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Pride and Prejudice in Austin's cornerstone: A history of *passions* in the Constituent Assembly of India

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“How to embody the aspirations was the subject of protracted, often bitter debate in India’s Constituent Assembly, *an island of calm deliberation amidst the historical currents that swirled through the country*” Sunil Khilnani, *The Idea of India* (New York: Farrar, Straus, Giroux, 1997)

“But at the time of the second reading, we developed a fear complex, if I may say so, maybe that it was justified by events that happened in our own country and also by events outside. But the fact has to be noted that it did affect the course of events.” H. V. Pataskar (*Constituent Assembly Debates XI: 18 November 1949*)

Independence, ethnic violence, uncertainty surrounding the fate of the princely states, fiscal crises, and a war in Kashmir. The Constituent Assembly authored India’s Constitution during a maelstrom of political crises from 1946 through 1949. Accounts of the tumult, especially of partition, reveal that emotions like fear, anger, enthusiasm, and jubilation were collectively felt.¹ Yet interpretive studies of the Constituent Assembly Debates seem to say little on the effect of passions on the framers. Was it the case that *passion* had no role to play? Was the Indian experience a product of *reason* and *interest* alone? Based on the Constituent Assembly Debates, I argue that *emotions* and *prejudices* may have motivated India’s constitution-framers to a greater extent than hitherto assumed. I do not presume to prove historically that the framers were motivated by *passion*, but to suggest that there is sufficient evidence to question the dominant account of the Assembly as an island of calm, reasoned deliberation. An analysis of *passion* might substantiate key findings in recent scholarship and enrich our understanding of institutional design and deliberation in the Constituent Assembly of India (henceforth “the Assembly”).² I employ a method of ‘contextual

¹ Newspaper reports in the Hindustan Times, The Hindu, and the Times of India from August 1947 narrate accounts of horrific violence in the northwest and the east; as well as the excitement and joy of independence in Delhi and many other cities.

² Bajpai, R. (2011). *Debating difference: Group rights and liberal democracy in India*. New Delhi: Oxford University Press; Dasgupta, S. (2014). “A Language Which Is Foreign to Us”: Continuities and Anxieties in the

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emotional choice analysis’ derived from Jon Elster and András Sajó’s respective studies of emotions and constitution-making.³

In the first section I describe Elster and Sajó’s approaches to emotions in constitution-making, and distinguish my ‘contextual emotional choice analysis’ method. In the next two sections, I examine the role of *hot passions* and *cold passions* respectively. I argue that the impact of *hot passions* was limited by procedural and institutional features. On the other hand, *cold passions* were pivotal in shaping framers’ arguments and the final document. I conclude by arguing that *passion* ought to be recognised as a significant motivation for constitutional drafting in India, refuting the suggestion that 20th century constitution-making was devoid of sentiment.

I. Passion and Constitution-making

In this section, I will explicate the study of emotional reasoning in Constitution-making, based primarily on the work of Elster (1999, 2013 and 2018) and Sajó (2011 and 2016). I begin with an explanation of emotions in the study of deliberative settings: specifically the effect of emotions on cognition and action. The main emotions and prejudices relevant for the Indian assembly, and the mechanisms through which they impact deliberation follow. The section concludes with an account of the cultural construction of specific emotions and a description of my method: a synthesis between emotional choice and cultural construction approaches to the *passions*.⁴

Making of the Indian Constitution. *Comparative Studies of South Asia, Africa and the Middle East*, 34(2), 228–242; Mehta, U. S. (2010). Constitutionalism. in N. Jayal & P. Mehta (Eds.), *The Oxford companion to politics in India* (pp. 15-28). New Delhi: Oxford University Press; and Mehta, U. S. (2016). Indian Constitutionalism: Crisis, Unity, and History. in S. Choudhry, M. Khosla, & P. B. Mehta (Eds.), *The Oxford handbook of the Indian Constitution*. Oxford: Oxford University Press.

³ Elster, J. (1999). *Alchemies of the mind: Rationality and the emotions*. Cambridge: Cambridge University Press; Elster, J. (2013). *Securities against misrule: Juries, assemblies, elections*. Cambridge; New York: Cambridge University Press; Elster, J. (2018). The political psychology of Constitution-making. In J. Elster, R. Gargarella, V. Naresh, & B.-E. Rasch (Eds.), *Constituent Assemblies*. New York: Cambridge University Press.; Sajó, A. (2011) *Constitutional Sentiments*. New Haven: Yale University Press; and Sajó, A. (2016) “Emotions in Constitutional Institutions”. *Emotion Review* (8:1).

⁴ My examination is far from exhaustive. Ronald de Sousa (2013) provides a concise introduction to debates in the philosophy of emotions. See de Sousa, R. (2013). Emotion. *The Stanford Encyclopedia of Philosophy*. Metaphysics Research Lab, Stanford University. Retrieved from <https://plato.stanford.edu/archives/spr2014/entries/emotion/>

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Following the French moralists, Elster (2013 and 2018) argues that *reason*, *interest*, and *passion* are the main motivations in assemblies. He defines *reason* as “the *rational* pursuit of long-term ends”. It entails judgement about ends, as also about the means necessary to achieve those ends. In the Assembly for example, members disagreed about whether India should be a ‘socialist’ state or not, and about what being a ‘socialist’ state meant. Even among those who shared the same beliefs about ‘socialism’ as an end, there was disagreement about the means: rapid, state-led industrialisation or decentralised village-republics? For Elster, *reason* includes concern for “non-consequentialist” values such as “the rights of another” and the “good of the whole”. *Interest* is understood “as the pursuit of advantage at a scale smaller than that of the relevant collectivity as a whole, and further subdivided into personal interest, group *interest*, and institutional *interest*”. Advantage includes the means to achieve personal welfare, and consequently, group or institutional *interest*.⁵ For example, Jawaharlal Nehru could have argued in favour of greater discretionary powers for the Prime Minister (or, as he did, for the Executive as a whole) on the expectation that such an institutional expansion would benefit him personally. Conceivably, members belonging to religious minorities could argue for group-specific rights that would benefit their community, and therefore, them. *Passion* comprises emotions and prejudices: like fear, anger, enthusiasm, contempt, and pridefulness. Unlike *reason* and *interest*, the constitution-making literature has largely neglected *passion*.⁶

In the Constituent Assembly Debates, it is difficult to distinguish clearly between *reason*, *interest*, and *passion*. From Elster (2018), consider the overlaps between *reason* and *interest*. One can find cases where “a choice or position may be *dictated by reason*, yet *correspond to the interest* of the relevant agents”. The expansion of the franchise for women (in the West and in India) was justified as a necessary means to the pursuit of equality, and simultaneously resulted in advantaging women’s *interest*.⁷ One can also find cases where “the choice may be *dictated by interest* yet correspond to (*some conception of*) *reason*”.⁸ Consider here the arguments made in favour of Hindi

⁵ Elster’s commitment to methodological individualism leads him to specify that group interest and institutional interest are pursued by individuals comprising the collectivities rather than groups themselves.

⁶ When scholars have acknowledged emotions, they have argued that emotions are important only for bringing about the conditions necessary for constitution-making to begin.

⁷ The debate on political safeguards for religious and caste minorities provides an interesting contrast.

⁸ Elster (2018).

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as a national language: the use of Hindi in matters of state would undoubtedly advantage North Indian Hindus (who were the proposal's most ardent proponents), though they argued that a 'national language' would further the cause of 'national unity', an end that corresponded to *reason*. It is neither possible nor important to decide whether *reason* or *interest* was dominant, and therefore, *the* motivation. It is sufficient to surmise that *reason* and *interest* had at least some causal efficacy in shaping the positions on these issues and the framers' subsequent choices.

Nathan Brown (2008)⁹ helpfully highlights the imprecision in the definition of *passion*, surveying its conflation with *interest* in the Federalist papers as well as in Elster's previous work. I am primarily concerned with *passion* as emotion, which includes anger, fear, pity, enthusiasm, and happiness; and as prejudices like pridefulness and contempt.¹⁰ I explore four relevant aspects of *passion*: (a) characteristic features; (b) types of affect; (c) the mechanisms through which they influence action; and (d) the cultural construction of collectively-felt *passion* in deliberative assemblies.

(a) Characteristic Features of Emotions

According to Elster, emotions are states of an organism that are triggered by a cognition or perception and are (often) characterized by physiological arousal and positive or negative valence that (often) result in characteristic action tendencies.¹¹ I focus on two features of emotions. First, emotions have cognitive or perceptual antecedents. In other words, it is possible to identify the conditions in which certain emotions are evoked. For example, anger is triggered by the negative action of another towards oneself. Beliefs about received information of another's actions prompt the emotional response. So for one to be angry, for example, is to believe some information about another's action is actually the description of a negative action towards the oneself.

Second, emotions shape action and belief. For instance, the action tendency most often associated with fear is 'fight or flight'. The influence of emotions on belief is more complicated, and more difficult to identify and study. These beliefs in turn influence how further information is received,

⁹ Brown, N. J. (2008). Reason, Interest, Rationality, and Passion in Constitution Drafting. *Perspectives on Politics*, 6(4), 675–689.

¹⁰ This is not a definition of passion, merely a statement about what is studied here.

¹¹ Qualifications in parentheses are mine.

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and how the actor views action. For example, anger against another may cause future actions by her to be seen as negative, thereby generating greater anger. In this way, emotion affects beliefs, beliefs about beliefs, beliefs about action, and action itself.

(b) Intensity and duration of Affect

I now turn to the two types of passion based on the intensity and duration of affect. *Passions* effect cognition, and therefore action, for varying periods of time. *Hot passions* get their name from the adrenaline release that actually causes one to feel more energetic when under their influence. They are accompanied by a high level of arousal, tend to have a short half-life, and dissipate soon. They may also trigger action immediately – wherein the actor moves from emotion to action without forming new beliefs. *Cold passions* trigger less intense arousal, and tend to linger, affecting beliefs at several stages, without compelling the actor to react in any characteristic manner at each stage.¹² The same emotion can be of both ‘hot’ and ‘cold’ types: for instance, the hot anger of feeling cheated in a minor financial transaction subsides faster than the cold anger of colonial subjects against their imperial oppressors.¹³ As this example hints, it is possible that repeated episodes of hot emotion (anger at instances of colonial brutality) shape beliefs that result in cold anger against colonial rulers. In relation to displayed features, *hot passions* are easier to identify vis à vis their cognitive antecedents, and the duration from trigger to action is shorter than it is with cold emotions. This distinction is not rigid, and must not be treated as such. Let it suffice to say that hot and cold *passions* tend to operate through different mechanisms.

(c) Mechanisms through which Emotions influence Action

Three mechanisms – motivated reasoning, urgency, and the empathy gap – facilitate emotion’s effect on action and beliefs. Motivated reasoning refers to the beliefs generated as a result of emotions. Returning to an earlier example, anger against another may bias the actor’s belief about new information that comes to light. For instance, a Hindu or Muslim who feels anger because she

¹² *Hot passions* correspond broadly to occurrent emotions, while cold emotions connote emotional dispositions (contingent and standing). The differences between hot and *cold passions* are the subject of much contestation in the philosophy of emotions and the study of social psychology. See Sajó 2011, 2016; and Elster 1999 and 2018.

¹³ This framing is distinct from Hirschman (1977), who examined emotions as having hot or cold effects on cognition. The suggestion here is that the same emotion (eg. Anger) can influence an actor in hot and cold ways, and have differing consequences. See Hirschman, A. O. (1977). *The passions and the interests: political arguments for capitalism before its triumph*. Princeton: Princeton Univ. Press.

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lost family to communal violence in 1947 may refuse to believe information that suggests a member of the other community committed an unrelated act of kindness. Motivated reasoning operates through changes in beliefs about information, beliefs about beliefs, and beliefs about action. Beliefs about beliefs may be affected through wishful thinking and counterwishful thinking. Wishful thinking is the phenomenon of subscribing to a belief because that belief is beneficial to the subject whereas counterwishful thinking is the opposite: the actor believes an event will occur because that event augurs badly for her. Elster (2018) demonstrates how the Norwegian framers mistakenly believed that Bernadotte – the Swedish crown prince and de facto ruler of Norway – would lose the war and a sovereign Norway based on the constitution they framed would be born. They were wrong – he returned victorious and the Norwegians accepted his sovereignty once again.¹⁴ In section III I will suggest that pridefulness drove the Indian framers towards the wishful thought that they would be able to fundamentally transform many aspects of the Indian polity within a period of ten years. Once again, it is important to note that the formation of these motivated beliefs is not limited to single instances- over time, beliefs become reinforced, and themselves act as the basis on which new beliefs are formed.

A second mechanism, urgency, refers to the desire to act swiftly, even at the cost of lower returns.¹⁵ It may be further characterised as inaction-aversion and/or it may manifest itself by preventing an actor from gathering more information before acting. *Hot passions* are more likely to trigger an impulse for urgency than *cold passions*. Consider the case of the French *constituants*: on 4 August 1789, they ignored the delay clauses they had themselves adopted one week previously. On 6 August, framers defended their actions by asserting “an elan of patriotism does not need [a delay of] three days”.¹⁶ In this way the French framers first acted on the impulse of urgency, and subsequently argued against self-binding on the grounds of inaction-aversion. The public announcement of “surgical strikes” into Pakistani administered Kashmir in September 2016 is a

¹⁴ It is a different matter that their *enthusiasm* and resultant wishful thinking helped them secure a constitution far better than one they might have claimed had they accurately estimated the Swedish forces. See Elster (2018).

¹⁵ See Elster (2009) for the difference between impatience and urgency. While the former refers to a preference for achieving ends sooner rather than later, the latter addresses the question of acting on such a preference. Elster, J. (2009). Urgency. *Inquiry*, 52(4), 399–411.

¹⁶ Kessel (1969), p. 127 cf. Elster (2018). My poor knowledge of French precludes an examination of the original document. See Kessel, P. (1969). *La nuit du 4 août 1789*. Paris: Arthaud.

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contemporary example of urgency. The Government declared that it felt compelled to act swiftly because the “nation’s anger was greater than ever”.¹⁷

The empathy gap refers to the inability to imagine how one would think or act if she were in the other state. Note here that ‘hot’ and ‘cold’ connote something different than they did when used in relation to hot and cold emotions. A hot state refers to an emotionally charged state. On the other hand, a cold state refers to the case where the actor is not influenced by *passion*. The hot-cold empathy gap may be said to have played a role when the US Congress overrode President Obama’s veto on a bill that allowed governments to be sued for failing to prevent acts of terrorism only to regret their haste the following day. Vice-versa, the cold-hot empathy gap results in the actor thinking implausible certain actions that she may commit when in a hot state. This is an important factor not only for its effect on constitution-framers, but also in their calculus when devising institutional arrangements that will mitigate the effect of *passion* in the years after the Constitution’s ratification.¹⁸

Recall that *passion* includes emotions and prejudices. I have expounded the features, characteristics and mechanisms of emotions above. Prejudices refer to standing beliefs about oneself or another. For instance, *pridefulness* connotes a favourable view of the actor’s attributes, while *contempt* of another refers to the agent’s belief that a group deserves scorn.¹⁹ Like cold emotions, motivated reasoning is the mechanism most likely to operate in the case of prejudices. Broadly speaking, motivated reasoning applies in cases of hot and cold *passions*, while urgency and the empathy gap have much greater valence in the case of *hot passions*.

(d) Cultural construction of *passion* in Assemblies

Sajó (2011: 18) argues “culture sets situational rules of emotional display, and the proper behaviour at the display is culturally scripted” in that “where the display of outrage regarding

¹⁷ Talukdar, S. (2016, September 21). Uri terror attack: Modi’s biggest headache isn’t Pakistan, but an enraged Indian public - Firstpost. Retrieved October 18, 2016, from <http://www.firstpost.com/world/uri-terror-attack-modis-biggest-headache-isnt-pakistan-but-an-enraged-indian-public-3013078.html>

¹⁸ Elster (2018).

¹⁹ Exceptions are numerous. Contempt, for example, can be triggered by the belief that another has performed cowardly action.

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slavery was culturally improper, antislavery sentiments were unlikely to develop”.²⁰ The cultural construction of interpersonal emotions and sentiments, for Sajó, is crucial to their role in shaping constitutional deliberation. He argues that “the interaction of moral judgments creates a prevailing majority” which eventually acquires the “normative power of the factual”.²¹ Sajó demonstrates how, in the eighteenth century, emotional displays became more acceptable, and that laid the foundation for them to be collectively felt. Sentiments, in Sajó’s discussion, differ from emotions. They are not merely the external response to an internal stimulus, but culturally constructed norms that are shaped and reshaped by the performance of certain emotions. It is beyond the scope of this study to reconstruct and situate the development of sentiments in colonial South Asia.²² Working exclusively with the Constituent Assembly Debates also limits the contribution I can make to the historicity of emotions.²³

Recall that Elster suggests emotions influence not only action, but beliefs as well. To extrapolate further, emotion and *interest* shape conceptions of *reason*, and consequently interact with *reason* to shape action. This observation is based on the recognition that there may be many conceptions of *reason* when understood to include a concern for public well-being.²⁴ It is possible thus to study emotions that become collectively recognisable and felt in culturally particular ways within an account of *reason*, *interest*, and *passion*. This method – which aims to bring together the tools of Elster’s emotional choice method and insights from Sajó’s analysis of sentiments – is what I call ‘contextual emotional choice analysis’.

²⁰ Sentiments for Sajó connote coalescing, publically displayed emotions, not all emotions per se.

²¹ See Sajó (2011: 21).

²² The neglect of deep historical study is not entirely disadvantageous in this case: Sajó’s (2016) discussion of sentiments as explanatory variables raise some endogeneity concerns. Consider his discussion of outrage over slave-ownership in the American South: “Where the display of outrage regarding slavery was culturally improper, antislavery sentiments were unlikely to develop.” It is unclear whether cultural conditions for display cause sentiments to grow or vice versa.

²³ On the historicity of emotions see *The Indian Economic & Social History Review*, 54(1).

²⁴ For a discussion of the two-stage effect of emotions and interests, see Elster, J. (2004). *Closing the books: transitional justice in historical perspective*. Cambridge, UK; New York: Cambridge University Press. p. 81. According to some philosophers, emotions actually enhance *reason* by limiting the acceptable ends the actor considers – see de Sousa (2013).

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The present study shall draw focus on *hot passions*, like fear, anger, and enthusiasm, and *cold passions* like cold fear, contempt, cold anger, and pridefulness.²⁵ Elster (2018) presents numerous instances of *hot passions* influencing constitution-making. Enthusiasm, for example, was crucial in shaping the 1789 French Assembly's decision to disband the state's feudal structure in one night. When that same French assembly surrendered to the demands of the crowd, they did so out of hot, visceral fear. Sajó (2011), on the other hand, contends that it was cold fear that inspired the American framers to enshrine safeguards against absolute political authority, as well as staunch protections of civil liberties. In what follows, I argue that while the conditions for instigating strong, *hot passions* existed, and indeed affected some members, the majority remained unmoved by them. *Cold passions*, however, indelibly shaped the Constitution-makers' effort.

II. *Hot passions in the Constituent Assembly*

Constitutions are often written during tumultuous times – following revolutions, war, or financial crisis.²⁶ The same is true for the Indian assembly – the framers deliberated while the subcontinent was engulfed in communal riots that had saw hundreds of thousands lose their lives and millions of people get displaced.²⁷ In addition, the fate of the princely states, which constituted a significant portion of British India's population was still unknown; and India and Pakistan became engaged in a war in Kashmir starting in October 1947. Gandhi's assassination in early 1948 only added to the tumult.

Amidst all this, the Constituent Assembly met publically in the British-built Parliament House in central Delhi, a few miles from the refugee camps for those who had fled violence in Punjab and other parts of North India. The interim government declared curfew in Delhi on several occasions while the Assembly was in session. Members were given curfew passes, and some members asked

²⁵ *Cold passions* might be said to include sentiments. However, since I cannot provide here an account for their construction, I cannot comment upon their role as explanatory variables or motivations.

²⁶ America and France (1789) are the most prominent 'revolutionary' constitutions; Norway (1815) and Germany (1948) are examples of postwar constitution-making; and Iceland's (2010) process was initiated as a response to the global financial crisis. Sweden (1969) is a prominent counter-example. See Elster (2013, 2018).

²⁷ A conclusive account of the casualties of partition is yet to be commissioned. According to Paul Brass, between 2,00,000 and 5,00,000 people died in the Punjab alone. See Brass, P. (2003). *The production of Hindu-Muslim violence in contemporary India*. Seattle: University of Washington Press.

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for police protection.²⁸ The events that shook the city also impacted the lives of the framers: Jawaharlal Nehru's official residence served as a makeshift refugee camp;²⁹ V. P. Menon recounts Vallabhbhai Patel's sense of foreboding when he learned of another riot in the city.³⁰ Partition did not have implications for the physical security of ministers in high office, so Nehru and Patel's fear of the spread of violence across North India was *prudential*, and as we shall see later, may have been *cold* fear. Muslim members of government, and of the Assembly, felt a more immediate sense of danger. Mohd. Saadulla repeated his fear of rioters after his request for police protection was granted.³¹

Even though the prevailing conditions would be considered conducive to 'strong passions',³² *hot passions* had little purchase upon the decisions of the framers (although they did motivate some framers' speeches).³³ I argue that this was the result of time-delays and conditions of separated responsibilities between the interim government and the assembly and within the assembly between legislative and constitution-writing tasks. I qualify my argument with counterexamples.

(a) Time-Delays

The framers of the Indian Constitution limited the role of hot passion within the assembly by adopting a drafting procedure with time-delays at nearly every step. They imposed a formal time-limit for completion of the Constitution and subsequently gave themselves numerous extensions (the duration of the Assembly remains unmatched: it sat for more than three years from 9th December 1946 to 24th January 1950).³⁴ The prolonged duration was partly the product of the

²⁸ Austin (1999: 55n77) mentions "Begum Rasul, Mohd. Saadulla, and others requested protection." See Austin, G. (1999). *The Indian constitution: cornerstone of a nation*. Delhi; Oxford: Oxford University Press.

²⁹ Sarvepalli Gopal describes Nehru's feeling of helplessness and panic in the face of this violence. See Gopal, S. (1985). *Jawaharlal Nehru: A biography*. Delhi: Oxford University Press.

³⁰ See Menon, V. P. (1957). *The transfer of power in India*. Princeton, N.J: Princeton University Press.

³¹ See *Prasad papers*, File 1-H/47-8-9 cf. Austin (1999:55-56n77)

³² See Elster (2018). I read strong passions as meaning a heightened impact of (hot and cold) emotional impulses.

³³ The *hot passions* of some members, who expressed their concerns about prevailing conditions, and about provisions the *government* successfully passed through the Assembly were counteracted by a majority's *cold passions*.

³⁴ It could be argued that the framers had an interest in delaying the Constitution's drafting – they would gain from remaining in power. Although that is possible, I would argue that it is unlikely given that the Assembly was also made the legislature thereby guaranteeing the framers' positions until the first election. This is discussed in greater detail below. I would also add that the framers imposed this limit on themselves through a motion passed on the floor of the House. I cannot speak to the legal implications of the motion's adoption.

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Assembly's legislative responsibilities and partly shaped by the rules the Assembly adopted. The prevailing crises of 1947 and 1948 necessitated prolonged sessions of the Dominion Legislature. In the words of one framer: "then, Sir, as we all know, partition was followed by many tragic events and a heavy responsibility was thrown, not only on our leaders, but also on the Constituent Assembly which began to function both as a constitution-making body and also as the Central Parliament under the Indian Independence Act."³⁵

The Assembly installed three different sets of rules that slowed proceedings. First, there were delays on the introduction of motions (including articles, Committee reports and amendments) before the house. Most documents had to be distributed at least three days before the Assembly would be in session (amendments had to be filed two days in advance).³⁶ The Assembly's President would determine the daily agenda, and it had to be announced at least three days in advance of the meeting. These delays ensured that urgency and the hot-cold empathy gap were moderated- neither impulse would survive for three days unless the stimulus returned.³⁷

Second, the Assembly adopted a system of Committees, like the Drafting Committee, the Advisory Committee, the Sub-committees on Tribal and Minority Rights, etc.³⁸ The Committees, which worked *in camera* and throughout the year (while the Assembly as a whole was not in session), prepared reports on the topics they were allotted and recommended draft articles for adoption.³⁹ The Assembly shelved discussions on matters under consideration by the Committees until they had tabled their reports, and when members put forward provisions for the President's consideration, they were frequently directed to Standing Committees that carefully examined the details of the proposed article.⁴⁰ The committee system introduced a dimension of secrecy to the

³⁵ H. V. Pataskar, CAD XI: 18 November 1949 in *Constituent Assembly debates: Official report*. (Vol. I-XII). (1999). New Delhi: Reprinted by Lok Sabha Secretariat.

³⁶ See Rule 38 (Shiva Rao I, pp. 452-459) in Shiva Rao, B. (1967). *The framing of India's Constitution* (Vols. I-V). New Delhi: Indian Institute of Public Administration.

³⁷ Jon Elster helpfully pointed out that the French framers adopted a similar provision (with a caveat), but overrode it because emotional impulses swayed them to do so. It is possible that the same could have happened in the Indian case – there exists evidence of alteration of other rules on the spot. Only a close historical examination of the Legislative debates and contemporary media reports would sufficiently establish whether or not these rules were violated under the imperative of urgency.

³⁸ Austin (1999: 22 fn 62): "the Assembly had a total of more than fifteen committees"

³⁹ As its name suggests, the Drafting Committee was tasked with producing the draft constitutions.

⁴⁰ See Austin (1999) and Shiva Rao (1967 V: 432-433).

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Assembly's functioning.⁴¹ Elster argues that publicity imposes restrictions on the actors by forcing them to appear to be motivated by *reason* and prevents them from pursuing unconcealed *interest*. It also commits them to positions which they cannot easily change for reputational reasons. In private these restrictions don't encumber actors – secrecy allows actors to bargain from *interest*, and also to change their minds. Secrecy also serves to isolate actors from the vitiating atmosphere of their surroundings. So the committees could theoretically continue working without concerning themselves with developments outside the meeting.⁴²

Third, the procedure for discussing Draft Constitutions also caused delays. Similar to the Westminster tradition of subjecting a Bill to multiple readings, the two Draft Constitutions were each read twice clause-by-clause before the Constitution was finally passed. The evidence suggests that the duration (but not the procedure) was accidental: the Assembly voted in favour of a time-limit (incidentally opposed by many minority members).⁴³ On 14 July 1947, K. M. Munshi sought approval for the provisions in a report which “suggest[ed] that the Assembly should complete its work by the end of October of [1947]. It is highly necessary that the work of constitution-making should be completed at the earliest possible moment”. He provided two reasons for this proposal: the Assembly was no longer encumbered by the Cabinet Mission Plan's proposal of federal groupings and double majorities thereby rendering it a “sovereign body”; and, “things are moving so fast that we cannot go on at the pace at which we intended to go before.” Munshi's plea for urgency was opposed on several grounds, mainly by members of indigenous groups and Muslims.⁴⁴ Nehru intervened to suggest that the debate was irrelevant: the Assembly would attempt

⁴¹ See Elster (1999, 2013).

⁴² This does not account for the experiences of individual members outside the Assembly. It is also worth adding here that the Committees were not the only meetings closed to the public gaze. Austin (1999:27-8, 387-396) describes the Congress Assembly Party, exclusive to the Congress party members and those elected with the Party's support in the Assembly, as a crucial site of decision-making. He suggests that nearly every provision was brought before the Assembly Party before being presented to the Assembly. It was here, he contends, that the ‘oligarchs’ voiced their frank, uninhibited opinions.

⁴³ See CAD IV: 14 July 1947.

⁴⁴ Members of the Muslim League, who had just joined the assembly, like Naziruddin Ahmed, asked for “a little time to study the previous report, the debates, and other relevant papers, before [they] can take a useful part in the House”. Proponents of Hindustani like R. V. Dhulekar saw an opportunity to amend the Objectives Resolution and declare Hindi/Hindustani as the ‘national language’. (He proceeded to express his support for the October time-limit after being pressed for his response on the motion by the President of the House). Jaipal Singh opposed the time-limit because the excluded areas sub-committee would not be able to produce its report by the end of August; while Aziz Ahmad Khan was among those who argued that more time was necessary for debate, even on subjects other than minority affairs. The President's view is instructive: he believes the only

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to complete its task “during [the present] session and take up the remainder in October or November”.⁴⁵ The motion passed, and thus the Assembly incorporated the time-limit in its rules. The framers subsequently dithered on whether this was a formal deadline or an academic one, and by 29 August, they were speaking of completing their task by March 1948.⁴⁶ When the two Draft Constitutions were presented, each was discussed clause-by-clause. The Constitution was not adopted until November 1949 and enacted in January 1950, more than two years after the first deadline was scheduled to pass.

The cumulative effect of these delay mechanisms was the containment of urgency and the empathy gap. In addition to the sobering effect of time between proposals and discussion, all decisions (including those that might have been made under the influence of *passion*) were brought before the Assembly for approval in the form of the Draft Constitutions. This allowed the framers to reconsider their decisions in a cold(er) state, and make changes accordingly.⁴⁷

(b) Separation of Responsibilities: Constitutional & Legislative, and Legislative & Executive

The Constituent Assembly was initially tasked *only* with writing a Constitution- it was a *pure convention* according to the Cabinet Mission Plan.⁴⁸ The Indian Independence Act changed this – it dissolved the Central Assembly, hitherto the federal legislature, and made the Constituent Assembly the Dominion Legislature. This act of the British parliament converted the Constituent Assembly into a post-facto *mandated legislating assembly*.⁴⁹ Elster (2013) argues that legislative

relevant question is that of minority sub-committee reports. He deemed issues like fundamental rights as resolved. B. Pocker Sahib Bahadur supported the amendment without declaring why. Ibid.

⁴⁵ Ibid.

⁴⁶ See *CAD V*: 29 August 1947.

⁴⁷ The drafting committee made numerous changes, especially to fundamental rights articles. For the most part, they reneged on earlier promises that would provide greater protection of civil liberties. See Austin (1999: 101-112).

⁴⁸ See Elster (2013: 206)

⁴⁹ A *mandated constituent legislature* is a “legislature elected with a dual legislative and constituent mandate”, while a *self-created legislating assembly* refers to “assemblies elected to write a constitution which then also assume legislative powers”. The latter better describes the expansion of the Assembly’s role to include legislative powers, while the former offers a more accurate depiction of how the Assembly came to acquire that status. At least formally it was British rule that *mandated* that the Constituent Assembly would replace the Central Assembly. I believe Elster (2013: 209) is wrong to classify the Indian Assembly as a self-creating legislative assembly.

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assemblies are prone to deviations from *reason* in three ways. First, aptitude declines as a result of the extra burden on the framers. Second, “decisions made by the assembly wearing its legislative hat may unduly affect the decisions it makes wearing its constitutional hat”.⁵⁰ Third, membership and *interest* in a mixed body may result in an incentive to enhance the power of the legislature in the Constitution.⁵¹ A fourth concern is that the framers might be wearing their constitutional hat when confronted with a crisis, and consequently, make impulsive decisions about the Constitution. How did these mechanisms impact the Indian assembly, and what were the implications for *hot passions*?

Recall the lament that partition brought with it the additional burden of legislation. The transition to a legislating assembly served as a time-delay mechanism *because* it divided the aptitude on hand for constitution-making. We turn, once again, to Pataskar’s speech on 18 November 1949:

“If these events had not happened probably we would have stuck to our original plan of having a scientific, systematic, complete federation of Units. But these events were combined with the task of framing the Constitution and this largely affected our outlook, which was till then consistent, and also affected many of the aspects of our task. The suddenness of the intervening events blurred, to some extent, our vision. A strong Central Government suddenly became a matter of urgent necessity.”

Here Pataskar addressed the second issue with mixed assemblies – the tendency towards path dependence in legislating and constitution-making roles. He argued that the legislative challenges with which the framers had to cope altered the Assembly’s outlook. Taken together, Pataskar’s observations imply that the mixing of tasks affected the process of constitution-making over a long period of time.

The Assembly debated the nuances of managing legislative and constitutional tasks, and resolved to meet separately, under different presiding officers.⁵² This resolution, in and of itself, would be

⁵⁰ Elster (2013: 211)

⁵¹ The motivations at play could be institutional or personal interest, and, importantly, pridefulness. I demonstrate how pridefulness shaped some of the Assembly’s position in the following section.

⁵² “It is not only possible but necessary for the proper functioning of the Constituent Assembly in its two capacities that its business as a constitution-making body should be clearly distinguished from its business as the Dominion Legislature... [F]or the purpose of avoiding complications and confusion, different days, or

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an insufficient safeguard against the fourth concern (of crises striking while the framers wore their constitutional hats) because a crisis could occur at any time, upending the plan to meet at different times for different tasks.⁵³ And many such crises did occur, although it's difficult to assess if any were addressed first in the Assembly.⁵⁴ The Interim Government met to consider these issues. Attendees included the British (and later Indian) Viceroy/Governor-General; the top-ranking members of the Indian cabinet (Nehru, Patel, etc); and the relevant bureaucrats or armed forces officials. They had discretionary and emergency powers, and sought and procured greater leeway from the legislature.⁵⁵ The government was answerable to the Legislative Assembly, but it did not require its sanction. It is likely therefore, that the fourth concern was mitigated by the presence of the Cabinet, which alone held the authority to carry out executive action to respond to unfolding crises.

All Cabinet ministers were members of the Assembly. Some, like Jawaharlal Nehru, Vallabhbhai Patel, B. R. Ambedkar, Rajendra Prasad, and Maulana Azad, held key positions in multiple Assembly committees. Austin (1999: 23 fn 65) referred to the overlapping memberships of the 'oligarchs' as triangular. "Fourteen of the eighteen [Congress] Working Committee members sat in the Assembly... Five members of the W. C. were also Cabinet Ministers". In reference to the *interest* of members in a mixed assembly, Elster's third concern, the Indian Assembly presented a

separate sittings on the same day, should be set apart for the two kinds of business" (Shiva Rao 1967 I: 582). From the debate on this question, Hussain Imam's proposal is worth noting. If the framers had accepted it, the problem of path-dependence might have been further compounded: "I do not think that we should embark on the full scope of the legislative body, having one hour for questions and the rest for other legislative functions. That would be really taking away too much of the time from constitution making and delaying the work which is in hand...I suggest that the Honourable President may adopt the rules of the Legislative Assembly regarding adjournment motions so that if and when necessary matters of urgent public importance may be ventilated before this House." Hussain Imam, *CAD V*: 20 August 1947.

⁵³ Recall here the above discussion of the French framers in 1789.

⁵⁴ A close study of the Constituent Assembly (Legislative) Debates, outside the scope of the present work, would be necessary to demonstrate this.

⁵⁵ At this time the hurdles on executive action were those that constrained British rule. For an example of increasing discretion see the debates on the Armed Forces Special Powers Bill in Constituent Assembly of India (Legislative) Debates, Official Report (Vol. II: 11-12 December 1947) cf. Bhatnagar, G. V. (2016, September 11). AFSPA was Strongly Opposed in the Constituent Assembly Debates. Retrieved October 18, 2016, from <http://thewire.in/65313/afspa-was-strongly-opposed-in-the-constituent-assembly/>

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complex picture. The *institutional interest* of the executive countered the *institutional interest* of the legislature.⁵⁶

The channels through which *hot passions* could move the Assembly were rife with stumbling blocks: time-delays, committees, dual institutional burden, and differentiated executive responsibilities. Together, this complicated network of institutional features mitigated the effect of *hot passions* by reining in impulses for urgency and the empathy gap, though not entirely without exception. These same features, I will argue, facilitated *cold passions* that shaped fundamental institutional questions in the Constitution.

III. *Cold passions*

In this section, I argue that *cold passions* undergirded two paradigms in the Indian constitution-making experience: the framers' quest for 'national unity';⁵⁷ and the project of 'transformational constitutionalism'.⁵⁸ I suggest that *cold fear*, and to a lesser extent, *cold anger* and *contempt* shaped the arguments assembly members offered to reject political safeguards for religious minorities in their aim to secure 'national unity', a capacious concept that included the nation-state's physical integrity, a sense of shared nationhood, etc. The debates on the powers of the 'transformational state' – born out of an interpretation of constitutionalism that viewed the document as an avenue for social and political transformation – showed how *pridefulness* ran through the framers beliefs about themselves and the people they were framing. I relate my study of *passion* to these conceptual frames because they have been developed by interpretive scholars who have worked on the debates. The argument is that the study of emotional reasoning can supplement these *reason-centric* analyses, although by no means is this an exhaustive account of *cold passion* in the Indian assembly.

⁵⁶ The group interest of the Congress party might also interact with the other two interests – of executive and legislative institutions. That is not to say that these interests always collided – the story of *pridefulness* in the Assembly is one of coalescing interests and motivated reasoning among a majority of the framers cutting across some interest cleavages.

⁵⁷ See Bajpai (2011) and Mehta (2016).

⁵⁸ See Dasgupta (2014).

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(a) Fear, Anger and Contempt in securing national unity

‘National unity’ was a crucial motivating anxiety for the Indian framers.⁵⁹ Bajpai (2011) suggests this anxiety included concern for the newly-born nation-state’s physical integrity; cultivating a sense of nationhood among people divided by class, caste, religion, and language; and rapid progress towards economic ‘modernity’ as a remedy to the crippling poverty comprised this concern for national unity. These concerns are not unique to India – every polity seeking to establish a new legal order confronts these questions in some way. Nor is it the case that the Indian framers had to no precedent to follow, in contrast to their eighteenth-century counterparts.⁶⁰ However, the particular construction of this concern inspired particular emotional responses, and consequently resulted in a unique constitutional document. Far and away the dominant component of the anxiety was ‘the minority question’ – how should India’s minority religious and caste groups be accommodated in state institutions? In the imagination of some nationalist leaders, Hindu-Muslim conflict was “purely a British creation... [the differences] were not in existence before their advent.”⁶¹ Many nationalist accounts accused the British of a policy of ‘divide and rule’, wherein the colonial rulers sought to manufacture divisions among Indians along religious and caste lines to exercise and justify their control over the colony. The nationalists identified minority political safeguards – especially communal electorates – as the institutional manifestation of British perfidy. In Bajpai’s (2011: 87) words, “Partition provided decisive proof, if any were needed, of the destructive effect of minority safeguards for national unity”.

The uncertainty at the eve of British withdrawal converted the threat to the physical integrity of British India from a prospective problem to an immediate challenge. The negotiations between the Muslim League, the Congress, and the British continued until after the Assembly began deliberating. Partition and the calling forward of the British departure were announced seven

⁵⁹ Mehta (2016) writes: “The underlying argument of this paper is that the themes of crisis, impending disunity and the prospect of anarchy, all worked to produce a collective self-understanding in which a concern with national unity were deeply, indeed constitutionally, braided with the sanction and the amplification of political power.” Bajpai (2011: 70) concurs: “National unity was the primary concept in [the framers’ conceptual] vocabulary, in relation to which the other concepts were construed”. Anxiety is used here and elsewhere to connote concern – reasonable, interest-based, or passionate.

⁶⁰ See Mehta (2016).

⁶¹ Purushottamdas Tandon, *CAD I*: 13 December 1946. cf. Bajpai (2011: 86). While blaming the British was a constant refrain, many other members acknowledged that “[their] country or community stands guilty for creating social barriers and divisions” R. V. Dhulekar, *CAD II*: 21 January 1947. See Bajpai (2011: 85-87).

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months into the Assembly's discussions.⁶² After India attained dominion status on 15 August 1947, a slew of other challenges to national unity emerged. By late 1947, India was fighting a war in Kashmir, the interim government was in the throes of a fiscal crisis, and the fate of other princely states, like Hyderabad and Manipur was still in question. The uncertainty about India's territorial frontiers manifested itself in the fluctuation of members attending the Assembly's proceedings.⁶³ It is conceivable that the framers were deeply anxious about the question of national unity.

I will now examine the debates about minority political representation. Bajpai (2011) recounts how the Assembly's approach to Minority Rights moved from an acceptance of separate electorates for religious and caste minorities to a complete disavowal of special political provisions for religious minorities and reserved seats in an undivided electorate for Dalits and Scheduled Tribes.⁶⁴ She suggests that the liberal-democratic aspiration of the Indian framers led them to deny such provisions on the basis that they were 'divisive' and 'primitive'. The framers' concern was simultaneously backward- and forward-looking: they believed these provisions would undermine 'national unity', and their adoption would prove that Indians were unfit to take their place among the liberal-democratic states of the West. I suggest that emotional motivations were interacting with imperatives of *reason* by working through the debates on special provisions for minorities. To be sure, there were many *reasons* to be *prudentially afraid* of the threats to national unity, and to oppose minority provisions. Each of the impending crises presented a near-existential threat to the territorial integrity of the nation-state for which they hoped to author a constitution. Recall that *prudential fear* connotes a rational estimation of the possibility that something bad might happen. In relation to minority provisions, it could be argued that separate electorates and other group-specific representative institutions foster communitarian identification and circumscribe representatives' capacity to represent all their constituents. The identification of minority provisions as the root cause for partition and the kernel responsible for the threats to national unity, however, entails non-reasonable argumentation as well. After all, the drastically reduced and

⁶² See Arvind Elangovan's essay in this volume for a detailed exposition of the negotiations and prevailing uncertainty.

⁶³ After partition it was announced members of the Muslim League from Indian provinces joined the Assembly. Ambedkar's seat was allocated to the Pakistani Assembly, and he had to return with Congress support. Throughout the duration of the Assembly, new members were being sworn in from the Princely States.

⁶⁴ See Bajpai (2011: 116-170).

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disempowered Muslim minority demanded separate electorates to guarantee their representation, not to perpetuate ‘divide and rule’, as these members feared. Upon the rejection of separate electorates, they made the case for reserved seats in a combined electorate. The Assembly rejected this proposal too.

Consider the following examples. Nehru voiced the fear of a fissure between minority claims and national unity when he declaimed “...there is no group in India, no party, no religious community which can prosper if India does not prosper. If India goes down, we go down, all of us, whether we have a few seats more or less, whether we get a slight advantage or we do not”.⁶⁵ Vijayalakshmi Pandit added “if the larger interest suffers, there can be no question of real safeguarding of the interest of any minority”.⁶⁶ Both speakers suggest that partial interests are bound to suffer if the interests of the whole suffer, and their speeches (ostensibly) appeal to *reason*.

In other instances, emotional reasoning is more evident. Purushottam Das Tandon asked of the British “If a hundred years or for that matter twenty years ago, the right of separate electorates were given to different sects of your country, what sort of government would [you] have had today? Would you not have had continuous civil wars?”.⁶⁷ The speaker here expressed *cold anger* against those he held responsible for committing a perceived injustice against him or those he spoke for. Renuka Ray called separate electorates “an echo of medieval times” which were “political devices... [that] serve the interests of our alien rulers”⁶⁸. Here we see evidence of *contempt* and *cold fear*. Speaking with derision about the provisions as unsuitable by virtue of their primitivism, rather than their merits in institutional terms is evidence of the former; and the assessment that these provisions were the design of alien rulers rather than minority communities seeking safeguards betrays *cold fear*. G. B. Pant chided the minorities for the “unwholesome and to some extent degrading habit of thinking always in terms of communities and never in terms of citizens”, and warned that “the minorities if they are returned by separate electorates can never have an effective voice... Will you be satisfied with the pitiable position of being no more than

⁶⁵ Jawaharlal Nehru, *CAD II*: 22 January 1947 cf. Bajpai (2011:78)

⁶⁶ Vijayalakshmi Pandit, *CAD II*: 20 January 1947 cf. *ibid*.

⁶⁷ Purushottam Das Tandon *CAD I*: 13 December 1946.

⁶⁸ Renuka Ray, *CAD V*: 28 August 1947.

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advocates?”⁶⁹ In another speech, Pant argued partly from *reason*: “If in a democracy, you create rival loyalties, or... a system in which any individual or group, instead of suppressing his extravagance, cares nought for larger or other interests, then democracy is doomed.” Simultaneously, “[he] admonished advocates of separate electorates: ‘apart from other things, it is a complete anachronism today. In a free country, nobody has ever heard of separate electorates.’”⁷⁰ Here too, *contempt* for the primitivity of the proposal is clear. After the demand for separate electorates had been withdrawn, a report Vallabhbhai Patel authored confidently asserted: “the abolition of separate electorates had removed much of the poison from the body politic”. Each *passion* assessed here is linked to national unity in a nuanced way, and was likely shaped over time. *Cold fear* stems from the belief that the fragile nation-state is in existential danger; *cold anger* connotes the anti-colonial ire directed at the British for their injustices against Indians; and *contempt* applied to the proposal and the people that were holding India back from achieving the progress it had been denied under colonial yoke.

Political safeguards for religious minorities were dispensed with entirely by the time the second draft Constitution was adopted. The fascination with removing communitarian representation should not, however, be seen as a complete disavowal of British colonial institutions. In what follows, I consider the framers’ attempt to author a ‘transformative constitution’, and the prideful reasoning that undergirded, facilitated, and justified it.

(b) Transformational Constitutionalism and *Pridefulness*

Mehta (2010) and Dasgupta (2014) have argued that the fundamental aim of Constitutionalism in India was different from the Western Constitutions that preceded it. For the Indian framers, rights that protected against state tyranny were necessary but insufficient ends. The ultimate goal was the eradication of poverty and illiteracy and securing ‘national unity’ that would not be imperilled by religious or social conflict. As demonstrated above, this ‘transformative constitutionalism’ was in part a response to sustained cold fear of the disintegration of the newly created state.

⁶⁹ G. B. Pant, *CAD II*: 24 January 1947.

⁷⁰ G. B. Pant, *CAD V*: 27 August 1947 cf. Bajpai (2011: 77 fn 7, 80 fn 11)

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In the struggle against colonialism, the British-educated Indian elite accepted the liberal principles of individual autonomy and representative democracy, but they challenged the notion that Indians were unfit for these institutions.⁷¹ Under Mohandas Gandhi's leadership the movement forged deep links with the rural and urban poor. Like the American colonists whose constitutional vision "stemmed from a deep distrust of power", the Indians objected to the arbitrary and unaccountable British institutions.⁷² However, the Indian elite's marked superiority in material wealth drove them to 'pity' the poor and socially oppressed.⁷³ Once India was free, they would have to confront many other social challenges – including caste discrimination, economic deprivation and religious strife. The leaders of the national movement saw the Constitution as the embodiment of the principles by which a self-determining state would address these problems. How would this transformation be constitutionally realised?

Dasgupta (2014) argues that the colonial state constructed a vast body of rules and norms that allowed its officials to borrow when administering far-flung parts of the diverse colony. The British developed an interventionist apparatus to bring 'order' and 'governability' to the chaotic, 'uncivilised' subcontinent. In the process, executive institutions like the police and the civil services became the powerful backbone of British rule, unlike the legislative Parliaments in contemporary Europe. Administrative Law grew alongside, even ahead of Public Law in India. The colonial state's coercive apparatus was further strengthened in the 20th century to deal with the national movement.⁷⁴ In postcolonial India, the Congress elite sought to use this extensive executive machine to oversee social transformation.

The Assembly adapted many technical instruments – like the Committee system and some rules and procedures – from the British Government of India Act of 1935. Similarly, a Westminster system was deemed most appropriate, albeit with amendments to the structure of the upper house and the head of state's position. More controversial, by far, was their attempt to continue the

⁷¹ See Mehta (2010).

⁷² *ibid.*

⁷³ *ibid.* In the words of Jon Elster: "the action tendency of pity is to alleviate the suffering of the person one pities. But this might also be caused by a sense of injustice." Pity does not connote equal-feeling – it was possible to pity the poor without considering them equals.

⁷⁴ It was the product of the anxiety that gripped colonial rulers- they were convinced of their racial superiority, but they needed to develop extensive protection against 'native' insurrection.

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colonial practice of preventive detention, which allowed colonial administrators to arrest and detain political prisoners without seeking a warrant or magisterial permission. In 1919, Gandhi led his first nationwide protest against the Rowlatt Act, which extended Preventive Detention to a peacetime provision. The interim government was in favour of retaining this provision as well as the legal sanction to conduct searches and arrests without a warrant as a reasonable restriction on the ‘Fundamental Rights’ accorded to citizens. For the sole Communist member in the Assembly, Somnath Lahiri, the article evoked fear. His home was searched and some of his belongings seized during his short term as a member of the Assembly.⁷⁵ Lahiri, and others along with him, charged the framers with writing the Constitution “from the point of view of a police constable”.⁷⁶ Ambedkar, defending the article, sensed that “Article 15 had been violently criticized by the Indian public”.⁷⁷ The Home Minister, Patel, resisted efforts to introduce oversight measures on arrests and detentions, arguing, “It would not be possible for the Executive to surrender their judgement...”.⁷⁸ Although Ambedkar successfully passed an amendment that would make it necessary for an Advisory Board to clear such measures, the Government found a way to restore its unhindered authority in the matter. An amendment was carried on 15 November 1949, just 10 days before the Assembly approved the Constitution, “embodying the views that the Home Ministry had expressed previously”.⁷⁹ According to Dasgupta (2014), some framers, especially those who Austin (1999) calls the ‘oligarchs’, saw the administrative machine as an asset for progress and change rather than a system of power unsuited for liberal democracy. They identified colonial oppression with the identity and motivations of the colonial administrators, not the excess of state power per se. If led by the right persons (Indians), they believed an extensive state machinery was necessary for ‘social transformation’.

⁷⁵ It is difficult to specify whether his fear was hot or cold; or visceral or prudential. The memories of searches might have provided hot impulses for visceral fear. However, his fear may also be construed as prudential, in that this empowered the government to arbitrarily detain and intimidate persons. See *CAD III*: 29 April 1947. For a detailed examination of prejudices against certain ‘political creeds’ and Vallabhbhai Patel’s belief that some political speech ought to be suppressed see Bhatia, G. (2018). *The conservative constitution: freedom of speech and the Constituent Assembly Debates*. In U. Bhatia (Ed.) *The Indian Constituent Assembly: deliberations on democracy*. Abingdon, Oxon: Routledge.

⁷⁶ *ibid.*

⁷⁷ Article 15 in the Draft Constitution allowed for Preventive Detention. Austin (1999: 111)

⁷⁸ *ibid.*

⁷⁹ *ibid.*

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The defence of preventive detention provisions, and subsequent manoeuvring in spite of “violent criticism” from the Indian public, relied on prideful assertions about the virtue of the elite that would hold power in postcolonial India. Recall that *pridefulness* is a prejudice wherein the actor holds a favourable view of herself, her actions, and her beliefs. In Elster’s words, “we find it both in the framers and in the assumptions they make about the framed”.⁸⁰ Now consider the following statements made by members of the Assembly. Brajeshwar Prasad, speaking on the subject of the state’s expansive powers of preventive detention, declared: “it is wrong to regard the State with suspicion” since “today it is in the hands of those who are utterly incapable of doing any wrong to the people”.⁸¹ Responding to Hussain Imam’s motion introducing checks on the state’s use of preventive detention, Lakshmi Kant Maitra proclaimed:

“May I tell him that the situation is now completely changed? We must realise that we are going to start a new State of our own, absolutely independent State, and that the Central Government, the Union Government must be armed with certain powers which can be used by it, not for frivolous reason, but for the interests of the State itself... therefore it is not a question of civil liberties being in danger; it is a question of high reasons of State, and reasons of State should take precedence over everything.”⁸²

The call to suspend suspicion of the state was novel: it was hitherto considered an essential tenet of liberal constitutionalism. *Pridefulness* is also evident from the debates on the Assembly’s legitimacy and competence. The framers were chosen by provincial legislators who in turn were elected on the basis of a partial franchise. The Congress had an overwhelming majority, and upper caste Brahmin Hindus held nearly 80% of the seats- vastly disproportionate to their share of the country’s population. The debates around the question of the Assembly’s legitimacy arose on numerous occasions, triggered by related debates on amendments and ratification. As in the case of debates on minority provisions, *reason*, *interest*, and *passion* interacted in the speakers’ arguments. It must be further stated that my observations pertain to the majority position, rather than the minority that did question the Assembly’s legitimacy.

⁸⁰ See Elster, J. (1995). Forces and Mechanisms in the Constitution-Making Process. *Duke Law Journal*, 45(2), 364–396.

⁸¹ Brajeshwar Prasad, *CAD VII*: 2 December 1948.

⁸² Lakshmi Kant Maitra, *CAD V*: 22 August 1947.

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Consider first the position of B. R. Ambedkar, Chairman of the Drafting Committee. While introducing the Draft Constitution on 4th November 1948, he addressed the suggestions that drafters had erred in making it difficult to amend the Constitution. Taking aim at those who questioned the Assembly's legitimacy, Ambedkar said:

“The Constituent Assembly in making a Constitution has *no partisan motive*. Beyond securing a good and workable constitution it has no axe to grind. In considering the Articles of the Constitution *it has no eye on getting through a particular measure*. The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in their way Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it.”⁸³

It is unclear from Ambedkar's statement why *this* Constituent Assembly has no partisan or particular motive.⁸⁴

On 5th November 1948, Seth Damodar Swarup moved a motion to defer consideration of the Draft Constitution until a new Constituent Assembly was elected through adult franchise.⁸⁵ Pandit Balkrishna Sharma and Shibban Lal Saxena argued against the motion, citing the lack of time, and suggesting that the framers could represent the disenfranchised even though they did not elect them. S. Nagappa mounted a more vehement criticism of Swarup's motion, stating: “We have been elected by the representatives of the people and every member represents some thousands of people. No doubt he does not represent every one of the people that are in that province but *he*

⁸³ B. R. Ambedkar, *CAD VII*: 4 November 1948. Italics mine.

⁸⁴ Gabriel Negretto (2018) demonstrates how partisan affiliation counteracted legislative institutional interest in Latin American constitution-making. See Negretto, G. (2018). *Constitutional Conventions in Democratic Constitutional Orders: The Problem of a Legally Limited Convention*. In J. Elster, R. Gargarella, V. Naresh, & B.-E. Rasch (Eds.), *Constituent Assemblies*. New York: Cambridge University Press.

⁸⁵ Maulana Hasrat Mohani moved a motion that entailed the same deferral the previous day. He argued that an Assembly elected by separate electorates was unrepresentative. For both motions and the debates surrounding them see *CAD VII*: 4, 5 November 1948.

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represents the educated that are the cream of the people.”⁸⁶ Here Nagappa is making the argument that representing the educated elite is better than representing the whole – a prideful judgement about the framed. The question of the Assembly’s representativeness also arose on other occasions. For instance, K. Santhanam’s assertion that “there was hardly any shade of public opinion not represented in the Assembly” was shared by “many other persons” Granville Austin interviewed.⁸⁷ In an earlier debate on the duration of the Assembly, K. M. Munshi declared “this house is sufficiently representative of all interests and there is no reason why we should unnecessary lengthen out the proceedings.”⁸⁸ The members had an institutional *interest* in refuting Swarup and Mohani’s motions, which they voted down right after Nagappa’s speech. Their speeches reflected a prideful view of the Assembly, and in at least one instance, of the population they represented. Thus, there is sufficient preliminary evidence for the suggestion that the constitution-makers were influenced by pridefulness.

Conclusion

I have argued that, for the most part, the Constituent Assembly’s rules of procedure and institutional features effectively negated the influence of *hot passions* on its work. *Cold passions*, especially fear and pridefulness, shaped crucial debates on national unity, minority rights and executive powers. I have disproved two problematic notions about constitution-making in India: that it was a project of calmly deliberating individuals in the midst of surrounding crises; and that it was but one case of ‘copy-paste constitutionalism’ uninformed by the *passions*, as Sajó (2011:145) describes 20th century constitutions. More careful historical work is necessary to demonstrate the causal efficacy of *passion* in Indian constitution-making.

⁸⁶ S. Nagappa, *CAD VII*: 5 November 1948. Italics mine.

⁸⁷ See Austin (1999: 13fn48). Austin believed the elite character of the Assembly was a good thing, for “the masses [had] a growing social consciousness, but little political awareness”.

⁸⁸ K. M. Munshi, *CAD IV*: 14 July 1947.

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