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Introduction

IN DECEMBER 1950 Mohammed Yasin, a young Muslim vegetable vendor in the small town of Jalalabad in north India, was in distress. He had received notification that the town government was implementing a new set of bylaws licensing the sale of various commodities and was providing only one license for the sale of vegetables in the town area. This license had been issued to a Hindu merchant, granting him a virtual monopoly over the vegetable trade in Jalalabad, which forced Yasin and other vegetable vendors to sell their goods after paying the license holder a certain fee. Yasin petitioned the Supreme Court to issue a writ of mandamus directing the town committee not to prohibit the petitioner from carrying on his trade. A writ of mandamus is an order issued by a superior court to compel a lower authority or government officer to perform mandatory or administrative duties correctly. Yasin's lawyer argued that not only was the new regulation *ultra vires* (i.e., beyond the powers of the municipality), it also violated Yasin's rights to a trade and an occupation, conferred by the Constitution of India.

As a vegetable vendor from a minor town, Yasin appears to be a nondescript bystander as the grand narratives of Indian history—*independence, partition, elections, the integration of princely states*—play out around him. Why should he be interesting to us today? Yasin is one of the first Indians to present himself before the new Indian Supreme Court as a rights-bearing citizen. His problem and its solution both emerge from India's new constitutional republican order and represent a phenomenon that is the subject of this book.¹

Yasin's constitutional adventure highlights three features, this book argues, that form the basis for Indian constitutionalism. First, the Constitution mattered as a limit to or a structure for daily living. Second, this constitutional engagement included large numbers of ordinary Indians, often from minorities or

subaltern groups. Third, a significant number of these constitutional encounters were produced through the new Indian state's attempt to regulate market relations.

India became independent at the stroke of midnight on August 15, 1947. Three years later the Constituent Assembly, whose members were nominated by elected provincial legislatures, promulgated a new constitution declaring the state to be a "sovereign democratic republic." This was a remarkable achievement for that time.² The Indian Constitution was written over a period of four years by the Constituent Assembly. Dominated by the Congress Party, India's leading nationalist political organization, the assembly sought to include a wide range of political opinions and represented diversity by sex, religion, caste, and tribe. This achievement is striking compared to other states that were decolonized. Indians wrote the Indian Constitution, unlike the people of most former British colonies, like Kenya, Malaysia, Ghana, and Sri Lanka, whose constitutions were written by British officials at Whitehall. Indian leaders were also able to agree upon a constitution, unlike Israeli and Pakistani leaders, both of whom elected constituent assemblies at a similar time but were unable to reach agreement on a document.

The Indian Constitution is the longest surviving constitution in the post-colonial world, and it continues to dominate public life in India. Despite this, its endurance has received little attention from scholars.³ Although there are a handful of accounts of constitution making and constitutional design, the processes through which a society comes to adopt a constitution still remain underexplored.⁴ Constitutions mark transformations of polity and codify moments of revolutionary change. Yet we have little idea of how Indians understood and experienced the new order marked by a constitution.

This is despite the fact that constitutional debates had dominated newspaper headlines in all major Indian languages since the 1920s. The process of drafting in 1946 evoked a great deal of interest across the country, and the Constituent Assembly was flooded with telegrams, postcards, and petitions from schoolboys to housewives to postmasters, staking claims, making demands, and offering suggestions for the constitutional draft.⁵ Thousands of Indians followed Mohammed Yasin in invoking the Constitution in the courts. These cases included situations of dire necessity (e.g., a Muslim man who, on being informed of his imminent deportation to Pakistan, smashed his tumbler and injured his face and hands to give his lawyer time to file a writ petition while he was receiving medical treatment);⁶ situations of mundane everyday life (e.g., an irate Bengali college professor who protested the rise in Calcutta tram fares by

challenging the legality of the notification);⁷ and leaps of imagination (e.g., a petitioner who demanded that the country switch to matrilineal succession and that all state documents require the name of the mother rather than the father.⁸ As we shall see, the Constitution did not descend upon the people; it was produced and reproduced in everyday encounters. From the earliest days of India's independence, citizens' political action influenced the court and reveals a long history of public-interest litigation driven by litigants rather than judges.

Despite the centrality of the Constitution to public and private lives in South Asia, it remains "ill served by historical imagination" and its history understudied.⁹ It is partly because Indian constitutionalism defies easy explanations. Constitutionalism is based on the desirability of the rule of law rather than the arbitrary rule of men, but both seem to exist simultaneously in India. On the one hand, India has a visibly vibrant constitutional culture. The Indian Supreme Court has been frequently described as the most powerful constitutional court in the world, exercising wide powers of judicial review.¹⁰ A constitutional court is the final authority on interpreting the Constitution and is tasked with ensuring that its limits are not transgressed. Aided by a robust bar, supported by the state, and enjoying tremendous public support, the courts have come to play an all-pervasive role in public life, so much so that scholars argue that "there is not a single important issue of political life in India that has not, by accident or design, been profoundly shaped by the Supreme Court's interventions."¹¹ The state is frequently taken to task, and governmental decisions that violate the constitutional limits are challenged and overturned. More significantly, self-imaginings, interests, identities, rights, and injuries of citizens have become saturated with the constitutional language, and even radical social and political movements are constrained to engage with law and constitutional structures. Marginalized groups, including Dalits and tribals, have transformed the constitution into a public resource through the construction of monumental public statuary commemorating the constitutional promise of equality or through installing stone slabs in villages outlining the constitutional safeguards to tribal areas.¹² Class struggles increasingly morph into class-action cases.¹³

On the other hand, the preponderance of constitutional language and rhetoric stands in sharp contrast to the systemic failure of both the government and the citizens to follow the law. Since the eighteenth century, corruption, expense, and chronic delays have been endemic to the legal system, much of which functions in a language incomprehensible to a majority of Indians.¹⁴

Levels of civil litigation have fallen since independence, indicating that people avoid the courts when resolving private disputes.¹⁵

This visible dialectic of “law and disorder” is similar to processes that have been observed in other states since the 1990s. Jean and John Comaroff argue that the law is increasingly ascribed with having a life force of its own, and the people’s faith in it is sustained because “the promulgation of a New Legal Order . . . signals a break with the past, with its embarrassments, nightmares, torments, and traumas.”¹⁶ Courts emerged as powerful juristocracies across the world.¹⁷ This growing faith in constitutionalism is attributed not merely to regime change but also to neoliberalism and the growth of transnational and human rights networks in the 1990s.¹⁸ Both neoliberalism and globalization lead to a greater dispersal of governance and the fragmentation of state authority, granting law a greater communicative force.¹⁹

The imbrications of the Constitution in daily life and the judicialization of politics have a considerably longer history in India that predates not just newly democratic Africa and Eastern Europe but also older democracies like Canada and New Zealand. Within days of the adoption of the new Constitution, thousands of citizens began invoking the Constitution when challenging state action. This book recovers a new genealogy of conditions in which citizen action drove politics into the courts. Conflicts with the state that had been negotiated through a variety of channels in colonial India, from street politics to back-room negotiations, began to migrate to the courts. Whereas the global judicialization of the 1990s emerged during the withdrawal of state authority, these legal and constitutional channels for conflict emerged at a moment of state expansion and of consolidation.

This book explores how the Indian Constitution, a document with alien antecedents that was a product of elite consensus, became part of the experience of ordinary Indians in the first decade of independence. It traces the process through which the Constitution emerged as the dominant field for politics. It recognizes that constitutions exist in a normative universe, a “world of right and wrong, of lawful and unlawful, of valid and void,” in the words of Robert Cover. This normative universe is constructed by the force of “interpretive commitments—some small and private, others immense and public.”²⁰ This book breaks new methodological ground by studying the Constitution through the daily interpretive acts of ordinary people as well as judges and state officials. Using previously unexplored archives at the Supreme Court, this book charts how the Constitution came to dominate, structure, frame, and constrain everyday life in India.

The Constitution as Triumph

What changed when the Constituent Assembly enacted the Constitution that declared India to be a sovereign democratic republic? Depending on whom you ask, you get two broadly different stories.

The first story is the triumphant institutional one, cherished by lawyers and politicians alike, that is perhaps best described by the Indian Supreme Court: “at one stroke territorial allegiances were wiped out and the past obliterated, . . . at one moment in time the new order was born with its new allegiances, springing from the same source all grounded on the same basis, the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.”²¹ Constitutional theorists have attributed the success of the Constitution to its moment of founding, the installation of a popular nationalist movement that was led by farsighted leaders committed to the rule of law.²²

In the last decade, intellectual historians and political theorists have made an effort to come to the rescue of the Indian Constitution and rehabilitate it as “a moral document embodying an ethical vision.”²³ They have engaged with the Constitution’s text and debates in the Constituent Assembly as sites for the enactment of basic oppositions in political theory: the tension between constitutionalism and popular democracy, between individual and group rights, or between religious freedom and secularism. This small but significant body of work has opened up the Indian Constitution both to scholars who are seeking the core values that undergird the Indian polity and to those seeking an archive of political theory from the Global South.²⁴

The institution of adult suffrage and the institutionalization of the social revolution are the markers of radical change in the Indian Constitution. The institutionalization of universal franchise was a revolutionary act in a deeply hierarchical society—especially when franchise had only recently been extended to women, people of color, and working-class men in various “mature” Western democracies.²⁵ Franchise without restrictions was a sharp break from the very limited franchise linked to communal identities and property qualifications that had been provided through various colonial reforms.²⁶ As Sunil Khilnani evocatively describes it, the imaginative potency of democracy lies “in its promise to bring the alien and powerful machine like that of the state under the control of human will, and to enable a community of political equals before constitutional law to make their own history.”²⁷

More remarkably, the question of economic and social deprivation was made central to the Indian Constitution. The preamble to the Constitution

guaranteed social, economic, and, finally, political justice to all citizens. The Constitution itself laid the ground for land reform by limiting the right to property, provided for constitutionally permitted affirmative action, abolished untouchability and human trafficking, allowed for special provisions to be made for women and children, and gave rights to religious and linguistic minority groups. Under the Directive Principles of State Policy, the Constitution laid out what it called the fundamental principles of governance: the equitable distribution of resources, a free and compulsory education for children, equal wages for men and women, fair work conditions and a living wage, the prohibition of alcohol, the abolition of child labor, and the improvement of nutrition and public health.²⁸ Despite the implicit hierarchy in the implementation of fundamental rights and of the Directive Principles of State Policy, Indian jurist Bhimrao Ramji (B. R.) Ambedkar reassured the Constituent Assembly that “the intention of the Assembly is that in future both [the] legislature and the executive should not merely pay lip-service to these principles enacted in this part but that they should be made the basis of all executive and legislative action that may be taken thereafter in the matter of governance of the country.”²⁹

The Directive Principles of State Policy incorporated a wide range of constitutional aspirations, from economic questions to moral precepts.³⁰ It also linked freedom to the removal of social and economic inequality.³¹ Promising social and economic change through a liberal constitution was a unique experiment in India; it challenged liberal theorists’ formulation that every attempt to resolve social questions of inequality and material destitution by political means would lead to terror and absolutism.³²

Despite their celebration of the radical departures of the constitutional text, intellectual historians remain cautious about the impact of the Constitution. They have reiterated that the Constitution was an elite project. In their narrative, the institution of democracy through the Constitution did not emerge from popular pressure, nor was it wrested from a state; Indian democracy, in their view, was a gift to the people of India by their political elite. Sunil Khilnani cautions us that the powerful ideas of democracy and equality persuaded few outside “intellectual and English-speaking circles” and did not have the backing of any particular powerful group.³³

In the celebratory story of the Indian Constitution, the main heroes are its charismatic and dedicated founding fathers who enshrined the principles of the nationalist movement into the constitutional document and largely abided

by it.³⁴ As the sheen wore off the next generation of politicians, scholars focused on the Supreme Court as the site for strengthening constitutional values and cheered the activism of Indian judges.³⁵

The Constitution as Illusion

Unlike the official narrative of the Indian Constitution, many have seen the document as a mirage and its promise as illusory. The excitement and despair produced by the Constitution is perhaps best described by Sadaat Hasan Mano, one of the finest writers in Urdu in the twentieth century, in his short story “Naya Kanoon” (The New Constitution).³⁶ The protagonist of the story, Ustaad Mangu, is a *tanga* (horse-drawn cart) driver in Lahore, a classic subaltern figure who is aware and excited about the buzz on the street about the passage of the Government of India Act of 1935, which promised to bring greater self-government to Indians. Throughout the story Mangu is elated at the passing of the new act, and he imagines that it will send the Englishmen “scurrying back into their holes.” On the day the act is promulgated, Mangu is assaulted by an English customer for daring to ask for a high fare. Mangu retaliates by landing blows upon the surprised Englishman and shouting, “Well, sonny boy, it is our Raj now. . . . Those days are gone, friends, when they ruled the roost. There is a new constitution now, fellows, a new constitution.” Mangu is surprised to find himself seized by two policemen, who drag him away to the police station. The story closes with the following lines: “All along the way, and even inside the station, he kept screaming, ‘New constitution, new constitution!’ but nobody paid any attention to him. ‘New constitution, new constitution! What rubbish are you talking? It’s the same old constitution.’ And he was locked up.”

Why is this short story about the Government of India Act relevant to a discussion on India’s postcolonial Constitution? In recent years, historians and constitutional scholars have turned to Mangu’s story as a metaphor for independence and the Constitution as a “spectacle of emancipation, i.e., the gap between the vision of emancipation that the law promises and the reality of violence that the law performs.”³⁷ Aamir Mufti describes it as a “lesson in the discrepancy between subaltern struggles and bourgeois aspirations,” in which the subaltern, blinded by the bourgeois project of reform, tries to claim his new rights and is quickly repressed.³⁸ The comparison is particularly tempting because the Constitution of India in 1950 almost identically reproduced

two-thirds of the text of the Government of India Act of 1935, the “new constitution” in Manto’s story.

A skepticism of transformative constitutional change was expressed repeatedly, beginning with the members of the Constituent Assembly. They pointed to the absence of a popularly elected assembly and the limits of its representation. The people had little input on the largely oligarchic process of constitution making.³⁹

Despite the incorporation of universal adult suffrage and a bill of rights, the legal framework of the Indian republic remained rooted in colonial laws and institutions that were designed for centralized control.⁴⁰ The text that the new Constitution reproduced verbatim from the colonial Government of India Act included its controversial emergency power that allowed the central government to proclaim a situation of emergency and suspend fundamental rights, restrict access to courts, extend the life of parliament, and dissolve elected state assemblies.⁴¹ Contrary to constitutional traditions that sought to protect individuals from the state, the Indian Constitution empowered the state to transform society and the economy.

Thus the new fundamental rights could be constitutionally circumscribed on the grounds of maintaining the sovereignty and integrity of India, the security of the state, good foreign relations, public order, public health, and decency and morality, among others.⁴² Somnath Lahiri, the sole Communist Party member in the Constituent Assembly, remarked that “many of these fundamental rights have been framed from the point of view of a police constable.”⁴³ The institutions of colonial government—the police, the army, the judiciary, and the district administration—continued largely unchanged.

Critics pointed out that the easy procedures for amending the Constitution made it an extremely malleable document. A simple two-thirds majority of parliament was all that was required to amend the Constitution, a task made easier by the dominance of a single party until the 1980s.⁴⁴ How could the constitutional text restrain the state’s actions, if it could be altered to suit the state’s purposes? The Indian Constitution has been amended ninety-seven times to date. It was amended seventeen times in its first fourteen years, the period this book examines. At least half of these amendments curtailed judicial review or amended fundamental rights in order to reverse the impact of a Supreme Court judgment.⁴⁵

Another illusory claim is that the Constitution was not authentically Indian or organic to India and thus remained outside the sphere of the people.⁴⁶ This echoes critiques by several members of the Constituent Assembly who had

argued that the Constitution was an alien document that would fail to work because it was made in “slavish imitation” of Western constitutions.⁴⁷ A disappointed member regretfully said, “We wanted the music of the veena or the sitar, but we have the music of an English band.”⁴⁸ Even the authors of the Constitution remained painfully aware that its founding notions were not available as actual experiences to the majority of its citizens. In his closing speech to the Constituent Assembly, Ambedkar observed that with the commencement of the Constitution, India entered a life of contradictions, recognizing equality in political life but denying, by reason of social and economic structures, equality in other spheres.⁴⁹ There seems to be an uneasy consensus that the Constitution reflects a gap between the elites comfortable with Weberian rationality and the people whose everyday discourse was not structured through formal rationality at all.⁵⁰

The Republic of Writs

Rather than promoting either the celebratory or tragic stories of constitutional change, this book presents a contrary argument: the Indian Constitution profoundly transformed everyday life in the Indian republic. Moreover, this process was led by some of India’s most marginal citizens rather than by elite politicians and judges. It shows that the Constitution, a document in English that was a product of elite consensus, came so alive in the popular imagination that ordinary people attributed meaning to its existence, took recourse through it, and argued with it.

In 1951, the year after the Constitution had come into force, the chief minister of the state of Hyderabad agitatedly wrote the following to the government in Delhi:

An extraordinary tendency has been noticed recently for all sorts of people to take cases up to the High Court citing provisions in the constitution relating to what are termed fundamental rights; a Pakistani woman has asked for a stay of an order erred on her by police asking her to leave the state for non-possession of a valid permit, . . . while two displaced teachers who were asked to pass a test of a regional language have prayed for the issue of a writ of mandamus questioning the validity of an order.⁵¹

The situation in Hyderabad was not unique. Much to the surprise of politicians and bureaucrats across the country, Indians from all walks of life began flooding the courts and the public sphere with claims based on the Constitution.

The situation in Hyderabad was remarkable because that state had been integrated into the Indian state only recently and was, in effect, still under military rule.

Despite the apprehensions about it, the Indian Constitution quickly came to dominate public life in India. The objective of this book is to study “constitutional consciousness” as it exists in people’s minds. The book charts the dialectic between the Indian Constitution as “politics of state desire” and the Constitution as “articulating insurgent orders of expectations from the state.”⁵² The former describes how the founders of the Constitution and succeeding governments imagined the Constitution would operate. The latter is generated by people who have their own expectations and make their own demands of the Constitution.

In service to this project of dialectical mapping, this book turns to a set of provisions in the Constitution that have largely been ignored, despite marking a clear break from the colonial past, in addition to the radical provisions of equality discussed above. These are the provisions that provide the right to constitutional remedies, which allowed any citizen of India to petition the Supreme Court for the enforcement of fundamental rights granted in the Constitution.⁵³ The powers granted to the state and provincial high courts (i.e., the appellate courts) were even wider: they were empowered to issue remedies in forms of writs against the state for the violation of fundamental rights, legal rights, and “any other matter.”⁵⁴ Although political scientists and historians have discussed the substance of the fundamental-rights provisions, they have largely ignored the section of remedies as mere procedure. However, with just one stroke these supposedly procedural provisions of the Constitution empowered citizens to challenge laws and administrative action before the courts and greatly enhanced the powers of judicial review.

The introduction of these new remedies occurred just as the state was beginning to expand and intervene in everyday lives in an effort to achieve social and economic transformation. This led to a massive explosion of litigation before the Indian courts, which both the state and the judiciary were unprepared for. Almost all litigation in colonial India was civil litigation, often property disputes, between two or more private parties. Civil litigation rates actually declined after independence, whereas litigation against the state increased exponentially.⁵⁵ The inclusion of constitutional remedies in the form of a wide writ jurisdiction of the courts in newly independent India radically transformed the practices of governance in ways the Constitution drafters did not expect. As the new state consciously sought to mold the behavior of its citizens,

many of them found their livelihoods and ways of life challenged. The postcolonial state drew its legitimacy from its democratic mandate and development agenda, making it particularly hard for electoral minorities to challenge its agenda publicly. A range of individuals disaffected with the policies of the new state, ranging from municipal sweepers to maharajahs, resorted to the courts through writ jurisdiction.

The popularity of the courts arose not only from the nature of the remedies available but also from the speedier hearing accorded to writ petitions in a system rife with endemic delays.⁵⁶ Valued at a flat fee, the writ petition was also a much cheaper remedy than most forms of civil litigation. In 1950 the Supreme Court heard more than 600 writ petitions. Its immediate predecessor, the Federal Court, had heard 169 cases in eleven years. By 1962 the Supreme Court had heard 3,833 such cases.⁵⁷ In contrast, over the same twelve-year period the US Supreme Court (with more than a century of history and influence) heard only 960 such cases. In the first fifty years of American independence, the US Supreme Court had heard about 40 cases, not even 1 a year. The dockets at the Indian Supreme Court, which were more accessible, grew even more exponentially. The wide original and appellate jurisdiction of the high courts, along with the comparatively simple procedural requirements for filing petitions, brought a greater diversity of disputes before the Indian courts than were brought before Western constitutional courts.

The writ petition therefore reveals the extent to which the state could penetrate everyday life as well as the point at which this interference would compel a citizen to petition the court. The adversarial nature of the litigation system forced each side to put forth its claims explicitly, making visible the emerging conceptual vocabulary of democracy. The constitutional court becomes the perfect lens to see top-down and bottom-up conceptualizations of constitutional law in interaction.⁵⁸ The constitutional courtroom thus becomes an archive of citizenship, a space in which the individual and the state can converse with each other.⁵⁹

The new Supreme Court's office was inside the houses of parliament, in the chamber formerly used by Indian princes for their meetings (fig. 0.1). The court was one of three chambers (the others being the House of the People and the Council of States). Chief Justice Harilal Kania and the majority of his brother judges had served on the Federal Court of India, which had been set up in 1937. Although the Federal Court was the first court to exercise appellate jurisdiction throughout India, for the majority of its existence it had only three judges and its jurisdiction was heavily circumscribed.⁶⁰ The coat of arms of the various



FIG. 0.1. Inaugural Sitting of Judges of the Supreme Court of India in the former Chamber of Princes, 1950. Ministry of Information and Broadcasting Photo Division.

princely states looked down upon the original eight judges as they deliberated their cases. In 1956, emphasizing their growing disagreement with the legislature, the now eleven judges moved to their own seventeen-acre complex a mile away.

The location of the Supreme Court in Delhi was a controversial decision. Despite being declared the capital of British India in 1911, the city remained a sleepy government town. There was no vibrant local bar, and the city lacked legal autonomy, coming under the jurisdiction of the Lahore High Court until 1947 and under the Punjab High Court until 1966. Metropolitan lawyers from Bombay, Allahabad, and Calcutta, though sneering at the Delhi bar, began to set up second establishments in Delhi because of the growing number of appeals. The early Supreme Court bar was small, populated largely by refugee lawyers from West Pakistan. The new judges had served a decade or longer on the provincial high courts and on the Federal Court, to which they had been appointed by the colonial government.

The Indian court system consisted of three levels (fig. 0.2). Just below the Supreme Court were the high courts, many of them established since the eighteenth century and housed within neo-Gothic structures at the center of major cities. However, the new Constitution greatly widened their jurisdictions and powers over the provinces. Half a dozen new high courts were established within the former princely states. The new Supreme Court and the

newly empowered high courts sat at the apex of a judicial system whose lower ranks continued to be staffed by executive magistrates.

Below the high courts was the district judiciary, the first point of contact in the legal system for most citizens. It comprised bureaucrats who performed executive functions such as revenue collection and maintenance of law and order and who dispensed justice. As the administration grew more complex, the state established specialized

tribunals with judges and experts to look into areas like income tax. Only the high courts and Supreme Court exercised constitutional jurisdiction; the district courts were the site where the conflicts originated or where cases generated by the new constitutional interpretations of the appellate (high) courts were lodged.

The Constitution laid down the separation of the judiciary from the executive as a goal, but its achievement was a slow process, finally accomplished in the early 1970s.⁶¹ Therefore, the courts exercising constitutional jurisdiction formed a clearly demarcated space that operated at a different register.

Indian litigants had attempted to approach the colonial judiciary for redress from the colonial executive. There was a brief period in the late eighteenth century when the judiciary in Calcutta and Bombay clashed repeatedly in an attempt to impose order on an unruly legal frontier.⁶² However, much of this confrontation was framed in terms of a liberal imperial justice that positioned a judiciary representing the interests of the British Crown and Parliament against a corrupt and unruly East India Company governance.⁶³

The narrative of judicial review in colonial India is one of constant erosion of authority over executive actions. The British Parliament curtailed the jurisdiction of the Supreme Court of Calcutta in 1781 and made the Governor's Executive Council the final body of appeal for all areas outside the city of Calcutta. These limitations were extended to Madras in 1800 and Bombay in 1823.⁶⁴ With the end of the company-state in 1857 and the enactment of the Indian High Courts Act of 1861, the powers of the high courts were pruned, and these confrontations became rarer. Chief Justice Ameer Ali of the Calcutta

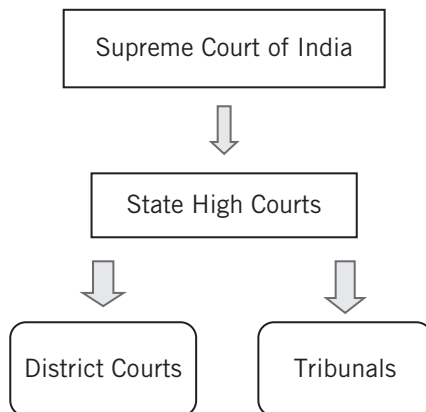


FIG. 0.2. Hierarchy of courts in India after 1950.

High Court was driven to wryly remark that his court had all the powers of the King's Bench in England, provided that "England in India was confined to (a) Calcutta and (b) to British subjects, i.e., servants of the Crown."⁶⁵

Before the Constitution was enacted, only the high courts of Calcutta, Bombay, and Madras had the jurisdiction to issue writs (Allahabad received its writ jurisdiction in the 1920s), and even this was available to and enforceable against only individuals and authorities within the city limits, as determined in the eighteenth century. The courts outside presidency towns (provincial capitals) had no power to issue writs. Even this limited remedy was a subject of much contestation from the executive, and the scope of writs was eroded, which led to the belief that a writ of liberty was a contradiction in a regime of conquest.⁶⁶

Further legislation sought to render the government immune from prosecution. Various indemnity clauses made it mandatory to acquire the consent of the governor-general before the institution of proceedings against government officials, and the courts were precluded from investigating the validity of government orders.⁶⁷ All matters relating to revenue or its collection were excluded from the jurisdiction of the high courts, ensuring that the chief objective of the colonial government remained unhindered.

Indian nationalists and liberal reformers repeatedly made demands (which the colonial government consistently ignored) for greater power and autonomy to be granted to the judiciary and for the establishment of a Supreme Court with broad powers.⁶⁸ Judicial review was expressly included in the constitutional text not just to provide remedies for breach of fundamental rights but also to open the actions of the entire executive to scrutiny. The original draft of the Constitution had revoked the immunity of the government for writs only to the extent that they violated the fundamental-rights provisions. B. R. Ambedkar proposed what he described as a "small but consequential amendment"; it provided that "nothing in this clause revoking governmental immunity shall be construed as restricting the right of any person to bring action against the government of India."⁶⁹ Alladi Krishnaswami Ayyar, who served on the committee that drafted the powers of the Supreme Court, emphasized that Ambedkar's amendment clarified the right of aggrieved individuals to petition the high court for writs not just when fundamental rights were violated but also whenever the government overstepped the limits of its power in exercising its quasi-judicial authority or in implementing statutory provisions.⁷⁰ Article 225 of the Constitution expressly stated that the high courts were

granted jurisdiction over questions of revenue collection, destroying one of the oldest bulwarks of executive immunity.

It is curious that the Congress Party–dominated Constituent Assembly voluntarily granted such significant powers of judicial review, for they were rightly suspicious of the judiciary and emboldened by public support. The answer lies partly in the nationalist accusation that the British were violating the rule of law in practice. A new regime would set itself apart from the colonial regime by reclaiming and instituting the rule of law. More cynical readings suggest that the judicial review was uncontroversial in the absence of a strong tradition of judicial interference with the executive.⁷¹ A closer reading of the workings of the assembly makes it clear that several members, particularly practicing lawyers, saw it almost as a natural step.⁷²

The Supreme Court of India: A Public and Secret Archive

The Supreme Court of India is located on seventeen acres in the heart of New Delhi (fig. 0.3). Built in 1958 and designed by Ganesh Bhikaji Deolalikar, the first Indian to head the Public Works Department, the white and red sandstone complex closely mimics the architectural style of the colonial public buildings in New Delhi. The complex itself is shaped to symbolize the scales of justice. A majestic red sandstone staircase directs visitors and the public gaze toward a high colonnaded gallery that wraps around the building.

Much of the public business of the court is carried out at this level. The colonnade leads to multiple wood-paneled courtrooms hung with portraits of legal luminaries. Litigants, visitors, clerks, and interns mill around the courtroom. Bored policemen desultorily pat down visitors and confiscate the occasional mobile phone. The judges, preceded by magnificently turbaned ushers in gilded uniforms, move through their own private red-carpeted corridors, where conversation is carried out in hushed tones. Stoic court officials in black jackets fill up the offices in both wings, slowly moving reams of paperwork. Cutting through all the spaces are hundreds of black-robed lawyers, arguing, gossiping, and occasionally sprinting between courtrooms with their robes billowing around them. This is the public view of the court, emphasized by the dozen odd OB vans and television crews that are almost permanently parked in the lawn across the main staircase. The Supreme Court is a designated court of record and is required to preserve its records for all eternity. Its final judgments are public and are scrutinized extensively by lawyers and reported



FIG. 0.3. The newly built Supreme Court of India, 1958. Ministry of Information and Broadcasting Photo Division.

in newspapers. A recent study showed that more articles in leading English newspapers discussed the Supreme Court than the parliament or the prime minister.⁷³

However, underneath the public archive, buried in the basement, is the Supreme Court Record Room, which stores the entire proceedings of the cases: the arguments made by the lawyers, the affidavits and evidence produced before the court, transcripts of witness statements, maps of crime scenes, the occasional bloodstained physical evidence, and so on. In 2010 I became the first scholar to work with materials in this “secret” archive.

The aura of secrecy around the Supreme Court Record Room (and the record rooms of the lower courts) is partly physical, in terms of difficulty of access, and partly methodological, in terms of its value as a source. No formal procedure exists for researchers to consult Supreme Court records; access is granted at the discretion of the registrar. Furthermore, legal scholars emphasize the final reported judgment because it is the only document with future consequences and precedent value. The chief justice of India, who very generously gave me permission to consult the records and work in the court, was bemused by my goal. “The judgments are available online,” he reminded me twice, emphasizing that I need not spend several months in the musky interior of the record room. Court officials, while personally welcoming me, were unsure where to place me. The usual visitors to the record room were Advocates-on-Record who wanted to consult a specific file on a case that was usually subject to a continuing litigation, and these individuals left within a few minutes after cross-checking details. In the absence of a designated space for

research, it was decided that I would be allotted the workspace of whichever official was on leave that particular day. Over the course of six months, I, along with cloth bundles of files, moved through a series of offices in the court complex. This book is grounded in the exploration of this archive, both as a physical space and a discursive one.⁷⁴

In order to understand the process of constitutional change, I sought early challenges to the new regulatory authorities and legislation that were set up as part of the state project to transform society and the economy, which emerged as critical cases. These cases became important as legal precedents and also resonated outside the legal sphere, in the form of discussions within the government or in the public sphere. Thus some, like the cow slaughter case, were repeatedly and frequently cited by early law textbooks and commentators; others, like the prostitution case, generated anxious correspondence between bureaucrats in state archives; still others, like the Prohibition case, were extensively discussed in newspapers and cartoons. The constitutional archive, while centered in the record room, is much larger than the records it contains.

Another important feature of this archive that became apparent to me was that the challenges to particular regulatory laws were dominated by individuals who belonged to the same caste or community. Since South Asian names mark both religion and caste, I first noticed this phenomenon when looking at the registers of case names, but a close examination of the case file showed that litigants almost always identified themselves by the community they belonged to. Minority communities (of caste and religion) appeared to be overrepresented in the courts, which shows that they took the state's obligations to protect them seriously. This book provides evidence that electoral minorities—that is, members of communities that were unlikely to represent themselves through electoral democracy because of class, sex, or race—were overrepresented before the courts in constitutional cases. Central to the construction of the constitutional order is a distinctive form of subalternity generated with the installation of electoral democracy through the tension between legislation and judicial review.

Although such a study cannot be exhaustive, this book attempts to capture the broadest range possible of regulatory measures and geographical distribution, ranging from Bombay to Bengal and covering large cities, small towns, and rural settings. Much of the existing scholarship on the Constitution is organized on the evolution of particular rights, largely property, free speech, and religious liberty, and is written to explain the evolution of that particular right

to the present moment. This book's analytic frame is the new regulatory state that emerged in the 1950s, and it pays considerable attention to the under-explored areas of civil liberties (e.g., freedom of profession) as well as the field of administrative law. Questions over the right to property, religion, equality and free speech are also explored.⁷⁵

Book Schema

This book seeks to demonstrate how constitutionalism became the governing frame in postcolonial India through a social history of constitutional and administrative processes. It does so through the minutiae of multiple constitutional encounters between citizens and the postcolonial state rather than through the construction of a teleological narrative.

The four numbered chapters are each named after a leading case that dominates the field. This is in tribute to both the formal discipline of common law adjudication, which is organized around legal cases, and the genre of popular legal writing. Legal thrillers like the Perry Mason novels of Earle Stanley Gardner or the courtroom dramas of John Mortimer remain popular in India. Lawyers like Khalid Latif (K. L.) Gauba and Kailas Nath Katju wrote best-selling and salacious titled narratives of famous trials.⁷⁶

Each chapter is framed around a particular set of constitutional cases and performs three tasks. First, it uncovers the deepening reach of the Constitution in everyday life. At the heart of each case is an attempt to transform the daily life of the citizen, be it through changing food practices, drinking habits, access to clothing, or sexual behavior. Through an engagement with quotidian practices, each chapter also highlights the changes or lack thereof during the transition from the colonial to the postcolonial. Second, in recognition of the plurality of citizen experiences with the Constitution, the analysis focuses on a different citizen political subject in each case. Chapters 1 and 2 deal with new spheres of regulation, prohibition, and market controls, whereas chapters 3 and 4 focus on how older regulatory debates over prostitution and beef eating became transformed in independent India. Finally, each chapter is also representative of a new form of legal strategy or technique that emerged in the period.

Chapter 1 is built on the litigation over the imposition of a draconian Prohibition regime on Bombay and focuses on the emerging practice of the test case. It also highlights how constitutional cases came to affect everyday legality. The Prohibition laws in Bombay and other provinces, brought in to enforce

Article 47 of the Constitution, were among the earliest attempts by the post-colonial state to regulate the everyday life of its citizens. The Prohibition policy was a critical aspect of the attempt of the state to fashion a postcolonial identity for itself by freeing its citizens from what it called the foreign practice of drinking. However, it relied on the mechanisms of the colonial state for its implementation, opening up questions about state involvement in private life and the role of the police in a democracy. Given that the majority of litigants were Parsis (Indian Zoroastrians), a community with strong links to the liquor trade, this chapter explores the emerging idea of public interest and the relationship between liberty, property, and community identity. The chapter also demonstrates how even minimal legal victories were able to erode the state's confidence in its abilities.

Chapter 2 examines a series of administrative law challenges to the Essential Commodities Act. Independent India retained commodity controls that were established to meet wartime shortages but had become a permanent instrument for addressing the needs of the developmentalist state. The system of commodity controls exemplified the permit-license-quota *Ra*, a form of economic regulation that characterized the Nehruvian state, and sought to discipline the market economy by criminalizing economic offenses. Economic offenders, often petty traders from the Marwari community who were denied political legitimacy, sought to challenge this new criminal law through the language of constitutionalism. Complicating the view that this system of controls contributed to a culture of corruption, this chapter argues that judicial review of administrative action, the hallmark of the rule of law in a state, emerged in India from this illegality and culture of corruption.

Although the first two chapters focus on the new fields of politics (Prohibition and economic controls, respectively) that were generated by the Constitution, the subsequent two chapters focus on how the enactment of the Constitution transformed politics dating back to the nineteenth century.

Chapter 3 examines the transformation of the political agitation over cow protection by the enactment of the Constitution. Although the debate over cow protection had always been framed in terms of the religious rights of Hindus and Muslims, the Constitution met the demands for cow protection on ostensibly neutral economic grounds and laid it down in Article 48 as a directive principle of state policy. After partition and democratic elections, the new elected state governments of north India enacted strict laws prohibiting cow slaughter and criminalizing the consumption of beef. This chapter examines a writ petition brought by three thousand Muslim butchers—possibly

India's first class-action suit—that challenged these bans through a language of economic rights rather than religious freedom. It examines how religious freedom, minority rights, and political mobilization were transformed through the emergence of the Constitution as a site for politics.

Chapter 4 explores the new laws against prostitution, enacted to enforce Article 23 of the Constitution, which sought to end the trafficking of women. For nationalists and leaders of the Indian women's movement, independence meant the achievement of constitutional and legal equality and the emergence of the republican female citizen as a moral, productive member of society. However, legislators and social workers were confronted by a different conception of freedom when sex workers began to file constitutional challenges to the antitrafficking laws. They asserted their constitutional right to a trade or a profession and to freedom of movement around the country, and they challenged the procedural irregularities in the new statutes. The chapter demonstrates that despite the sex workers' minimal success in the courts, this litigation prompted mobilization and associational politics outside the court and brought rights language into the everyday life of the sex trade. This is evident from the deep anxieties this largely unsuccessful litigation created for politicians, bureaucrats, and middle-class women's activists.

The epilogue underscores the three connected themes that emerge from the cases: the process through which the Constitution emerged as an organizational assumption and a background threat for the state; the greater acceptability of procedural over substantive challenges to government action; and the origins of constitutional consciousness among certain citizens.

Demonstrating the early emergence of the constitutional field through the acts of marginal citizens, this book challenges the established narrative of the rise of judicial power in India as well as theories of juristocracy globally, which locate this shift in the 1980s and identify the main actors as judges, politicians, and international nongovernmental organizations (NGOs).

Rethinking the People's Constitution: The Constitution

The title of this book, *A People's Constitution*, refers to how we understand constitutions and imagine people's relationship to them. Constitutional and administrative history has long been out of fashion in India. This is in complete contrast to the United States, the other nation with a long history of constitutionalism and a powerful Supreme Court, where constitutional history threatens to crowd out other bodies of legal history. The dry and voluminous tomes

that exist on the subject in India date back to the 1960s; they are consulted largely by those preparing for government service examinations or serve as treatises for practicing lawyers tracing the evolution of a doctrine.⁷⁷ Judges are central, and judgments are the final word. The historian's neglect of constitutional law arises from its identification with elite histories and linear narratives. This book makes a methodological shift by focusing on the contingency of constitutional law and the processes of mediation and translation.

The Constitution as Practice

This book argues that by asking “What did the court do?” in a certain case, we fail to consider the real contestations among judges, litigants, lawyers, and other actors in the presentation of legal claims. To understand how constitutional law works in India, then, it is necessary to understand what people (whether legal officials or ordinary citizens) believe law is and what they do with this knowledge as they make decisions in their daily lives.⁷⁸ An equally frustrating query is “Who won the case?” Although the question is tempting, it is reductive and often unhelpful in explaining people's repeated engagement with law. This book challenges the idea that constitutional interpretation is the monopoly of state elites and recognizes that there are various ways of reading and interpreting the text.⁷⁹

This book challenges the singular truth produced by a judgment-driven narrative by emphasizing the contingency and the contestation that make up the process of litigation. People who decided not to go to court are as important as subjects of study as people who did go to court when faced with a similar dispute. Similarly, this book pays equal attention to the losers in constitutional litigation, exploring what their vision of the correct constitutional order would have been. Legal losses are not always understood as such outside the legal arena. The book examines the afterlife of a court case, not just through its circulation as legal precedent but also through its effect on the lower courts, executive practices, and popular memory. This wider canvas shifts constitutional law away from a teleological project to an arena for struggle.⁸⁰

The Constitution as Archive

What changed with the adoption of a written constitution? What did it mean to be a citizen of a sovereign republic? What did freedom mean to citizens of the Indian state? The answers to these questions remain surprisingly elusive.

The Indian state after independence has received little historical attention compared to both its colonial predecessor and its more recent past. Until recently, disciplinary divisions marked the study of India before independence as the province of historians; after independence, political scientists and anthropologists dominate.⁸¹ Research was also stymied by poor record keeping and other archival practices of the postcolonial states. State documents after independence, the mainstay of histories of colonial India, have rarely been transferred to the archives.⁸²

This book focuses on the two decades that have been described as the Nehruvian period, which begins with Jawaharlal Nehru's appointment as prime minister in 1947 and ends with his death in 1964. Politically, the Congress Party, headed by Nehru (whose leadership was virtually unchallenged after 1952), held office continuously in the central government at Delhi and in almost all state and local bodies. In contrast to contemporary India, which is dominated by neoliberal economic policies and the increased visibility of a politics of identity based on caste and religion, the Nehruvian period has been defined as dominated by a consensus on socialism, secularism, and nonalignment.⁸³ Through centralized planning and modern developmental projects, the primary aims of the state were to combat poverty and to reduce India's dependence on Britain. Its politics were seen as modern and liberal and were dominated by debates about class rather than identity. Its foreign policy was based on principled nonalignment between the Eastern and Western blocs during the Cold War and an opposition to militarization.⁸⁴

We still know very little about the Nehruvian state.⁸⁵ We know particularly little about the role of provincial and local governments, let alone the quotidian lives of ordinary citizens.⁸⁶ However, these constitutional cases are valuable for the breadth of interactions between state and citizen that it makes visible. The Supreme Court Record Room provides a new archive of postcolonial India, and its files contain a variety of documents, including affidavits, government memoranda, newspaper reports, and printed material, that were submitted to the court for evidence. Given the spotty coverage of records in the state archives for this period, the court's record room becomes even more valuable.⁸⁷ These materials open up the cultural practices of the Nehruvian state, the institutionalization of law and legal discourse as the authoritative language of the state, and the "materialization of the state in . . . signs and rituals" and in the practical language of governance (i.e., assertion of territorial sovereignty, development, and management of the national economy).⁸⁸

The emerging scholarship on Nehru's India has focused on how citizens encountered the state in various places. As a result, studies on state formation in postcolonial India have focused on the centralized formation of cultural production from above, either through an analysis of debates among "powerful state actors" about state-produced documentaries, organization of parades, and new practices of town planning or by tracing the intellectual history of the new consensus on an Indian model of development that emerged among elites.⁸⁹ There is an assumption that most citizens remained outside these elite discussions altogether and were increasingly puzzled by their terms. Even though figures like Nehru were aware of the gap and constantly sought to explain the operations of the state and democratic politics to the people, they were caught within their own conceptual language and the limitations of the intelligibility of English.⁹⁰

There is a broad consensus that in the absence of a mechanism of representation, the colonial state relied more on oppressive power and less on self-discipline. The logic of racial difference made it impossible to create a modern liberal state without superseding the conditions of colonial rule.⁹¹ This book examines the nature of postcolonial governance: how regimes and techniques that were predicated on racial difference worked when discrimination was erased and popular representation introduced.

The ambition of the postcolonial state was to reshape both society and the economy. New instrumentalities were created to plan, review, and monitor these programs, and thousands of new laws were enacted by all levels of government. Of the 437 pieces of central-government legislation passed in a century and a half and found in a compilation of civil laws made in 1958, 140 were passed in the first decade of independence. In addition, 73 of the 191 acts involving penal sanctions belonged to the same period.⁹² The majority dealt with social or economic regulation or administrative process, whereas only 28 of the approximately 400 colonial laws could be identified as such.⁹³ The Constitution created a powerful central government with vast revenue-raising powers and virtually blanket powers of legislation. The Planning Commission was established to create overall plans within which a "protective but realistic socialism would be created." The economy was subjected to regulatory control, perhaps more stringent than that of the agencies set up by President Franklin D. Roosevelt as part of the New Deal. A huge public sector would make the manufacture and production of goods and services so vital that they could not be left to the vagaries of private enterprise, and a new import policy would

ensure a measure of austerity for the national good for the Indian middle classes.⁹⁴ The police powers of the state expanded massively at the same time that democratic processes were being implemented. Police powers are deeply rooted in the idea of public welfare, and by tracing changes in police power this book uncovers the transition from the colonial idea of the public to a postcolonial public. The familiar story of the state is of tax collectors marching into villages, social workers teaching housewives about nutritious diets, doctors vaccinating babies, and forest dwellers being displaced to make big dams. This book shows a different side of the experience, when the people not only refused to pay the tax but also started making claims against the state that used the state's own vocabulary.

The most visible practices of citizenship in Nehru's India have been those of refugees and of people displaced by partition. Research in this area has been aided by the preservation of the records of the Ministry of Refugee and Rehabilitation, unlike other ministries, as well as multiple projects to record the oral histories of partition survivors. The refugee experience offers two models of state society relations: one that recognizes the helplessness of individual citizens in the face of bureaucratic violence and decisions from above, and one that emphasizes the active agency of refugees, who used collective action to persuade lower-level officials to deviate from the letter of the law.⁹⁵ Drawing on both approaches, this book turns to the emergence of the Constitution as a field in which the state imagination and citizen agency would interact.⁹⁶

The archive of litigation captures a broad spectrum of everyday interactions between the different levels of the state and its citizens. In 1958 the Law Commission report on the administration of justice argued that since

the country stagnated for one hundred and fifty years of foreign rule, our legislatures are now trying to advance the nation in all directions. In their zeal to achieve quick results, they have not infrequently enacted legislation interfering with the vital and daily functions of the citizen. In order that their policies may go forward uninterrupted they have endeavored to entrench the executive and succumbed to the temptation of restricting the powers of the court.⁹⁷

As the new state sought to implement its policies through laws and administrative action, those affected by it frequently appeared before the courts. The docket might include an association of printers challenging the state government's takeover of textbook production;⁹⁸ a schoolgirl refusing to comply with a government order forcing her to study in her mother tongue;⁹⁹ a widow

protesting the requisitioning of her apartment by the rationing office;¹⁰⁰ a Hindu man unable to take a second wife because of marriage law reform;¹⁰¹ and a Communist Party newspaper editor facing censorship by the central government.¹⁰² It is not surprising, therefore that citizens “make of the rituals, representations, and laws imposed on them something quite different from what their originators had in mind.”¹⁰³

The Constitution as Democratic Practice

Unlike studies on how the state was produced from above, the Constitution opens up ways that the state is undone and negotiated from below. As this book demonstrates, constitutional litigation provided an option for citizens to insert themselves into an elite conversation. The writ petition and the new Constitution compelled state authorities, including high-ranking bureaucrats and ministers, to come to court to defend their policies. It also required them to respond specifically to the claims made by the litigants. The constitutional courtroom is distinctly different in form and content from the records of the executive or the legislature; here, instead of citizens encountering the state, the state suddenly encounters its citizens.

The courtroom was therefore the space of the unexpected. A study of the Supreme Court in the mid-1960s showed that two-thirds of the cases involved a level of government on one side and an individual or a private party on the other side. The government lost fully 40 percent of its cases in this category of litigation. Moreover, in 487 of these 3,272 decisions, the validity of certain legislation had been explicitly attacked by the private party in the dispute, and in 128 of these instances the legislation was held unconstitutional or otherwise invalid in its entirety (twenty-seven state laws, four laws) or in part (seventy state laws, twenty-seven central laws). The study concluded that “few, if any, other governments in the world fare as poorly in encounters with their citizens before the nation’s highest judicial tribunal.”¹⁰⁴ It is the uncertainty of the encounter in the courtroom that makes it a valuable archive, for law is the arena in which abstract new principles run up against the messiness of social change.¹⁰⁵

Rethinking the People’s Constitution: The People

The people who inhabit books on constitutional law are judges, lawyers, and the occasional politician. In doctrine-driven scholarship, judges emerge as the central actors, and little attention is paid to the actual litigants or to the

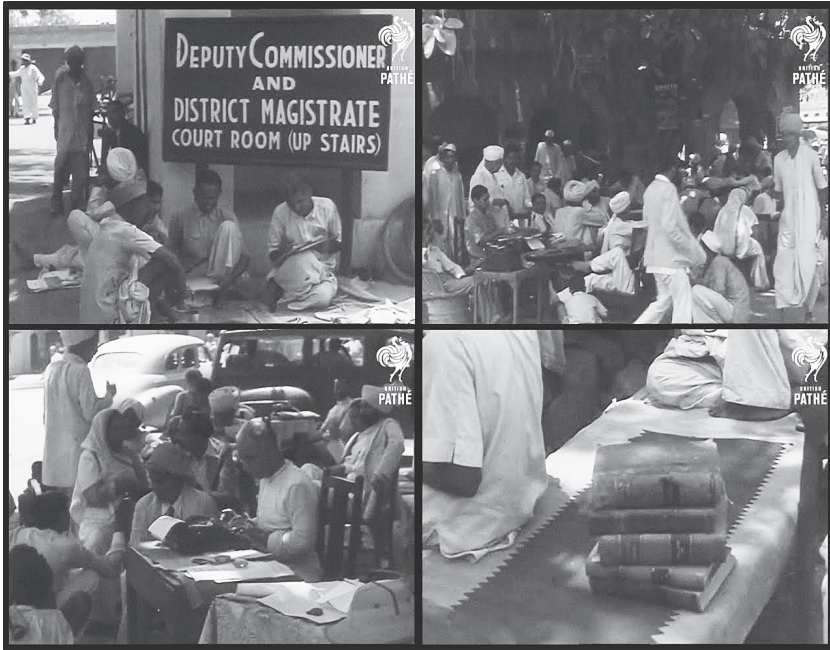


FIG. 0.4. Scenes from *Lawyers of Delhi* (Pathe Films, 1948) of refugee lawyers and clients conducting business on the streets outside the Delhi district courts.

histories of the disputes. It is not surprising, therefore, that the major debates over constitutional law in India have been framed around the question of judicial intervention or activism: What is the appropriate role for judges in a democracy?¹⁰⁶ This book makes a methodological shift away from the approaches distinguished above and toward a social history of constitutional law. In seeking to integrate the subjects of Indian social history (subaltern actors and everyday life) and Indian constitutional law (high politics, judges, and political theory), I draw upon the methods of constitutional ethnography to “better understand how constitutional systems operate by identifying the mechanisms through which governance is accomplished and the strategies through which governance is attempted, experienced, resisted, and revised, taken in their historical depth and cultural context (fig. 0.4).”¹⁰⁷

The central actor in this book is the citizen litigant, who has received little attention as a political actor in South Asian history. Litigants, and even litigation itself as a mode of political action, have easily been labeled bourgeois in India; as such, litigation has been regarded as an activity unavailable to the majority of the population. The popular argument is that the bulk of democratic

politics in the postcolonial world, particularly India, lies in the realm of political society in contrast to civil society. Whereas civil-society politics are marked by modern associations such as autonomy, deliberative decision making, and individual rights and operate through formal institutions like the courts and the media, political-society politics “make their claims on government, and in turn are governed not within the framework of stable constitutionally defined rights and law, but rather through temporary, contextual, and unstable arrangements arrived at through direct political negotiations.”¹⁰⁸ Law is regarded with suspicion here because its application seeks to disrupt the tacit acceptance of illegalities, such as squatting or vending without a license.

This book challenges the above view as an empirical fact, showing that thousands of individuals who turned to the court were from groups that were marginalized both socially and economically in independent India. Although only a few could be considered to be absolutely poor, many participated in the informal economy or were rendered marginal because of their religion or their sex. This diverse group of litigants included prostitutes, Muslim butchers, Hindu refugees, Muslims who had been evicted from their homes, vegetable vendors, and even the occasional peasant rebel. This book does not suggest that litigation was an option available to all citizens of India but only argues that access to it was not determined solely by one’s socioeconomic class.

Unlike litigation in the United States, to which it is often compared, strategic litigation in India was not driven by NGOs or public-interest law firms. For organizing legal campaigns nationally, there was no Indian equivalent to the American Civil Liberties Union in the United States or the Haldane Society of Socialist Lawyers in Britain. The lawyers who appear in this book are largely ordinary lawyers, handling a range of different matters, who were approached by their clients. However, India at the time of independence had at least 72,425 legal practitioners.¹⁰⁹ Although the number might seem small relative to India’s population, it was the second highest in the world after the United States and was striking, compared to most newly independent states of Asia and Africa. For instance, on the eve of independence, Indonesia had only 36 native lawyers. China reported only 3,000 lawyers in 1957, despite having a comparable population to India’s. The situation in the former British colonies was equally dire, with expatriate Indians making up most of the non-European legal profession in eastern and southern Africa.

By the 1940s the Indian legal profession had come to constitute a fairly well-defined professional public, with common journals, association meetings, and lobbying groups. Lawyers who represented opposite sides and the judges who

heard them continued to share professional and social bonds. It is this bond that the book explores in order to contextualize legal professionals as mediators. In the decade after independence, lawyers, judges, and legal academics were consciously engaged in examining the problems of the Indian legal system. Through commission reports, journal articles, biographies, and newspaper editorials, they spoke as lawyers expressing their concerns and visions for the new legal regime.

The People as Postcolonial Citizens

How were the claims and strategies of Indians as postcolonial citizens different from their claims as colonial subjects? Rights claims and rights consciousness in India did not emerge with the enactment of the Constitution. The challenges in a search for rights consciousness arise from the fragmented nature of the public sphere in colonial India. Indians were seen to lack the Liberty Tree of British imaginings. In his history of liberal thought in India, Christopher Bayly has emphasized how everyday encounters in colonial India informed the debates among both British and Indian intellectuals over the rights of Indians. For instance, cases of lascars (Indian seamen) in Britain who were damaging ships in response to mistreatment opened up a debate over the rights of Indians and their relationship to British property.¹¹⁰ Demanding access to new professions and jurisdictions across the empire, Indians formulated and laid claim to various universalist ideas of citizenship even when it was being denied to them.¹¹¹ However, these forms of rights and claim making were limited in significant ways.

First, even the most persuasive advocate of these British Indian claims had little ability to enforce them. The powers of the courts were trimmed, and the limited representative government that existed had minimal powers. Thus a majority of these claims were expressed through the petitioning of various authorities, a practice that later nationalists would pejoratively describe as mendicant liberalism. Early Indian liberals adopted a juridical model of justice, but they saw the British Crown and Parliament as their court, where they could make appeals against the despotic local colonial government.¹¹²

Second, in the absence of guaranteed liberties, many of these claims had to be made with great subtlety, through “parody, innuendo, and indirect criticism,” and the claimants had to search for new forums in the absence of representative institutions and in view of the elusiveness of the law.¹¹³ Finally, Bayly makes an important distinction between claims made by rights-bearing

individuals (which formed the basis of Indian liberalism) and claims made by holders of “ancient customary liberties.”¹¹⁴

The demand for the protection of “ancient customary liberties,” made by subjects ranging from Hindu widows insisting on their inheritance rights to temple authorities resisting taxation, formed the more broad-based secondary order of rights claims in colonial India. This order drew on promises made by the colonial government, in 1772 and 1858, to apply Hindu and Muslim religious laws to matters concerning marriage and inheritance. These promises became a point of furious contestation between the state and various groups of citizens. The colonial state’s interference in the private domain was resisted by many nationalists, who viewed the incipient nation as enjoying sovereignty and superiority in the inner domain of family, culture, and community while conceding the colonial state’s dominance in the outer domain.¹¹⁵ As recent scholarship has argued, the administration of Hindu and Muslim law did not merely resurrect scriptural authority but transformed it through liberal ideas of equality, women’s rights, and difference.¹¹⁶ Tanika Sarkar argues that rights were developed from messy encounters between scriptural law and the Anglo-American legal system rather than from any form of systematic political thinking.¹¹⁷ Unlike the West, where group rights emerged within established civic communities, in colonial India rights were accorded to groups before the formation of a civic community, that is, the nation.¹¹⁸

The Constitution transformed both orders of rights. It brought forward a written code that explicitly granted rights to all citizens. Citizens belonging to a broad range of classes presented themselves before the state as rights-bearing individuals, in contrast to petitioners seeking to have some rights recognized or propagandists working through innuendo or shadows. The difference is not merely semantic. Rights claims in colonial India were first a question of recognition—that is, of whether the subject had a right—whereas under the new Constitution they became a question of enforcement, based on an assumption that the existence of rights was already guaranteed. A legally enforceable right is distinct from the same right framed as a moral claim or as a privilege granted by the benevolent colonial state.

Furthermore, the distinction between claims made as rights-bearing individuals and those made as holders of customary liberties became difficult to sustain after independence. The argument for noninterference with custom and tradition had been based on the fragmented authority between the alien state and its communities. However, with independence the state moved from the outer sphere to encompass all areas of life. The Constitution explicitly

recognized religion and family as arenas for transformation. The right to practice and profess one's religion was limited on several grounds, including public order, morality, and health.¹¹⁹

The most drastic change from the precolonial system was the displacement of a normative inequality as the foundation for the conceptions of rights in India. Rights under the colonial government were determined by caste, class, and sex and drew on custom.¹²⁰ The Constitution, however, heralded a formal equality between all citizens and created a common source of rights for all. However, as the constitutional founders recognized, this did not herald immediate social transformation. Given the limited history of individual rights claims in colonial and precolonial India, from what source did the new post-colonial rights claims emerge?

The People, Property, and the Market

The cornerstone of the colonial legal system and classical liberal theory was the protection of individual property rights. Property law thus became the framework within which status-based community identities could be incorporated into state-recognized individual rights.¹²¹ The language of property rights was called on even when other rights were at stake—for instance, disputes over religious ritual and authority were settled by appealing to property titles.¹²² David Gilmartin and Jonathan Ocko argue that property law provided the model for the notions of rights in colonial India and linked the individual and indigenous conceptions of identity together. Thus, religious and customary privileges came to be conceptualized as forms of individual property. It was not surprising that the only right guaranteed in the colonial Government of India Act of 1935 was the right to property.¹²³

However, the right to property itself became a ground for contestation in the Constituent Assembly. Several members argued in favor of weaker property rights to allow the state to bring about land reforms and redistribute property. Although the Constitution guaranteed the right to hold, acquire, and dispose of property, the right was subject to several limitations. Confronted with early court decisions striking down land reform law as violating the right to property, parliament sought to successively amend the Constitution and narrow the right. The very first amendment to the Constitution in 1951 granted the state the power to acquire property for “public purposes” or to “secure property management.” Laws implementing such acquisitions were declared immune to judicial review and fundamental-rights challenges. The right to

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