manner in which the state responded to put and end to the fasting and also to move her out of the public sight. In my two years in Imphal this was the first time that I saw such violence against Sharmila. The problem here was not merely of criminality. But the weight that such a public gesture of suffering could have on the people.

Back to the Court

Sharmila's arrest brought everything back to square one. It showed that her acquittal from the critical charge in the court case did not substantively change in the way the state responded. When a new FIR was filed against Sharmila, it was pretty much a reproduction of prior charges. Again the

police alleged that she was attempting to commit suicide, that the police had received information that the hunger strike was being carried out near the hospital and thus she was arrested. The only change in this new FIR was the allegation that she had prevented the police from carrying out their duties.

Khaidem Mani through his representatives again represented her and challenged her charging under section 309. A new Chief Judicial Magistrate had to determine this question. They made similar arguments before the Imphal East magistrate which was now occupied by a different judge. Justice Wisdom Kamadong decided to follow Justice Sharma's lead. He made a detailed analysis of the facts of the case and posed a similar question whether Sharmila had indeed attempted to commit suicide.

> 'In the considered view of this court, it is true that the accused has undertaken a fast unto death for the demand as mentioned above, however, as stated, she was given a nose feeding by the doctors of JNIMS and the accused accepted the nose feeding given by force or on initial refusal. Therefore, the very act of the accused cannot be construed that the accused was literally fed by force. Another ingredients (sic) of section 309 IPC to be charged against the accused is reached (sic) to the point of death. Here in this case the accused Irom Chanu Sharmila has undertaken fast unto death for certain demand and it can be prevented at any point of time when the accused (sic) demands are considered. There is always a chance that her fast-unto-death can be withdrawn at any point of time.
>
> Under the circumstances, the levelled against the accuse u/s 309 is not made out and there is no sufficient material in the prosecution case to framed (sic) the charge under section 309 IPC.'

Justice Kamadong pretty much reproduced what the higher court had decided in the previous case. The ingredients for attempt to commit suicide did not exist- the state had failed to establish clearly

whether she had any intent at all in the first place and neither had they proven that she had actually acted towards the fulfilment of that intent. The charge did not apply and she had to be released. The only point on which Kamadong differed from Sharma was that the former did not give any explicit instruction that she could be arrested if she continued her hunger strike.

She was released again and as expected to be rearrested soon. This marked a slight change in the manner in which Sharmila's hunger strike was dealt with. The ritual changed in technique but in its substantive effects it remained the same. Previously there would be no trial, no case, she would come and go from the court several times only to be released at the end of the year. Now she was arrested brought to court and promptly charged under section 309. The promptness of the charging process partly facilitated by the presence of a powerful lawyer. The charge would be challenged, the challenge would be upheld and then she would be released only again to be rearrested. She would again be accused of the same charge knowing very well that she was likely to be acquitted. In this new arrangement she was likely to be released more frequently by the court- but substantively it made no difference.

The state government's dual objective of keeping her alive as well as keeping her out of sight was secured in this new structure as well. There is a clear convergence between how the state saw the protest fast and how Sharmila saw it. Sharmila repeatedly reiterated that the eventual success of her fasting and the potential repeal of the AFSPA depended on a mass uprising. She never posed her struggle as one where her suffering would lead to a change in heart of the state. This is precisely what the police understood and wanted to limit/eliminate this possibility. Judge Sharma's judgement had brought some alterations to the script. He limited the grounds on which the police could justify arresting her and force feeding her. But that would not come to matter. Her eventual acquittal did not make any changes to the process through which the state had managed her hunger strike. Their

discretionary power to arrest her and the space between charging and acquittal gave them the room to repeat the process over and over again.

Sharmila too eventually came to see the futility of the whole exercise, that she could not wrest herself from the control of the state in anyways whatsoever. When the trial process had started Sharmila would try to gather witnesses to speak on her behalf. But none of that yielded anything good for her and her objective remained far-fetched as ever. Eventually in July 2016 Sharmila declared that she had had it. On the next day of her appearance she would pay the bail bond, accept her release and then break her hunger strike bringing to close an unprecedented hunger strike. Some of her supporters were furious at her decision and condemned her decision as a betrayal of the struggle against the AFSPA in Manipur. Her decision again generated massive interest in the media and on her next hearing there was a huge gathering of journalists from across the country. After the hearing she came in front of the cameras and said that she would adopt a new path to continue here movement. She said that she would challenge the Chief Minister of Manipur in an election. There was a sharp turn from the points of emphasis, no longer would there be a peaceful withdrawal of the law but instead there would be a full-fledged attempt to take over state power. All of this obviously sounded extremely naïve and impractical. No one thought that she had any chance in the electoral prospects of the state. When she ended her hunger strike, an Amnesty International volunteer asked her about what she thought of the Indian Constitution- she smiled and said that she thought it was a joke.

In the next year's election there was substantive interest in the media regarding her candidacy. Especially because she had decided to directly challenge the Chief Minister Ibobi Singh. There was a new political unit of which she became a part of called PRJA. However when the results came in she had received less than a hundred votes and the Chief Minister had defeated by a whopping fifteen

thousand votes. She had again failed to make a mark in the Manipuri imagination, establishing once again that she was nothing more than an ordinary, this was not only the truth but it was tragically true.

Sharmila's case showed the conundrum that structures the discourse around suicide and public protest in India. Suicide is illegal and the state prevents it but there is the concern with the public dimension of suicide as well.

III. Santhara and Suicide

In September 2015, The Indian media reported that the Rajasthan High Court had issued a judgement on the Jain practice of Santhara based on a Public Interest Litigation which was filed in 2006. Santhara is an end of life practice of the Jain community in India. Once the vow of Santhara is adopted Jains, mostly older Jains stop taking food slowly and through an act of self-cleansing and detachment embrace death. The PIL claimed that the practice was often abused, illegal and was an act of committing suicide. Jains are a relatively small religious group in India. There are four million Jains in India most of them living in central and western India and tend to have economic clout in the region. There are two broad division of among the Jains the Svetambaras and the Digambars. One of the key tenets of the Jain religion is non-violence. Not only are Jains not allowed to eat meat, there are sanctions against eating root vegetables since they are known to kill animal life in the soil. Purity and sanctity of life are key aspects of the Jain religion.[5]

The petitioner urged the court to declare the practice illegal and ban it. After nine long years the court came out with a judgement claiming that the practice was indeed a violation of section 309 as well as a violation of the right to life and ordered the Rajasthan government to immediately put an

[5] For an anthropological account of the Jains *see* Laidlaw 1995 on Santhara especially *see* Laidlaw 2005. For theological accounts of Jain practice of Santhara *see* Settar 1990, Tukol 1976.

end to it. The case of Santhara and the case of Irom Sharmila show some of the fraught ways in which the question of suicide can be posed and how right to life is a critical aspect of the problematization of suicide in India. In this instance I will excavate how the debate over Santhara is primarily a concern about the tension and public affect. But many issues are intertwined here, and I want to tease them out slowly. First let me consider what the practice of Santhara entails especially as it is represented by the competing parties in this particular case.

Case of the Petitioner

The case was filed by Nikhil Soni, a young advocate practicing in the High Court in Rajasthan. He was not a Jain and neither did he claim that the practice caused him any personal injury. One of his co-petitioners told me that one of the underlying motivations for filing the case was that Soni was particularly bothered by the abuse involved in the practice of Santhara. He himself was from a small town in Chiru in Rajasthan and had seen the practice being used to target the elderly. The petition itself was not framed in that manner. He argued,

> 'to be more precise a religious fast to death under the pretext that when all purposes have been served or when the body become (sic) to serve any purpose the Santhara (sic) is adopted in order to obtain 'Moksha' (salvation) wherein they stops (sic) eating and even drinking water and wait for death' (Soni, 2)

Soni acknowledges that the practice is part of a long tradition but he argues that the act itself is a violation of the basic tenets of Indian law since it amounts to an intentional self-destruction of life. This act of 'voluntary suicide'- is often a communal event with participation from the larger community and the community 'helps in their designing (sic) of suicide, ceremoniously' (3). These events often attracted crowds of devotees seeking their blessings, it becomes a site of pilgrimage. The practice whenever it is undertaken is clearly glorified. Soni makes a series of assertions to claim

why this practice ought to be criminalized. Every individual ought to be individual Soni argued should be doing their best for the motherland. No one should be permitted to forget their rights and liabilities towards his family and nation. The law applies equally to everyone and one should not be allowed to abandon their responsibilities on religious grounds.

One of the moves that Soni makes, is the comparison of Santhara with the practice of Sati or widow immolation. The practice of Sati was also a public event with the Hindu widow set on the pyre of her deceased husband in a public ceremony. Sati was also widely glorified.[6] Soni partly uses Sati as a mnemonic device because the last controversy on Sati in India occurred in Rajasthan when Roop Kanwar in 1987 set herself on fire. There was an outcry in India following the incident and the then Rajasthan government passed a law banning the practice and attempted to stop public worship of the Sati itself. [7] Soni argues that Santhara also involved a form of voluntary death, was publicly glorified and thus should be banned. Even an expanded notion of right to life in the Indian Constitution did not include the right to die as the Supreme Court had already determined, this practice could not be protected on that ground. In cases of hunger strike as well, the state is known to stop such practices. These instances seek to establish how the state has systematically acted against all forms of intentional self-killing and Santhara was also another such instance which the state should put an end to. Religion could not be a justification to permit the perpetuation of this practice. Based on these claims Soni urges the Rajasthan High Court to direct the Rajasthan Government to put an end to the practice.

Intention and public affect are two crucial devices through which Soni has framed this petition. He sees Santhara as an intentional act of self-killing. The person voluntarily adopts the vow of Santhara

[6] On Sati *see* Mani 1998, Sunder Rajan 1993, Spivak 2010.
[7] This law was challenged later in the Rajasthan High Court. The Court by and large upheld the law. It struck down the section which banned the worship in temples devoted to Sati.

and sets on the path of embracing death. Thus, clear intention is stated on their part. But the vow also has a public dimension. The vow of Santhara is not a private affair rather it was a public event. The dying body of the vow taker creates a spiritual community around it- but Soni argues that this implicates them in this act itself making them liable for abetting suicide. When it comes to the question of right to life, Soni argued that the Jains could not be an exception to the practice since the Supreme Court has repeatedly upheld the constitutionality of Section 309 of the Indian Penal Code. All forms of voluntary death has been limited by the Supreme Court of India and Soni argues that the court has been categorical that the right to life could not be interpreted to include the right to voluntary death. What was striking about the petition was the fact that it lacked very clear specificity. Soni's petition includes specific examples but does not elaborate upon those examples to substantially claim that a crime had been committed. He rather poses a hypothetical situation. This would precisely be the point that the respondents would raise challenging the petition.

The jurisprudence of Public Interest Litigation, as we have seen is not dependent on either specific injury, neither does it depend on standing. Soni could thus file this petition at a High Court seeking an injunction against the state to force it to ensure that this particular religious practice was banned. The conditions of possibility for a petition like this lies in the emergence of the PIL. Thus, Soni instead of framing his petition as specific violations occurring in the state of Rajasthan sought to impose a complete ban through the high court, despite not being directly injured by the practice. In the conventional sense of the law he had no standing- the practice caused him no specific injury. He could approach the court, as he noted, as a public interest litigant in the name of public interest.

Response

Nikhil Soni had filed his initial petition against the State of Rajasthan and no Jain individual or organization who were likely to be affected by such an injunction of the court were made party to

the original petition. Subsequently a whole set of Jain organization sought to be impleaded in the proceedings one of whom were the Stanakvasi Jain Samaj and they submitted a petition challenging the claims in the petition of Soni. This response was prepared under the direction of Mr. Panachand Jain who was a former justice at the Rajasthan High Court and who had written the decision upholding the Rajasthan legislation banning Sati from the state. The counter claim by the respondents from the Jain community was focused on three things- the technical grounds of the PIL which they regarded as dubious, the constitutional basis for the freedom of religion which Jains claimed protected the practice of Santhara and lastly right to life and article 21 of the Indian Constitution.

The respondents challenged the intentions of Soni claiming that the substance of the case lacked merit and should be dismissed. Regarding Soni they claimed,

> 'He is a meddlesome interloper, at whose instance the issue may not be raised nor is justiciable. The issue is justiciable when it can be resolved through judicial process. The present litigation is neither bona fide nor for public good. It is a cloak for attaining private ends by a member of the Hindu society against a religious minority community known as "Jain"' (Stanakvasi jain Committee quoted in Rajasthan HC, 8)

The question of justiciability is an interesting one. The petitioners were suggesting that the case had failed to raise a substantive legal or constitutional question and in its absence what was there for the court to resolve? They were also insinuating a certain animus on the part of Soni- this was an act of majoritarian intervention in a minority religion. The claim of public interest is also non-substantive. The petition gave the example of a few women who had carried out the Santhara. But were those practices equivalent to committing suicide, were they a clear violation of the section 309? The petitioner had not given the evidence to prove that. Thus, cause of action was unclear, and the

petition lacked the substantive merit needed to invite a response from the constitutional court. The specificity of the accusation in a particular case determines the jurisdiction of the court. In this case the petitioner wanted the court to declare that the Santhara amounted to committing suicide and thus should be declared as in violation of section 309. But according to the SDN that was a theoretical question and speculative proposition and the court did not have the jurisdiction or the competence to determine such a matter.

The core argument the respondents was that Santhara was crucial part of the Jain religion and was derived from the Jain worldview, it was logical extension of that worldview and integral to the practice of the Jain way of life. Given the centrality of the practice to the Jain worldview, the practice was protected by the freedom of religion clause in the Indian Constitution which guarantees the right to freely practice, profess and propagate religion. The respondents argue that Santhara is a voluntary vow, an 'exercise of self-purification and a popular religious practice throughout the history of Jainism.' It is not taking life or committing suicide rather it taking 'death in its own stride.'

> 'man who is the master of his destiny should face death in such a way as to prevent influx of new karmas even at the last moment of his life and at the same time liberate the soul from bondage of Karmas that maybe clinching to it then' (9).

Santhara is a practice to free the soul. Human life leads to the accumulation of karma, humans are continually gaining new karma through their attachments to the world. By taking the vow of Sallekhana, the Jains seek to put an end to this accumulation and thereby begin the process of freeing the soul and start the process of purification. The petitioners claim that this does not entail Moksha- a concept which is rooted in Hinduism and not derived from Jain thought, rather it is about freeing the soul. Drawing on the work of Jain scholars, the petitioners claim that the vow of Santhara is taken when the conditions of normal life are no longer possible due to age, infirmities or

natural calamities. Systematically the ascetic withdraws him/herself from material attachments including food and prepares to die at a certain point in time. Those who take the vow can also withdraw it if they wished to. Santhara in this view is a logical culmination of what is the Jain worldview- a life of attachments, renunciation and thereby freeing the soul.

To bolster their arguments, the respondents through a series of historical instantiations show the historical depth of the practice as well as the fact that it was an integral part of the Jain religion. The objective being to establish that this is an essential religious practice and thereby protected by constitutional guarantees. Religious freedom, the petitioners point out, entails the freedom of a religious group to maintain their own affairs subject to certain limits.[8] In the instances of Santhara public order is not harmed and there is no creation of health issues. In Indian jurisprudence they point out that the state has sought to inquire historically whether a religious practice is essential to the religion or not. Based on these determinations such practices can be practiced or not. They point out that religious practice has always been recognized as being critical in the determination of the rights of religious people and that religious groups are supposed to enjoy complete autonomy in determining their religious practice.

Article 21 plays a crucial role in this argument. Soni's petition had already described Santhara as an act of intentional suicide therefore in the realm of right to life. Suicide and right to life hinges on the conditions of death- what are the conditions under which the state can intervene and extent to which individuals could be forced to live their lives. As we saw in the previous section, the thinking about right to life in India especially in relation to the problem of suicide has always been haunted by the question whether the right to life of an individual also extends to their death, can someone choose to die. The respondents argued that a claim has been made in some cases in India that the

[8] The condtions of restriction are as follows.

right to life also includes the right to die. But this was not a position that they were in agreement with. On the contrary they introduce the idea of dignity to understand the concept of Santhara. They acknowledge the inherent ambiguity in the concept of life and the diverging meaning that it possesses. They claimed that the right to life 'has been construed as life with human dignity.' Right to life does not entail a right to death but it does mean the right to live with dignity, to live with dignity till the very end of life. This means the right of a person to die with dignity 'when his life is ebbing out.' If someone is in a vegetative state or where the process of death has begun in those cases individuals will have the ability to determine for themselves how they wish to die. They had already framed Santhara as something which is adopted at the end of life when the process of natural death had already begun. They point out that the Indian Supreme Court has not struck down section 309 of the IPC but nonetheless it has requested the Parliament to consider repealing it. The allusion here is to the fact that there is something unnatural to force someone to live their lives if they cannot do so with some dignity.

Suicide and Santhara are not the same thing the respondents argued. The main difference was that suicide was an expression of unfulfillment with life. Suicide is not carried out by a person who is at peace, rather the very act of suicide is an expression of extreme consternation. But Santhara can only be undertaken by a person who was at complete peace with the self. Suicide also entails some active instruments to kill oneself. In Santhara no such extraneous tools are neither permitted nor can they be used- it ceases to be a religious practice if such tools are used. Santhara could not be compared with the practice Sati either, because those undergoing Sati were doing so from 'ignorance, infatuation and social pressure.'

Throughout the petition Santhara is identified as a practice which is tied to age old infirmities where the person is on an inevitable path to death. In a sense the right to determine one's death in this

account is dependent on conditions that are out of one's control. This characterization of Santhara is contrary to other interpretations of Santhara which do not impose such restrictions. Such interpretations argue that Santhara is an act of ritual renunciation which are not in anyways tied to illness and someone who is fit and in good health could also take the vow.

Thus, there is a curious play of agency and constitutional right is operating here. The respondents are claiming that Santhara is indeed an intentional act. But they have already also limited the scope of Santhara claiming that the practice is adopted at old age or with the onset of infirmities. But is this narrowing of Santhara valid? This is a complicated point and there is sufficient evidence to suggest that taking of the vow of Santhara is not necessarily conditional on those claims. But the thrust of the argument made in this instance relied on the freedom of religion provisions of the Indian Constitution. The emphasis was on the claim that Santhara was an integral aspect of the Jain religion proven historically and material and textual artifacts and therefore the Jains had the right to continue practicing it without any intervention from the courts or the state.

Freedom to practice, profess and propagate religion was a key ingredient of Santhara in India. The only way one can make sense of this phenomenon is that to make the practice more legible to the courts. The intentionality of Santhara was circumscribed by the supposed onset of death, it then gets reframed less as a classical understanding of Santhara but rather as a practice which is adopted when death is imminent- a claim of dubious merit.

Judgement of the Court

The Rajasthan High Court posed the following question:

> In this writ petition filed in public interest, we are concerned with the short question as to whether the practice of Santhara/Sallekhana practiced by the Shvetambaras group of Jain

religion is an essential tenet of the Jain religion protected by the right to religion under Article 25 of the Constitution of India (28).

The court decided against the Jain community and declared that the practice of Santhara was not an essential ingredient of the Jain religion and that it did amount to a violation of sec. 309 and Article 21 of the Indian Constitution. The court limited the reading of the freedom of religion clause in the Indian Constitution and the question of right to die as an extension of right to life.

The court decided that Santhara was not an integral part of the Jain religion. The court premised this decision on the grounds on previous precedents where the Supreme Court where the court had imposed restrictions on religious practices which it had regarded as being inessential or when such practices were held to be contrary to public order, morality or health. Most of these precedents relating to the practice of cow slaughter over the years when the Supreme Court held that the practice was not essential to Islam and imposed restrictions on it. The court held that they did 'not find that in any of the scriptures, preachings, articles or the practices followed by the Jain ascetics, the Santhara or Sallekhana has been treated as an essential religious practice, nor is necessarily required for the pursuit of immortality or moksha' (43). The judge rejected the argument that the practice was adopted by most ascetics or lay persons had also not been proven- nor was it an essential part of the philosophy of the Jain religion. Given its lack of the 'essential' the right to practice Santhara was not protected under Article 26 of the Constitution. Article 21 also did not give cover to the practice because there are certain set guarantees of freedom in the Constitution and Article 21 does not give one the right to give up their lives. Even the freedom of religion does not give anyone the right to take anyone's life. The judgement simply ignored the historical evidences that the respondents had submitted. Neither was it clear what was the precise criteria through which

it was determined that this particular practice was not essential in the Jain religion. But based on these determinations the judgement instructed the Rajasthan government to

> 'stop and abolish the practice of 'Santhara' and 'Sallekhana' in the Jain religion in any form. Any complaint made in this regard shall be registered as a criminal case and investigated by the police, in light of the recognition of law in the Constitution of India and in accordance with Section 309 or section 306 IPC, in accordance with law' (45-46).

Reactions to the judgement

The judgement was widely criticized. Pratap Bhanu Mehta (2015) argued that the sovereignty of the state lies in its ability to determine the conditions under which death is permissible. That state is the ultimate arbiter of this question but there were clear theological underpinnings in the projected neutrality of the state in this matter, the Indian Penal Code had its roots in the Christian worldview of the colonial state. Mehta defines Santhara more broadly as the passage of Jains to the death state and beyond without any explicit attachments. But the court had simply decided that Santhara was not an essential religious practice for the Jains. Not only that, it took the narrow view of equating the practice with suicide. But Mehta does not advocate that the state should never intervene in the realm of religion. He identifies the subordination of women and outright coercion as being two instances when intervention from the court should be welcome. But he is aware of the contradiction that emerges in such a situation. Because if one where to argue that all religious activity validated through social pressure should then which religious practice could ever survive? Another legal scholar Ratna Kapur (2015) argued along similar lines claiming that the Rajasthan High Courts understanding of the practice was extremely constricted by modernist notions of death.

Action in the Supreme Court

However, that was not the end of the matter. The representatives of the Jain community decided to file an appeal in the Supreme Court of India. The Supreme Court promptly set aside the Rajasthan High Court judgement. The practice was allowed to continue till the Supreme Court decided the constitutionality of the practice of Santhara. The stay order was passed within a few weeks of the initial order by the Rajasthan High Court. Since then multiple instances of Santhara have been reported across the country (Iyengar 2015).

The decision of the High Court was received with mass protests by Jains across the country. In the state of Rajasthan, a state-wide strike was announced by Jain organizations. Schools and other educational institutions run by Jain organizations in the city remained close for the day and a number of silent marches were carried out across the city of Jaipur. Some Jains tonsured their heads to protest the decision. Protestors were angry at the notion that the Court had held Santhara to be equivalent to suicide and the assertion that Santhara was not an integral part of the Jain religion. These protests were held across states and cities where Jains formed a substantive community. The practice however is now legal as Supreme Court hears the matter (Caron 2015).

The issue of Santhara was again highlighted as recently as 2016 when in Bangalore a thirteen-year-old girl adopted the vow and went on a fast for sixty-eight days in the southern city of Bangalore (Rao Apparasu 2016). Two days after breaking her fast the girl died from a cardiac arrest. Child rights activists in the city filed a complaint against the parents alleging negligence. The activists pointed out that her parents had taken out advertisement in the newspaper celebrating her as the 'bal tapasvi' meaning a child renouncer. The complainants feared that these activities would inspire others in the future and wanted the police to act against her parents. Besides the ensuing controversy, this matter showed that Santhara was not a practice which was adopted at the end of life or when the process of death has set in, it could be adopted by children as well. Though the

practice of child Santhara is very uncommon it is nonetheless a phenomenon that is not unknown. Meaning the premise on which the decision of the court had been passed was highly contentious.

These protests in Jaipur following the High Court order and the protests in support of the Santhara showed the continual formation of emotional communities around the issue of the Santhara. Santhara is directed more towards seeking blessing and salvation, the protests showed the potential political consequences that could emerge if the Supreme Court indeed had upheld the judgement. This chapter will not get into the substantive issues relating to the Jain religion per se. But I want to give a tentative account of the reason for the prompt response of the Supreme Court in this instance. Why did the Supreme Court promptly set aside the decision of the Rajasthan High Court? The Supreme Court has tested the legality of religious practices primarily on the test of essentialism to the religion itself, meaning whether a particular practice is regarded as an essential part of the religion itself or not. But in deciding that question the Supreme Court had not come up with effective tests. This has often resulted in the Court exercising arbitrary discretion in a matter of critical importance regarding religious rights. In this case I would argue that one of the reasons that Supreme Court acted promptly to suspend the Rajasthan High Court order was because of the public affect generated by the suspension of a crucial practice. The possibility of virulent public response to Court interventions in religious matters is a potent possibility in India. One can give numerous instances where court judgements have resulted in outpouring of anger. Though it is not possible at this point in time to assess what the outcome of the case might be, one could guess that the court would either keep deferring the case as was seen in the Rajasthan instance or it would restore the constitutionality of the practice. The primary reason behind it being potentiality public anger at the suspension of a legal practice.

IV. Conclusion:

In this chapter I compared two cases, the recent criminalization of the Jain practice of Santhara and the trial of Irom Sharmila. Both of these cases were constituted as instances of suicide, a perennial question in Indian jurisprudence. More importantly in the context of the dissertation, the problem of suicide has been problematized through the category of right to life. Those who defend the right to kill oneself defend it through the right to life, those who oppose it also invoke the right to life. Through a comparative study I showed that the critical register on which the differing responses to the two supposed practices of suicide can be understood is through the tension between intention and public affect. In both cases the determination of whether these acts were indeed suicide hinged on the question of intention. In the case of Sharmila the question was whether she had actually done enough to kill herself. The judge contended that the state had not established that conclusively, neither could they establish that she had ever claimed that she wanted to kill herself. Thus, she could not be charged under section 309 of the Indian Penal Code. But nonetheless the judge argued that in case Sharmila chose to continue with her hunger strike then the police would have the authority to intervene and force feed her. By adding this clause in his judgement, the judge tried to create the legal basis for the state to intervene despite the fact that such a question had not been asked in the case. I argue that this was necessitated because of the public affect that the dying body of the hunger striker could generate. The case was therefore decided through the twin concerns of intention and public affect. A similar conclusion can be drawn in the case of Santhara. Here the judge argued that the adopter of the vow of Santhara was indeed someone who intended to kill himself and therefore his/her act amounted to an intentional act of suicide. But the judgement of the court created a significant backlash from the Jain community who protested across the country. But the Supreme Court issued a stay on the judgement allowing the practice to be continued. I would argue that this can be understood by the public affective backlash against the High Court judgement. The key contention of the chapter is that anthropological theory has effectively shown how the practice of

suicide is bound by the concerns of agency and authorization. In this chapter I showed that there is another critical dimension which is the problem of public affect, paying attention to it would enable us to understand the contingencies involved as the state confronts and tackles the question of suicide.

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