

The Constitution of India

A Contextual Analysis

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Origins and Crafting of the Constitution



Pre-colonial forms of governance – Constitutional forms of government under the East India Company and The British Raj – Nationalist efforts at Constitution making – Crafting a Constitution for the new republic

I. INTRODUCTION

INDIA HAS A long civilisational history dating back to ancient times. Historians have noted how the many kingdoms and dynasties that ruled over parts of the Indian subcontinent from 500 BC onwards experimented with and implemented many innovative features of law and governance.¹ As we will see later in this book, some aspects of the older traditions of the law survive in the contemporary legal system, especially in the realm of religious laws, and have influenced the nature of multiculturalism in Indian constitutionalism in significant ways. These ancient traditions of law and governance are often invoked in contemporary political and constitutional discourse, sometimes by judges and Cabinet Ministers, and accounting for them is important to understand contemporary constitutional discourse. However, all these measures were engineered while staying broadly within the structural framework of monarchical and dynastic systems, which, despite their many variations, did not impose constitutional limits upon the authority of the ultimate power holder. Nevertheless, some scholars have sought

¹ See generally, PV Kane, *History of Dharmasastra: Ancient and Medieval Religious and Civil Law*, 2nd edn, (Pune, Bhandarkar Oriental Research Institute, 1968–1975); John Keay, *India: A History* (New York, Gloria Press, 2000).

to argue that ideas similar to modern notions of constitutionalism existed in India from very early times.²

This chapter adopts the stance that while law and governance in India have a long pedigree, and one can find instances of many innovative forms of legal thinking in ancient and medieval India until the Mughal period, constitutionalism in India, as in other parts of Asia and Africa, is a modern project, whose origins can be traced to much more recent times. The chapter thus focuses on the colonial period, particularly since 1857, when, in the aftermath of an event that the British colonial regime referred to as the Mutiny and the nationalist movement would term the First War of Independence, the British government formally took over charge from the East India Company. Soon thereafter, the demand for forms of constitutional government was increasingly articulated by leaders of the nascent Indian nationalist movement starting from the late nineteenth century. In response to such demands, the colonial authorities ceded constitutional powers to the representatives of the people of the Indian subcontinent gradually over a period of half a century, culminating in the independence of the new nations of South Asia through the Indian Independence Act 1947. There is a rich body of work that documents this complex narrative.³ My goal is to sketch the broad contours of that narrative, with a focus on specific parts that are relevant for the purposes of this book project.

Specifically, the chapter seeks to track two parallel lines of development—the gradual ceding of constitutional powers by the colonial government from 1861 onwards, and the increasingly sophisticated constitutional demands raised by the nationalist movement (represented principally by the Indian National Congress, which was formed in 1885). A focus on both tracks is essential for understanding the

² See, eg, M Rama Jois, *Legal and Constitutional History of India* (Gurgaon, Universal Law Publishing, 2012, first edition 1984). For a contrary view, see Arun K Thiruvengadam, ‘Excavating Constitutional Antecedents in Asia: An Essay on the Potential and Perils’ (2013) 88(1) *Chicago-Kent Law Review* 45–61.

³ See generally, WAJ Archibald, *Outlines of Indian Constitutional History* (London, Curzon Press, 1926), AB Keith, *A Constitutional History of India 1600–1935* (Delhi, Pacific Publication, 1937, reprinted 2010) and MP Singh, *Outlines of Indian Legal and Constitutional History*, 8th edn (New Delhi, Universal Law Publishing, 2006).

complex ways in which the crafting of the Constitution of India of 1950 sought, simultaneously, to achieve two seemingly contradictory objectives: the adaptation of colonial structures of governance that were premised on efficiency in achieving imperial, exploitative goals, with the insertion of new instruments and institutions to usher in an egalitarian and democratic spirit within the new constitutional order. While seeking to provide a chronological account that spans three-and-a-half centuries, my goal will be to focus on key moments that help set out the overall narrative in order not to overwhelm the reader with historical detail.

Descriptively, the chapter begins with a short section on the entry of the East India Company into India towards the end of the Mughal Empire, and the legal rules and systems it established to initially supplement and eventually supplant the system that existed in India during the Mughal era. This is followed by an overview of the reforms brought about in the post-1857 era when the British government formally took over charge of the Indian colony. Section III analyses the significant period of about 90 years during which many constitutional ideas and reforms were discussed and introduced, focusing on the perspective of the colonial authorities. Thereafter, Section IV details the early attempts at Constitution making by the Indian nationalists. Section V describes the making of the Constitution of India in the Constituent Assembly during its nearly three-year tenure between 1946 and 1949.

II. THE MUGHALS AND THE EAST INDIA COMPANY (1550–1857)

The Mughals were the last of the great empires to control large portions of the territory of modern-day India before the advent of colonial rule. The Mughal Empire was at its zenith from the middle of the sixteenth century until the early part of the eighteenth century, shortly before the death of Emperor Aurangzeb in 1707. Although it covered a vast territory across present-day India, the Mughal Empire was primarily concerned with issues of commerce, trade and taxation. Ideas of constitutional governance, as understood in the contemporary modern sense, were not well developed in any of the pre-colonial regimes in India. As in many other parts of Asia and Africa, such ideas were often

developed by leaders of anti-colonial movements whose introduction to ideas of nationalism, liberalism and constitutional democracy emerged through their exposure—either through education or through texts—to discourses in the metropolitan centres of colonial rule.

The Portuguese were the first Europeans to arrive in India in 1503, followed successively by the French, the Dutch and the English. By the early part of the seventeenth century, several European trading posts had been established in India. By the time the Mughal Empire went into active decline around the middle of the eighteenth century, the struggle for control over trade between the European powers was largely between the British and French as other European powers had been marginalised. Eventually, the British became the dominant European power in the Indian subcontinent.

The British presence in India was established through the East India Company, which had been created through a Royal Charter issued by Queen Elizabeth in 1600 as a mercantile body that was to possess a trading monopoly in the East. Soon after its creation, the East India Company was able to obtain a toe-hold in India during the reign of the Mughal Emperor Jahangir and initially focused on expanding its commercial and mercantile activities in India. The East India Company was initially granted certain limited powers of a legislative character, including the power to impose penalties, to enable it to perform its commercial functions.⁴ As the Company's operations expanded, it demanded and obtained greater legislative, executive and ultimately, judicial powers. The initial laws issued by the Company sought to establish courts and other institutions of English/continental law in several of the territories under their control. This led later to the codification of criminal, civil and 'personal' laws of various Indian religious communities. Over time, the Company officials obtained powers similar to legislators for India, but continued to deny the responsibilities that came with exercising effective State authority in India.⁵

⁴ Keith (n 3) 5–6.

⁵ See generally, Ramkrishna Mukherji, *The Rise and Fall of the East India Company: A Sociological Appraisal* (New York, Monthly Review Press, 1974); Cyril Henry Philips, *The East India Company, 1784–1834* (Manchester, Manchester University Press, 1961); Tirthankar Roy, *The East India Company: The World's Most Powerful Corporation* (New Delhi, Penguin Books, 2012).

For nearly a century before its formal control over India ended, from about the middle of the eighteenth century until the middle of the nineteenth century, the Company conducted itself as a proxy for the British government. The foundation of the colonial legal order was established in India during this period. The Company followed a practice of governing the Indian colony through a Governor-General and his Legislative Council at the Central level, and through a Governor and his Legislative Council at the level of the provinces. Appointments to these offices were based on nominations, which in turn depended on the judgement of the Company and its supervising governmental authorities.

By the late eighteenth century, the East India Company adopted the coercive, administrative and financial processes typical of contemporaneous empires, and gradually took on more of the functions of sovereignty, such as collecting revenues, making treaties or fighting wars with regional potentates and exercising juridical authority.⁶ This was accompanied by high levels of corruption, acts of despotism, and a growing perception that the officials of the Company were exploitative and immoral in their extractive zeal. This led to demands, primarily from within Britain, that the British Parliament intervene to remedy the situation, which in turn led to legislative acts to regulate the functioning of the East India Company. In response, the British Parliament enacted the Regulating Act 1773 to overhaul the management and operations of the East India Company. A decade later, to rebut the perception that the Regulating Act was not effective in its mission, the East India Company Act 1784 sought to further these reforms by establishing a Board of Control and by strengthening the British government's regulatory powers over the Company. The clamour against company misrule also resulted in the impeachment of the former Governor-General, Warren Hastings, which, while ultimately unsuccessful, ignited a heated domestic debate championed by figures such as Edmund Burke on empire, liberalism and its consequences for ideas of British governance and democracy.

⁶ Jane Burbank and Frederick Cooper, *Empires in World History* (Princeton, NJ, Princeton University Press, 2010) 170–78, 240–45.

III. THE BRITISH RAJ AND COLONIAL FORMS
OF CONSTITUTIONAL GOVERNMENT
(1858–1947)—A BIRD’S EYE VIEW

It was the aim of the greatest among the early British administrators in India to train the peoples of India to govern and protect themselves ... rather than to establish the rule of a British bureaucracy.

Arthur Berridale Keith⁷

This statement captures, in overarching terms, the view of a section of the British colonial administrators about the overall objective of colonial government in India during the period of direct British rule. This ‘pedagogical’ self-perception of the colonial role was severely contested by the growing nationalist movement and, in the next section, we will see how it led the nationalists to develop constitutional documents that set out a competing vision for constitutionalism in India. At the same time, each constitutional development initiated by the colonial authorities across this period was at least in part a response to the nationalist movement’s criticism of the previous initiative. In what follows, due to constraints of space, I focus on significant legislative instruments enacted by the British Parliament during this period, rather than other events that were also salient. This survey of laws enables one to appreciate how the colonial forms of constitutional government evolved over this nine-decade period.

The Great Indian Mutiny of 1857, or the First War of Independence as it came to be called by the nationalists, spelt the death-knell of the rule of the East India Company, which had faced criticism domestically within Britain for over a century. Through the enactment of the Government of India Act 1858 by the British Parliament, the task of governing India was formally transferred to the British Crown, acting through the Secretary of State. The colony of India was formally ruled by the British government for 90 years (from 1858 to 1947), a period which is also referred to as the ‘British Raj’. One major change made to the structure of the Governor-General’s Legislative Council from the time of the rule of the Company was that under the new regime, an Executive Council was also set up to aid the newly created office of the Viceroy, which replaced the office of the Governor-General of India.

⁷ Keith (n 3) 1.

A. Early Constitutional Developments in the Indian Councils Acts

Despite the formal change, little of substance changed on the ground in colonial India, at least initially. The Indian Councils Act 1861 made a few technical changes to the governmental superstructure that had been used by the East India Company to govern India, without addressing the increasing demand for representation in the Councils by Indians. The demand for real change became more pressing after the formation of the Indian National Congress in 1885. This event represented the growing clout of the emerging Indian middle class, which was still small in numerical terms but whose growth was a consequence of the introduction of schools, the press and associational forms facilitated by the policies of the East India Company. Initially, the Congress was dominated by a moderate wing, led by Gopal Krishna Gokhale, who chose the path of negotiating with the colonial authorities through the route of petitions to seek incremental reforms, while engaging in social service alongside.

The Indian Councils Act 1892 sought to respond to the demand of the nationalists seeking greater representation for Indians in the Legislative Councils by making some more minor administrative changes. However, the worsening economic and political situation, caused by famine, the spread of bubonic plague and the growing popularity of the leader of the extremist wing of the Congress, Bal Gangadhar Tilak, led to the perception that these were feeble attempts to assuage a rising tidal wave of demands for reform. These rising demands were not satisfied by the next legislative measure, the Indian Councils Act 1909, which increased the representative capacity of the Legislative Councils, extended their powers and also recommended that Indians be appointed within the Governor-General's Council. However, like its predecessor enactments, it effectively left control in the hands of the executive, with little restraint on its powers. It therefore lacked credibility as a serious initiative towards constitutional reform, if measured by the introduction of effective checks and balances on the power of the imperial authorities. Keith approvingly notes that the authors of this particular reform 'absolutely disclaimed the idea of introducing responsible government or parliamentary institutions within India'.⁸

⁸ *ibid* 258.

They did, however, seek to ‘consult’ Indians in matters affecting their interests. The overall approach of British administrators (and scholars such as Keith who recorded their efforts) was to oppose the introduction of representative politics of the British type in India, convinced as they were, along with leading British liberals like JS Mill, that Indians were not ready, because of the stage of their civilisation, for full liberal democratic politics.

To understand why there was a mismatch between the approaches of the colonial administrators and the growing nationalist movement, it is important to recall that the Indian nationalists were closely following developments across the globe, and especially in other British colonies. The granting of Dominion status, with concomitant concessions to autonomy and self-rule, to Canada in 1867, to Australia in 1901 and to South Africa in 1910 emboldened the nationalists to seek similar concessions from the British for Indians as had been made for white settler populations in these colonies. However, the British were not willing to concede such a status to Indians for a much longer time to come. Among the first to understand this was Mohandas Gandhi, who had struggled unsuccessfully in South Africa through much of the 1890s and the 1900s to seek parity with the white settler population for his fellow Indians in South Africa. Upon his return to India in 1915, Gandhi began a process of self-discovery and re-examination of his beliefs in relation to his approach towards British colonial authorities. He ultimately concluded by 1919 that the British would never treat Indians on a par with the white settler colonies and that a different approach would be required.

B. The Government of India Acts of 1909 and 1919

To return to the chronology of colonial concessions to constitutional governance for Indians, Keith notes that the reforms of 1909–12 were ‘clearly unlikely’ to satisfy the demands of the extremist wing of the Congress party led by Bal Gangadhar Tilak, and ‘in fact went but a small way to conciliate the moderates’⁹ led by Gopal Krishna Gandhi, who had become a mentor to Mohandas Gandhi. The First World War and the stellar role played by Indian soldiers in the important theatres

⁹ *ibid* 264.

of the war, made it imperative that the colonial government be seen to be responsive to the growing demand of Indians for representative government.

It was against this context that the Government of India Act 1919 was enacted in December 1919, which promised some significant changes 'with a view of the progressive realization of responsible government in India'.¹⁰ In its details, the Act sought to fulfil its promises by emphasising greater autonomy to the provinces, and by making changes to the powers of the Secretary of State and his Council, and those of the Central and provincial governments. The Act introduced a system of 'dyarchy' in the provinces, whereby for some subjects in a 'transferred list' authority to legislate would be subject to scrutiny and accountability by the Provincial Council. These reforms were truly significant in that they held the prospect of enabling Indians to exercise real legislative power, especially at the provincial level. However, the Act offset the impact of these changes by providing a very restricted franchise, by making very small budgets available to provincial legislatures, and by including rural and special-interest seats that were perceived as amenable to control by the colonial authorities. The reforms sought to be ushered in by the Act of 1919 were diluted by the near simultaneous enactment of the draconian Rowlatt Act 1919 and the brutal massacre ordered by General Dwyer at the Jallianwala Bagh, which turned public opinion against the colonial authorities in a definitive manner. Although the Government of India Act 1919 did not have a great impact in practice, its innovations were later discussed for inclusion in the text of the Constitution of independent India, and for this reason it remains a significant constitutional landmark, apart from being an improvement on its predecessor enactments.

By 1920 Mohandas Gandhi had emerged as the undisputed leader of the Congress. Although he started as a protégé of Gokhale, his experience of following 'moderate' politics in South Africa appears to have convinced him of the limitations of such an approach. After his return to India in 1915, Gandhi began to initiate campaigns that had seeds

¹⁰ This quotation is taken from the statement of the newly appointed Secretary of State, Edwin Montague, who took office in June 1917. Montague, together with Lord Chelmsford, the erstwhile Viceroy of India, authored the Montague-Chelmsford report, which formed the basis of the Government of India Act of 1919.

in the experiments that he had begun while in South Africa. These campaigns, built on the strategies of *satyagraha* (“striving for truth”) and *ahimsa* (“non-violence”), in turn converted the Indian National Congress from an elite group of middle class intellectuals to a mass movement with deep roots across the Indian subcontinent. In the aftermath of the Jallianwala Bagh massacre, Gandhi started a Non-Cooperation movement which found support across the whole of British India and signalled to the colonial authorities that a new kind of anti-colonial movement had emerged.

C. The Government of India Act 1935 and the Indian Independence Act 1947

The next significant law to be passed by the British Parliament to regulate constitutional development in India was the Government of India Act 1935. This law made some pivotal changes and introduced many elements, especially in relation to its federal provisions, that were ultimately retained by the Constitution of India. The Act of 1935 introduced direct elections and expanded the franchise, enabling several million Indians to exercise voting rights. It also established the Federal Court in India, which became an important judicial institution, and was both the predecessor and a role model of sorts for the Supreme Court that was instituted by the eventual Constitution of India. Indeed, one respected scholar has asserted that as much as ‘seventy-five percent’ of the Government of India Act 1935 was to find place in the new Constitution of independent India.¹¹ However, this should not lead to the impression that the Act of 1935 was a document that actively sought to secure ‘responsible government’ for Indians. While it had several notable features, the Act of 1935 was apace with other colonial constitutional documents in empowering the colonial executive with supreme powers, including the power to take back any of those conferred upon

¹¹ Subhash C Kashyap, *Our Constitution: An Introduction to India’s Constitution and Constitutional Law* (New Delhi, National Book Trust, 2004) 4–5. See also Arvind Elangovan, ‘Provincial Autonomy, Sir Benegal Narsing Rau, and an Improbable Imagination of Constitutionalism in India, 1935–38’ (2016) May, *Comparative Studies of South Asia, Africa and the Middle East* 66–82 (noting that the continuity can also be explained by the fact that Sir BN Rau was an important contributory draftsman of both constitutional documents).

bodies where Indians were allowed to exercise legislative and executive power. The Act of 1935 abolished the system of dyarchy introduced by the Act of 1919, which had proven to be both unpopular and impractical. It went further than any other colonial statute in empowering provincial governments but, as mentioned earlier, also enabled the colonial executive to step in and retrieve powers should it perceive any threat. This was viewed as paternalistic and an incurable flaw by the nationalist movement. As we will see in the next section, by this time the nationalist movement had experimented with several constitutional documents and had presented them to the colonial authorities. What is striking about the Act of 1935 is how completely it ignored the demands of the nationalist movement on many fronts, including their demand for a Bill of Rights, and how it represented a step back even from the Act of 1919. It is important to recall that the Act of 1935 was the result of a compromise between those who sought to advance responsible government in India and those who were completely opposed to it. Since the law was enacted by a Conservative government, it was perhaps to be expected that those opposed to granting any meaningful concessions to the Indian nationalist movement won out.

As it happened, the federal provisions of the Act of 1935 never came into effect. The Act of 1935 came into force in relation to the provinces only in 1937. In elections held in 1937, Congress governments were elected in eight out of 11 provinces. For two years until 1939, when the Indian National Congress decided that its governments in the provinces would resign en masse in protest against the British government's unilateral decision that British India was to join the Allied cause in the Second World War, the Congress had, for the first time, direct experience of governance. This was to prove crucial for many reasons and also explained why, despite their awareness of the flaws of the Act of 1935, the Congress was willing to retain elements of the scheme of the Act of 1935 in the Constitution of independent India.

As noted above, the start of the Second World War in 1939 affected the implementation of the Act of 1935. As in the case of the First War, Indian soldiers were used extensively in the major theatres of the war, and India's involvement in the war once again led to demands for the grant of independence in exchange for loyalty to the Allied cause.¹²

¹² See generally, Srinath Raghavan, *India's War: The Making of Modern South Asia, 1939–45* (New Delhi, Allen Lane, 2016).

These efforts did not yield much result due to opposition from Conservative politicians in England.

Once the Second War ended in 1945, a Labour government under Clement Atlee was elected. Atlee's government brought about radical reforms within the UK and presided over the start of the decolonisation of the British Empire in South Asia. Prime Minister Atlee's government took a realistic view of the following factors in reaching its decision to exit from the colonies: the state of the UK's poor finances in the post-War era; the international pressure that the UK was facing for the hypocrisy between its rhetoric against the Axis powers and its own oppressive conduct in its colonies; and the lack of confidence expressed by imperial generals about the ability of the Indian army to remain impervious to the call of nationalism.

The Indian Independence Act 1947 was the principal legal instrument by which the new nations of Pakistan and India came into being in August 1947. Its effect was to formally bring to an end 182 years of British rule in India, confer the status of dominions upon the new nations of Pakistan and India from 15 August 1947, and provide for legal and administrative continuity until the new constitutional orders in both nations emerged. In India the process of creating a new Constitution had begun formally on 9 December 1946, when the Constituent Assembly held its first sitting. Section V of this chapter will delve into the details about the body and its processes. However, since this factor is underemphasised in the current literature, it is important to acknowledge that the intellectual groundwork for the process of crafting a new Constitution for independent India was a process that began at least half a century before the first sitting of the newly constituted Constituent Assembly. It is to this important historical aspect that we turn in the next section.

IV. THE NATIONALIST MOVEMENT AND THE BUILD-UP OF ATTEMPTS AT CONSTITUTION MAKING (1895–1947)—A WORM'S EYE VIEW

As noted in the previous section, the Indian National Congress had been through a process of change and evolution since its founding in 1885. At first, it was a small organisation formed of middle and upper class Indians and was derisively referred to as a 'debating club'. By 1920, under Gandhi's charismatic leadership, it had transformed

into a mass movement that grew in numbers and popularity almost continuously until India gained independence in 1947. In the previous section it was noted how the Congress resisted and opposed the incremental and often painfully slow concessions made by the British colonial regime towards providing autonomy and self-governance to Indians. However, the Congress was not just an oppositional force; it was equally a constructive force, and was simultaneously involved in creating a new vision for the independent country that India would eventually become. This nation- and Constitution-building aspect of the Congress's workings has been relatively neglected in contrast to the large body of work that has studied its resistance to colonial constitutional statutes by demanding greater autonomy as a means towards *Swaraj* or self-rule. This section seeks to focus on the constitutional documents that were drafted by the Congress from fairly early on in its history. The focus will be on the evolution of this constitutional vision as the Congress's own sense of what the independent Indian nation would represent and symbolise changed over time.

A. The Earliest Attempts at Constitution Making (1885–95)

An early example of the first phase of the Congress is to be found in two resolutions passed by the 1889 session of the Indian National Congress that was held in Bombay. These resolutions, passed within five years of its inception, saw the Congress seeking more representation for Indians in the Legislative Councils, which were important legislative institutions created under the Indian Councils Act to govern India.¹³

However, soon thereafter, in 1895, came the Constitution of India Bill. While its author remains unverified, the document states that it had been prepared after a study of the Constitutions of the US and Brazil, and contained provisions relating to the government of India which were housed in separate chapters detailing provisions relating to the legislature, executive and judiciary.¹⁴ The Bill also contained a set of rights provisions which primarily sought guarantees of civil and

¹³ The full text of the two resolutions is reproduced in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents*, vols I–V (New Delhi, Universal Law Publishing, 1967, Reprint 2010) vol I, 3–4.

¹⁴ The full text of the Constitution of India Bill is set out in *ibid* 5–14.

political rights. This was, from the point of view of the tradition of British constitutionalism, a radical demand since British constitutional culture, even today, is very sceptical about constitutionalised Bills of Rights. The Bill further sought to catalogue the issues that could potentially form the subject of legislation (an early form of the List system that would be used in the final Constitution to classify subject matter competence between the Central and State legislatures) and also made a bold attempt to catalogue the departments within the executive (equivalent to Ministers in our time). Consisting of 111 provisions, this Bill represented an early yet sophisticated attempt at drafting a Constitution for independent India. What is striking is that this document, conceived more than a half century before the eventual Constitution for independent India was drafted and adopted, anticipates many of the institutional issues that would come to dominate the imagination of the framers of the eventual Constitution.

**B. Evolution of Constitution-making Efforts:
The Commonwealth of India Bill 1925 and the
Motilal Nehru Report 1928**

As the Congress continued to grow and debates within it became more sophisticated, more resolutions, declarations and models continued to emerge. In 1918, at another annual session held in Bombay, the Congress issued a Declaration of Rights that sought a statute from the British Parliament recognising a series of rights for Indians on a par with British citizens. In the early 1920s, under the leadership of Annie Besant and the respected lawyer, Tej Bahadur Sapru, the Commonwealth of India Bill was drafted by a convention consisting of 255 persons endorsed by the Congress, and introduced into the British House of Commons in 1925 (where, once the first elected Labour government which took office in 1923 fell after the elections in 1924, its fate was sealed). Nevertheless, the contents of the Bill are noteworthy also because they influenced models of Constitutions that emerged in its wake. The Commonwealth of India Bill conceived of the right to local self-government and envisaged five levels of government across the village, taluk, district, province and Central level.¹⁵ It guaranteed a set of rights which went beyond the classic civil and political rights

¹⁵ For the full text of the Bill, see *ibid* 43–50.

(including the right to liberty, property, freedom of conscience and free expression) to social rights (specifically the right to free elementary education).

Shortly afterwards, at the Madras session of the Congress in 1927, it was resolved that a Swaraj Constitution would be drafted for India. This eventually led to the creation of a committee led by the senior Congress leader, Motilal Nehru, and consisting of others such as Tej Bahadur Sapru. The Nehru Report, as it came to be known, set out the text of a Constitution that was based on the principle of Dominion status for India (seeking parity with the colonies of Canada, Australia, New Zealand, South Africa and the Irish Free State) and devised a responsible government on the parliamentary model. As Niraja Jayal has argued, the Constitution set out in the Nehru Report was 'a rather exceptional document' as it envisioned many novel aspects.¹⁶ It contained extensive provisions on rights, which directly inspired many provisions in the Fundamental Liberties chapter (Part III) of the eventual Constitution, while some others inspired provisions in the chapter on Directive Principles of State Policy (Part IV). The Nehru Report had more elaborate provisions on the structure and form of the three wings of government than any previous Constitution-making effort and also sought to tackle the thorny issue of communal representation explicitly.

C. Alternative Conceptions of the Constitution and the Sapru Committee Report (1945)

In the period after the Nehru Report was published in 1928, the Congress continued to demand greater autonomy from the colonial regime while also investing in developing its own constructive vision of what a Constitution for independent India should consist of. Once the Second World War began, followed by the 'Quit India' movement launched by the Congress in 1942, attempts at Constitution making in order to influence the new Constitution became even more urgent. Before turning to the Congress's attempts, it is worth taking note of three attempts by non-Congress individuals and groups which sought to provide alternative conceptions of the new Constitution.

¹⁶ Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Cambridge, MA, Harvard University Press, 2013) 138–39.

These include: MN Roy's *Constitution of India: A Draft* (1946), SN Agarwal's *Gandhian Constitution for Free India* (1946) and the Socialist Party's *Draft Constitution of Indian Republic* (1948).¹⁷ Roy, a former Communist, authored a radical and populist Constitution which contained many guarantees of social rights. Agarwal's Constitution drew from Gandhian ideas of village-based decentralised governance. The Socialist Party's Constitution conspicuously left out the right to property. These alternative conceptions are worth emphasising to draw attention to the fact that while the Indian National Congress enjoyed great popular support, it had to contend with many other streams of opinion and thought, which often clashed with its own ideas and were difficult to build consensus upon given the wide range of interests and ideologies represented within the Congress itself. Recalling these facts is necessary to appreciate the importance of the inclusive style of decision making followed in the Constituent Assembly.

In December 1945 a committee under the leadership of Tej Bahadur Sapru and consisting of members including N Gopalaswami Ayyangar (who would play a pivotal role within the Constituent Assembly) was constituted to deal with the growing problem of communalism and the significant issue of minority rights. The Sapru Committee Report placed considerable emphasis on minority protection and the rights of minorities and became an influential model for these provisions in the eventual Constitution of India.¹⁸

V. CRAFTING A CONSTITUTION FOR INDEPENDENT INDIA: THE WORK OF THE CONSTITUENT ASSEMBLY

A. Background and Origin of the Constituent Assembly

The work of the Constituent Assembly of India has been described in laudatory, even heroic, terms.¹⁹ It has also been the subject of strong

¹⁷ *ibid* 143.

¹⁸ This voluminous report also saw several notes of dissent drafted by some of the committee members. The full text of the report, being too large to be included in its entirety in the B Shiva Rao papers, is available online at <<https://ia801407.us.archive.org/19/items/saprucommittee035520mbp/saprucommittee035520mbp.pdf>>.

¹⁹ The most prominent of these adulatory accounts is still Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi, Oxford University Press,

criticism, both contemporaneous and recent.²⁰ Regardless of whether one thinks of it as broadly positive or not, the result of the efforts of the framers of the Indian Constitution has been markedly influential across the post-colonial world, and its provisions came to be emulated in many other Constitutions. This section focuses on the origins of the Constituent Assembly, its processes and the main themes that it dealt with. In each subsequent chapter of the book the substantive work of the Constituent Assembly will be examined closely within the rubric of specific constitutional issues. Here, the purpose is to provide a broad, descriptive overview of some foundational matters.

As noted in the previous section, many Indians—and not just the leaders of the nationalist movement—had focused on the nature and type of Constitution that independent India should be governed by for a considerable period of time before independence was actually achieved. The Indian National Congress's previous efforts at Constitution making were marked by robust debate among several contending positions and had reached an advanced stage of deliberation whereby consensus was reached on some broad issues such as the need for a strong Bill of Rights, agreement that a parliamentary system would work best for India's many needs, and the need for a federal system which would guard against fissiparous tendencies while allowing India's diversity to flourish.

It is important to consider the backdrop against which the Constituent Assembly was established in December 1946. After the Second War and the election of Prime Minister Atlee's Labour government, Great Britain was finally willing to grant independence to India, albeit on its own terms. By the mid-1940s, the differences between the Indian National Congress and the Muslim League had become unbridgeable, in part because Mohammed Ali Jinnah, the leader of the Muslim League, who had been a prominent and important member of the

1966). Austin's account of the making of the Indian Constitution is regarded as authoritative, five decades on, but is written in stirring, adulatory tones which, even as it seeks to critique several aspects of the working of the framers, has a consistently positive appraisal of the process and the results reached.

²⁰ See generally, Shibanikinker Chaube, *Constituent Assembly of India: Springboard of Revolution*, 2nd edn (New Delhi, Manohar Publishers, 2000). A recent work which is scathing in its criticism of the overall 'imperial' approach of the Constituent Assembly is Mithi Mukherjee, *India in the Shadows of Empire* (New Delhi, Oxford University Press, 2010).

Congress during its crucial foundational period, was deeply sceptical that the Congress would successfully represent India's diversity beyond its own constituency, the dominant sections of the Hindu population. In 1945 Jinnah had expressed scepticism about the idea of a single Constituent Assembly, demanding two separate Assemblies for the new nations of India and Pakistan. For its part, the Congress, which had the backing of many Muslims, regarded Jinnah as unfairly attacking its secular character and exploiting long, simmering, communal tensions to build his 'two-nation' theory. The primary reason for Partition was undoubtedly the fact that these two significant political groupings could not come to an agreement on the future of colonial India. Their differences notwithstanding, there were several rounds of negotiations between the Congress and the Muslim League to begin the process of Constitution making even as such tensions persisted.

In May 1946 the Cabinet Mission, which had been established by the Atlee government to effect the transfer of power from the British to the Indians, delivered its report. Although both the Congress and the Muslim League had reservations, both formally accepted the plan, following which elections for the Constituent Assembly of India were held in July 1946. The Congress had long demanded a Constituent Assembly elected on the basis of universal adult suffrage. However, it gave in to the Cabinet Mission plan's proposal that the Constituent Assembly be indirectly elected, through the existing provincial legislatures, because it recognised that holding general elections on the basis of universal franchise would delay the important task of convening the Constituent Assembly. In addition, the Constituent Assembly also had representation from 600-odd Princely States. Of the 389 seats in the Constituent Assembly, 93 were accorded to the representatives of the Princely States, while the Congress (208) and the Muslim League (73) emerged as the dominant political parties.²¹

The first session of the Constituent Assembly was held on 9 December 1946 but given the tense atmosphere, not much business was transacted. On 13 December 1946 Nehru moved the 'Objectives Resolution', which set out the broad objectives and contours of the Constitution-making process. The Constituent Assembly also started

²¹ Barbara N Ramusack, *The Indian Princes and their States* (Cambridge, Cambridge University Press, 2004) 8.

identifying the various working committees that would do the major work of drafting portions of the eventual Constitution but discussions did not begin in earnest until after independence. The Muslim League participated only half-heartedly in the Assembly's initial sessions; even this stopped after Jinnah instructed its members to boycott the Assembly in July 1947. The second and third sessions of the Constituent Assembly were held in January and April 1947 but the prospect of Partition ensured that substantive deliberations on important issues were minimal. Once the Indian Independence Act 1947 came into force on 15 August 1947, the Constituent Assembly was formally granted legal recognition, enabling it to move much faster towards its goal.

B. The Ambient Atmosphere of Constitution Making

The immediate effect of the Indian Independence Act 1947 was to make the Constituent Assembly also the Dominion Parliament. Members of the Assembly were simultaneously converted into parliamentarians and they spent half of their time dealing with day-to-day matters of government. Being seized of immediate problems inevitably affected their long-term constitutional vision, especially on crucial issues such as the powers that the executive and Parliament should have to restrict the rights of citizens. Awareness of the broader context at the time will help us situate their decisions better.

The Indian subcontinent in the period 1946–50 was, to put it mildly, in a state of turmoil. Although the Atlee government was praised for its decision to free India and its other South Asian colonies, this decision was made in an overly hasty manner, which made the by-then inevitable partition of the Indian subcontinent into the Muslim-dominated Pakistan and the Hindu-dominated India more messy and violent than it had to be. The British government had originally announced in February 1947 that it would quit India by June 1948. However, in June 1947 the newly appointed Viceroy, Lord Mountbatten, announced that Partition would come into effect not after a year, but in two months. This led to a sense of panic that historians—both British and Indian—believe exacerbated the problems involved. The subcontinent had been roiled by communal riots since August 1946. After starting in the eastern city of Calcutta, the riots had spread westwards through the State of Bihar, and to the capital in Delhi. By 1 November 1946 the death

toll across India had reached 5,000. Once Partition was effected in August 1947 the subcontinent bore witness to 'the greatest mass migration in history': between 10 and 15 million people emigrated in response to the physical dismembering that led to the creation of the new State of Pakistan out of parts of the eastern and western perimeters of British India. Both new nations had to scramble to prevent mass carnage. In the latter, they were only partly successful: erstwhile estimates of the killings put the deaths at 1 million, while more recent historians believe that the death toll reached 2 million. On 30 January 1948, after he had made valiant efforts to quell the communal killings, Gandhi was assassinated in Delhi by a Hindu fundamentalist, who later blamed him for causing the partition of India by conceding to demands from Muslims.

There were other monumental problems. It is often forgotten that British India was not a cohesive political entity. The British governed a large portion of their territory in India indirectly, large pockets of which were constituted by the assorted chiefdoms and states of what were known as 'Princely States', of which there were 600-odd in existence. The new governments of India and Pakistan had to negotiate with each of these rulers in a bid to persuade them to join their territories or face the prospect of 'balkanisation' of the subcontinent. While most rulers eventually agreed to join the new States, some rulers held out: Junagadh (in western India), Hyderabad (in southern India) and Kashmir (in northern India, with a shared border with Pakistan). While the ruler of Junagadh eventually agreed to join India in November 1947, the Indian government had to send in its military to overwhelm the defiant ruler of Hyderabad in September 1948. Kashmir would prove to be a much harder case. It has been a continuing source of strife between India and Pakistan and has resulted in armed skirmishes on several occasions, including for many long months in 1947-48. The terms under which Kashmir joined India have led to continuing legal uncertainty and social and political strife nearly continuously to the present time.

In the immediate aftermath of Partition, many of the major Indian cities were flooded with refugees: the numbers ranged from half a million each in Delhi and Bombay to 1.7 million in Calcutta. In all, 8 million refugees are estimated to have entered India. What made the problem worse was the serious shortage of food, coupled with an inflationary crisis across the nation. These were only some manifestations

of the grave economic problems that the British Empire had bequeathed to the subcontinent. Exploitative economic policies over two centuries resulted in a huge mass of the population being left in the grip of poverty, illiteracy and severe forms of underdevelopment. To address these issues, Nehru's government was determined to carve out space for a strong, centralising government in the Constitution that would be able to undertake the massive social development programmes that were urgently needed.

Those broader problems were made more acute because of the effects of Partition, the influx of refugees and the continuing spectre of communal and other forms of violence. The Communist parties in India, which enjoyed popular support in the Telangana region of the State of Hyderabad and in parts of Bengal, had, in February 1948, proclaimed the start of a general revolution in India and advocated forms of violence against the Indian State. The Indian government responded with propaganda and repression, causing their support to dwindle temporarily. The government also turned its instruments of force upon members of the Hindu fundamentalist groups in the wake of Gandhi's assassination, banning the Rashtriya Swayamsevak Sangh (RSS) and arresting several of its cadres. Having to deal with the threat posed by the RSS and Communists gave many of the leaders of free India an appreciation of the police powers enjoyed by the colonial State, and this appreciation is also reflected in their attitude towards restrictions on fundamental liberties that were then under discussion in the Assembly.

As we will see in subsequent chapters, these factual circumstances resulted in substantive and structural responses and solutions by the framers, which influenced the broader constitutional vision and specific institutional arrangements in the new and independent India.

C. Processes, Modes of Functioning and Stages of Constitution Making in the Constituent Assembly

The Constituent Assembly of India was in existence for 2 years, 11 months and 18 days, between its first session, which was held on 9 December 1946, and its final session on 26 November 1949 when the final draft of the Constitution was adopted. A great deal of attention was paid to the processes and procedures that would be followed in

order to make the 389-member body function efficiently and democratically. For this purpose, the Assembly had drafted the services of Sir BN Rau, who had recently retired from the judicial side of the Indian Civil Services and had considerable exposure to comparative trends in Constitution making, having been involved in the making of the Constitution of Burma of 1947. The level of preparation and planning is evident from a note prepared by him in September 1946, which contained comprehensive notes on the modes of voting, whether sessions should be open or held *in camera*, how the Chairman should be chosen, and the language to be used, and cited precedents from the Constitution-making exercises in the US, Canada and South Africa.²² The Assembly had access to a well-staffed Secretariat which was paid out of Central revenues and was thus able to attract high-calibre officials.²³

The Assembly constituted itself into several committees (more than 15 in total) to complete its work. Of these, eight handled the major issues: Rules, Steering, Advisory, Drafting, Union Subjects, Union Constitution, Provincial Constitution and States. These eight committees had approximately 36 members in all. Granville Austin notes that some of the members of the Assembly were more equal than others because of their stature as leaders of the nationalist struggle and their role in government. Austin refers to four of these—Jawaharlal Nehru, Vallabhbhai Patel, Abul Kalam Azad and Rajendra Prasad—as the ‘oligarchy’, who wielded enormous authority within the Assembly while also holding important positions in the Dominion government. Another prominent member of the Assembly was BR Ambedkar, who was appointed, at the instance of Gandhi, as the Chairperson of the Drafting Committee. Dr Ambedkar was the undisputed leader of the former Untouchables and his appointment was an important symbolic reminder of the diversity within India. Other influential Assembly members, representing a range of regional, linguistic, religious and intellectual strands, included KT Shah, KM Munshi, Syama Prasad Mukherjee, Purushottamdas Tandon, Rafi Ahmed Kidwai, Bakshi Tek Chand and AK Aiyar. Significantly, the Assembly had 15 women representatives, with Hansa Mehta playing a significant role in the

²² ‘A Note on points of procedure—Sep 2, 1946’ in Shiva Rao (n 13) 405–18.

²³ ‘Setting up the Constituent Assembly Secretariat: Correspondence and Notes’ in Shiva Rao (n 13) 360–72.

Fundamental Rights Sub Committee, and Begum Aizaz Rasul being a consistent and vocal voice on the floor of the Assembly across a range of issues. As several commentators have noted, the Congress, particularly after Partition when the departure of the Muslim League members left it with an overwhelming dominance in the Assembly, took several concrete measures to ensure that the constituents of the Assembly represented, as far as practicable, the range of interests present in Indian society.

The Assembly completed its functioning in five stages:²⁴

- (1) The Working Committees for specific subject areas met, debated and deliberated, and prepared reports often requiring several revisions. This process lasted from December 1946 until August 1947.
- (2) Sir BN Rau, the Constitutional Advisor, considered these reports and prepared a first draft of the Constitution in collaboration with the Assembly Secretariat between August and October 1947.
- (3) The Drafting Committee, led by Dr BR Ambedkar, scrutinised the draft Constitution prepared by Sir BN Rau and produced its own revised draft through daily meetings between 27 October 1947 and February 1948. This revised draft was then made public, inviting comments, suggestions and criticisms. The phase of gathering public responses and responding to them lasted from February to November 1948.
- (4) In November 1948 Dr Ambedkar introduced the draft Constitution on the floor of the Constituent Assembly, following which a clause-by-clause deliberation was conducted over an 11-month period between 15 November 1948 and 17 October 1949. Following this, the Drafting Committee met again to revise the draft Constitution, incorporating all the amendments that had been accepted and giving final shape to the Constitution.
- (5) In November 1949 Dr Ambedkar presented the final draft of the Constitution before the Assembly. Amendments were considered by the Assembly between 14 and 16 November and on 26 November 1949 the final draft of the Constitution was adopted by the Assembly.

²⁴ 'Progress of the Constitution through the Assembly' in Shiva Rao (n 13) 107–18.

Two months later, the Constitution of India was formally enforced on 26 January 1950. In its initially adopted form, it contained 395 articles (divided into 22 parts) and eight schedules, and was one of the world's longest Constitutions.

D. A Summary of Important Provisions and Themes in the Text and Process

In the remaining chapters of the book, several significant aspects of the Constitution of India will be focused upon at length. This section takes note of some striking aspects of the Constitution as a whole.

The Constitution of India established a modified version of the British Westminster form of parliamentary democracy in India. India is both a republic and a federal state, albeit with a stronger central authority than is the case in most federations. Important changes to the colonial order include a constitutionally entrenched Bill of Rights, an independent judiciary and a range of constitutionally empowered technocratic institutions (including the Election Commission, and the Comptroller and Auditor General) which are to serve as guardians of the constitutional order. The Constitution of India has been described as a 'transformative' document, given its commitments in relation to secularism, the removal of untouchability, and gender equality. The framers of the Indian Constitution made an important departure from the American model by providing a relatively easy amending procedure, which has, predictably, resulted in more than a 100 amendments to the Constitution in the six decades that it has been in force. What may not have been predictable is the innovation of the 'doctrine of basic structure' that came to be evolved by the Indian judiciary and will be examined more closely in Chapter 7.

On the substantive content and themes of the Constitution, Upendra Baxi has argued that the Indian Constitution can be viewed as oriented towards four goals: 'rights, justice, development and governance'. Baxi argues that each of these goals is 'intertwined and interconnected with the rest and in contradictory combination ... with both the constitutional and social pasts and their images of the future'.²⁵

²⁵ Upendra Baxi, "A Known but Indifferent Judge" Situating Ronald Dworkin in Contemporary Indian Jurisprudence' (2003) 1(4) *International Journal of Constitutional Law* 557–89, 582.

Similarly, Uday Mehta has argued that the framers were guided by three broad objectives: (i) an overriding concern with national unity; (ii) a deep and anxious preoccupation with social issues such as poverty, illiteracy and economic development; and (iii) an intense concern with India's standing in the world.²⁶ Mehta, like Baxi, suggests that the first two goals identified by him in particular have the potential of moving towards ends which are quite different from those of the anti-colonial struggle which emphasised ideas of freedom. Benjamin Zachariah's tracing of the intellectual history of ideas of 'development' among the nationalist elites between 1930 and 1950 indicates that the term had an ambiguous quality and could encompass goals that were seemingly common among imperialists, capitalists and socialists.²⁷ These multiple understandings of 'development' had a role to play in the constitutional entrenchment of the goal of 'development' in the text and institutional structures of the Constitution of India.

The length of the Indian Constitution has been the subject of much commentary and speculation. It must be noted that unlike in the case of many federal states, where state Constitutions are housed separately, the Constitution of India sets out the provisions in relation to both the federal and State units. Its length has also been attributed to the anxiety of its framers to set out even minute details in black letter law for fear that failing to do so would lead to the constitutional order being dismantled quite early on. This is a reference to the many factors not conducive to constitutionalism in India: its long history of communal violence, the rampant illiteracy and underdevelopment that characterises its populace, the inequality in caste Hindu society which was exacerbated under the exploitative practices of colonialism, and the persistence of feudal mindsets in large parts of the country. That length has also enabled, as noted in the previous paragraph, the co-existence of many contradictory features within the overall model of Indian constitutionalism. Careful historical research is beginning to reveal that perhaps inevitably, the many different actors who contributed to the process had multiple motivations which were very often at odds with each other. The implementation of the Constitution has

²⁶ Uday Mehta, 'Constitutionalism' in Niraja Gopal Jayal and Pratap Mehta (eds), *The Oxford Handbook to Politics in India* (New Delhi, Oxford University Press, 2007) 16.

²⁷ Benjamin Zachariah, *Developing India: An Intellectual and Social History* (New Delhi, Oxford University Press, 2005) xv–xvii.

led to some portions of the text gaining more importance over others. Equally, as the practical politics of Indian constitutionalism has worked itself out, some of the expectations of the framers have been defied by the realities of politics, while some other expectations have proved to be very accurate. In its various chapters, this book seeks to highlight examples of both tendencies. This analysis seeks to emphasise the point that the framers of India's Constitution were extraordinary men and women, who often acted with great insight into the human condition but were not seers or astrologists. The cases where the framers misread expectations are nearly always as interesting as when they did foresee what would be required to regulate the constitutional politics of a specific issue.

An important issue that was much debated within the Constituent Assembly, and is also relevant for comparative audiences, was the heavy reliance on foreign models. This gave rise to several heated debates on the importance of autochthonous models of constitutional governance for securing both credibility and durability. Such debates have continued across the working of the Indian Constitution as the foreign origins of some provisions and institutions in the constitutional order have been attacked from time to time by a range of forces on the political Left and Right. The Indian Constitution-making exercise provides a valuable resource for those seeking to evaluate the perils and promise of cosmopolitanism in the art of Constitution making. What is striking about the Indian constitutional order is that it has not only survived, but also thrived across the relatively long period of its existence.

VI. CONCLUSION

This chapter has sought to provide an overview of forms of governance during the pre-colonial and colonial periods of Indian history. It has focused in particular on critical constitutional developments that occurred across a hundred years, from the middle of the nineteenth century to the middle of the twentieth century, to track significant events in the shaping of the constitutional order of India. While providing a broad overview of historical events, the chapter has sought to emphasise the interplay between the efforts of the colonial authorities to govern India while ceding to the increasingly vehement demands of the nationalist movement in respect of constitutional governance.

It has also focused on the themes and processes that characterised the working of the Indian Constituent Assembly as it designed and deliberated upon the content of its Constitution. An important theme that has been emphasised is the complexity of interactions between the forces of colonialism and constitutionalism, and the need to be alive to the motivations of these forces, which act in surprising and unexpected ways at times.²⁸

Having obtained a sense of the overall nature of the Constitution and its making, we turn, in Chapter 2, to a focus on the most important institutions of governance under the Constitution of India: the Executive and the Parliament.

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- Barbara D Metcalf and Thomas R Metcalf, *A Concise History of India* (Cambridge, Cambridge University Press, 2002).

²⁸ In this regard, the emerging historical work of Arvind Elangovan is significant. Among other issues, Elangovan focuses on the separate importance of the category of 'nationalism', which adds further complexity to this mix.

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