

# The Cambridge Handbook on the Material Constitution

Edited by

**MARCO GOLDONI**

University of Glasgow

**MICHAEL A. WILKINSON**

London School of Economics and Political Science



**CAMBRIDGE**  
UNIVERSITY PRESS

## A Materialist Analysis of the Indian Constitution

*Sandipto Dasgupta*

The nearly two decade-long dissolution of European empires led to the formal political independence of nearly one third of the world's population. In the place of empires emerged a host of nation states, all of which adopted a written constitution to create and organise the new post-colonial regime. It was, by a stretch, the most productive period in the history of constitution making. However, such a momentous endeavour has been analysed primarily through a derivative lens. It was implicitly assumed that the basic norms, features, and formal structure of a modern constitution were already forged in Europe and America. The work of post-colonial constitution-makers was primarily that of adaptation; their 'successes' and 'failures' to be measured by how well or poorly they managed to incorporate a script that had already been written. Post-colonial constitutions are therefore to be viewed as a derived instantiation of a 'globally shared mode of organizing socio-political formations'.<sup>1</sup> That assumption erases the socio-historical specificity of the post-colonial transitional moment and the political creativity of the regime formation. It also shares a particular view of constitutions – as a set of widely shared norms, whose validity is independent of their specific socio-historical context, and one which necessarily bestows legitimacy on any political regime. The tradition of the material constitution stands as a critique of that assumption, which is precisely why it is a significant intellectual standpoint from which to interrogate the specificities of post-colonial constitutional experiences.

The absence of material constitutional analysis from the post-colonial scene was not just a scholarly oversight. As Chris Thornhill points out, during the Cold War era the intellectual momentum in both constitutional theory and constitutional practice was toward a more formal, normative, view of constitutions.<sup>2</sup> Certain features were prescribed in order for constitutions to be considered a part of the liberal democratic world.<sup>3</sup> With the eventual triumph of the US-led global order, this view became globally hegemonic, especially during the constitution-making era that coincided with the wave of democratisation in Central and East European countries. Constitutions, at least in their prescriptive form, became globalised and standardised.<sup>4</sup> This was particularly true for the post-colonial countries. With the demise of Third Worldist projects of

<sup>1</sup> J. Go, 'A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 *International Sociology* 72.

<sup>2</sup> C. Thornhill, *A Sociology of Constitutions* (Cambridge University Press, 2011), 3–4.

<sup>3</sup> A. Rana, *The Two Faces of American Freedom* (Harvard University Press, 2010); M. Tushnet, "'Our Perfect Constitution" Revisited', in P. Berkowitz (ed.), *Terrorism, the Laws of War, and the Constitution: Debating Enemy Combatant Cases* (Hoover Institution Press, 2005), 131–58.

<sup>4</sup> H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000).

economic sovereignty and developmentalism, and under the compulsion of sovereign debt crises, countries in the global periphery were unable to assert their ideational or economic autonomy. In the heady days of unipolar globalisation, international organisations and constitutional experts advocated homogenous constitutional forms. The contextual, materialist type of constitutional analysis found little political favour.

A material analysis of the post-colonial constitutional form is therefore also a recovery of a historical moment. Decolonisation was not just a time of formal political freedom to be then baptized by the adoption of certain idealised juridical norms. It was an attempt at shaping a distinctive post-colonial future through autonomy from the circuit of imperial capital. In the condition of a weak and dependent bourgeoisie under colonialism, post-colonial countries tried pursuing autonomy through projects of planned development, state-led industrialisation, and social transformation. These projects demanded the primacy of sovereignty over property – as witnessed in the various attempts at nationalisation and land reform in the first decade after decolonisation. The constitution of the post-colony therefore sought to differentiate itself from the borrowed norms of the metropole privileging property rights and constraints on state intervention.

However, any study of the material constitution of the post-colony has to also contend with the eventual decline and exhaustion of that initial project and to consider how the initial constitutional vision and practice changed or struggled on its own terms. Rather than a simplistic judgement about success or failure to achieve some idealised version of ‘liberal constitutionalism’, it has to account for constitutional change in terms of shifting social bases.

In this chapter, I will explore some of the main elements of that experience through a material analysis of the Indian Constitution. India is in many ways exceptional amongst its post-colonial peers. The most significant colony of the British Empire, it gained independence through the largest and most popular anti-colonial movement in the world. Its constitution was drafted without any interference from or influence by its former colonial rulers. That constitution has survived over seven decades without any coups or foreign interventions – a rarity amongst its post-colonial peers. However, these exceptional elements make India a particularly suitable case to investigate the material constitution of the post-colony on its own terms. It showcases some of the central terms and problematics of the material constitution of the post-colony.

The persistent danger posed by the ‘social question’ in conditions of under-development and inequality was the central challenge for the post-colonial regime builders. The solution, across much of the post-colonial world, was a project of state led social transformation, known as development planning. The post-colonial constitution, I would argue, was designed to facilitate and realise this central goal. It was a constitution by and for administrators and planners. Setting up the terms of the foundational constitutional design in these terms then allows us to track its shifting coordinates over the next decades. In the subsequent parts of the chapter, I will explore how lawyers and judges supplanted administrators as the primary custodians of the post-colonial constitution as the fortunes of development planning declined and the Third World became ‘liberalised’; concluding with some reflections on the fate of the original post-colonial ambitions of social transformation through the constitution.

### 20.1 THE PROBLEM OF HEGEMONY

The anti-colonial movement that brought independence to India was the largest mass movement of its kind anywhere in the world. After the First World War, Gandhi emerged on the Indian political scene and transformed the Indian National Congress – till then a party of urban

professionals petitioning the colonial government for various remedies – into a mass party with an organisational structure spread across every district in the country. When independence from colonial rule happened, Congress became the ruling party with little doubt about its claim to be the legitimate representative of the hitherto colonised population. The scale and the success of the Congress and the anti-colonial movement that it led gave rise to the view of a constitution of the post-colonial regime based on consensual and high minded principles.<sup>5</sup> This picture held sway until the 1970s, when irrevocable tensions between different organs of the state and factions within the party led to a full-blown constitutional crisis.

Scholars at the time questioned the earlier model of consensual post-colonial transition to highlight the various conflicts and contradictions that lay at the heart of the post-colonial regime. They utilised the work of Antonio Gramsci to make the argument that the post-colonial ruling elite faced a crisis of hegemony.<sup>6</sup> Despite Gandhi, the Indian elite were not successful in fully overcoming their distance from the peasant masses – remaining unable to create a new common *Weltanschauung*. The alliance between the elites and the masses that led to a genuinely popular anti-colonial movement under the umbrella of the Congress was contingent on fighting a common enemy, and did not necessarily translate into a widespread ‘common sense’ about the new order that was to follow.

The absence of an ethico-political hegemony gave special urgency to the social question borne by two major problems: under-development and inequality. A highly uneven distribution of landholding, backed by the colonial system of *zamindari* (landlordism), subjected the rural masses to deep-rooted hierarchy and oppression. Although facilitated by the colonial regime, the sources of much of these quotidian experiences of hierarchy and oppression were indigenous landlords and money lenders. With the departure of a common enemy, there was a very real danger that the resistive energy turn inwards against the indigenous sources of social power. At the same time, colonial economic policy, domination of British capital and persistent under-investment meant relatively low levels of industrialisation, indigenous capital formation, and economic growth. Taken together these manifested in widely prevailing poverty and scarcity. Added to a population politically mobilised through the anti-colonial movement, such conditions portended very real dangers of social upheaval. The social question was an unavoidable one for the nascent post-colonial regime.

The lack of hegemony and threat of social upheaval led the Indian elites to a ‘passive revolution’ in the Gramscian sense, that is, a deliberate project of ‘revolution without revolution’.<sup>7</sup> The post-colonial ruling elites realised that their rule depended upon addressing the social question in a deliberate, gradual, and controlled fashion. They needed to intervene in and transform society without risking a tumultuous and extra-institutional revolutionary upheaval. The Constitution, rather than a formal impedimentum of political sovereignty or a set of treasured and widely accepted norms, was a carefully designed institutional structure for that project.

The lack of hegemony and the potential for social conflict provided the need and the rationale for managing the social transformation through the Constitution. The particular

<sup>5</sup> R. Kothari, ‘The Congress “System” in India’ (1964) 4 *Asian Survey* 1161; M. Weiner, *Party Building in a New Nation: The Indian National Congress* (Chicago University Press, 1967); R. Kothari, *Politics in India* (Little and Brown, 1970); I. Lloyd and S. H. Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (Chicago University Press, 1987).

<sup>6</sup> R. Guha, *Dominance without Hegemony: History and Power in Colonial India* (Oxford University Press, 1998); P. Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?* (Oxford University Press, 1986); S. Kaviraj, *The Imaginary Institution of India: Politics and Ideas* (Permanent Black, 2010).

<sup>7</sup> A. Gramsci, *Selections from the Prison Notebooks*, Q. Hoare and G. N. Smith, trans. (International Publishers, 1971), 58.

dynamic of formulating the constitution was further conditioned by two related sets of conflicts. The first was a credible threat of popular unrest, and the second was the conflict and negotiations between the different groups that comprised the post-colonial ruling elite.

## 20.2 THE PARTY, THE PEOPLE AND THE STATE

For the Indian constitution-makers, the challenge was how to manage a revolution (through the Constitution) in order to avoid a revolution (in the streets). ‘If the Constitution holds up, blocks, the future progress of our country’, warned a member of the Constituent Assembly, ‘I dare say that the progress which has been thus retarded will be achieved by a violent revolution: revolution will take the place of evolution.’<sup>8</sup> This threat was a result of the events that were playing out outside the Assembly during the four years it took to draft the Constitution. The decade preceding the Constituent Assembly was one of increasing radicalisation of peasant and labour politics which, while never challenging Congress’ dominance of the political landscape, did constitute a cause for concern. In 1946, the year the Constituent Assembly convened, major militant (and at times armed) peasant movements broke out in Bengal, Maharashtra, Travancore, and elsewhere.<sup>9</sup> During the years of drafting the Constitution successful strikes took place in textile mills, ports, railways, mines and postal services.<sup>10</sup> One can add to this the threat posed by the Communists given the global prominence of the Communist movement and the revolution in neighbouring China. As Chairman of the Drafting Committee B. R. Ambedkar noted in the Constituent Assembly ‘this urge for self-realization in the down-trodden classes must not be allowed to devolve into a class struggle or class war [. . .] That would indeed be a day of disaster’.<sup>11</sup>

The anxiety about the radical energy of the popular movements was based in the nature of the Congress as a party. It was not a revolutionary party organised under the banner of a coherent ideology, with a committed army of cadres. Nor did the radical sentiments on the ground find a relatively unmediated path through the party. By the 1920s, the anti-colonial movement had become a genuinely popular struggle. Mass movements have an inherent tendency to radicalise and exceed the scope and focus of their leaders. By the end of the 1930s, the majority of the Congress leadership made a deliberate choice – over the protest of the left-wing faction within the party – to contest elections and enter provincial government under the colonial constitutional act called the Government of India Act of 1935. This transformed it from the party of anti-colonial mass movement to a government in waiting.<sup>12</sup> Its primary habitus shifted from the streets to the government buildings.

The ordering principles for the post-colonial polity would therefore not be drawn for the organisational structure of the anti-colonial mass movement. There remained an almost uninterrupted continuity between the institutions, norms and personnel of the late colonial state into the post-colonial regime. The very same bureaucracy, police and army that was used to suppress the anti-colonial movement transitioned seamlessly to administering the new post-colonial regime.<sup>13</sup> Given India’s centrality to the British empire, the colonial state machinery was the

<sup>8</sup> H. V. Kamath, *Constituent Assembly Debates*, 17 September 1949.

<sup>9</sup> S. Sarkar, *Modern India: 1885–1947* (Macmillan, 1983).

<sup>10</sup> R. Chandavarkar, *Origins of Industrial Capitalism in India: Business Strategies and the Working Classes in Bombay, 1900–1940* (Cambridge University Press, 1994); M. D. Morris, *The Emergence of Industrial Labor Force in India: A Study of Bombay Cotton Mills, 1854–1947* (University of California Press, 1965).

<sup>11</sup> B. R. Ambedkar, *Constituent Assembly Debates*, 4 November 1948.

<sup>12</sup> Sarkar, *Modern India*.

<sup>13</sup> A. Burra, ‘The Indian Civil Service and the Nationalist Movement: Neutrality, Politics, and Continuity’ (2010) 48 *Journal of Commonwealth and Comparative Politics* 404.

most developed version of its kind. Now, the new rulers sought to use it, with only minor modifications, for the purpose of post-colonial governance and transformation.<sup>14</sup> The state in other words, preceded the Constitution, which in turn was built around the existing infrastructure of the state.

### 20.3 THE DOMINANT CLASSES AND THE CONSTITUTION

Hegemony, however, is not just a question of political common sense. A necessary, though not sufficient, condition is supplied by the political economy of post-colonial transition. In a capitalist system investment decisions are private and, since governments in power depend on continued investments both for electoral gains and political stability, they are generally not willing to extend their redistributive agenda beyond a point that would – in Gramsci’s phrase – ‘touch the essential’.<sup>15</sup> In such a condition of dependence, the present material interest of the capitalist (i.e., profit) appears as the future universal interest of the whole society (growth).<sup>16</sup> Through two centuries of colonial rule, the developmental trajectory of Indian industrial capital was heavily determined by the needs and policies of the metropolitan economy. For most of colonial history, the focus was on the export of cheap raw materials and trade controlled by British capital. Development of indigenous capital under this condition remained weak, sporadic and informal.<sup>17</sup> Therefore, capital in India was not in a position where its interests could appear, simply by virtue of its place in the economy, as the universal interest of the nation. Instead, capital was crucially dependent on the state for its growth and reproduction.<sup>18</sup>

The economist Pranab Bardhan developed the notion of a ‘coalitional model of domination’ whereby he argued that in India the capitalist class, due to its historic weakness, had to share power with other dominant classes.<sup>19</sup> This coalition consisted of three groups – industrial capitalists, rural landowning elites and professional elites. Independent dominance of any one of these classes was never a concrete historical possibility. Hence the coalition was not an incidental fact or an accident, it was the very condition of elite dominance, which would otherwise be destabilised. This provided a centripetal constraint on the coalition, but not a frictionless unity of purpose. As independence drew near, the general goal of winning freedom from colonial rule gave way to intense negotiation among these classes for determining the structure of new political institutions and the allocation of resources.<sup>20</sup> The process of drafting the Constitution was similarly marked by intra-coalition negotiation between the dominant classes. That negotiation was constrained by the aforementioned inability of any group to claim independent dominance. In terms of constitution-making this implied an inability to propose a separate system of rule, from the one being hammered out inside the Assembly. In other words, neither group had the ability, and hence the desire, to lead either a revolution or a coup. This was the material basis that created the condition for, and maintained the stability of, an electoral democracy in India.

<sup>14</sup> S. Dasgupta, ‘A Language that is Foreign to Us: Continuities and Anxieties in the Making of the Indian Constitution’ (2014) 34 *Comparative Studies of South Asia, Africa, and the Middle East* 228.

<sup>15</sup> Gramsci, *Prison Notebooks*, 161.

<sup>16</sup> A. Przeworski, *Capitalism and Social Democracy* (Cambridge University Press, 1985).

<sup>17</sup> A. K. Bagchi, *Private Investment in India* (Cambridge University Press, 1972); A. Kohli, *Imperialism and the Developing World* (Princeton University Press, 2020).

<sup>18</sup> F. R. Frankel, *India’s Political Economy, 1947–2004: The Gradual Revolution* (Oxford University Press, 2005); P. Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton University Press, 1993).

<sup>19</sup> P. Bardhan, *The Political Economy of Development in India* (Blackwell, 1984).

<sup>20</sup> S. Kaviraj, ‘A Critique of the Passive Revolution’ (1988) 23 *Economic and Political Weekly* 2429.

Although shaped by the dynamics of this coalition, one amongst these three groups exercised overwhelming influence in formulating the Constitution: the professional elites. The reason for their prominence was the corresponding weakness of the other two dominant classes when it came to constitution-making. While the industrial capitalist class did have a plausible vision of 'national interest' shaped in its own image and borrowed from the annals of the advanced capitalist countries, it lacked either the political or the economic position required for its vision to become hegemonic. Its dependence on the state manifested itself in its acquiescence in developmental planning, where the state was to play the primary role in the economy.

The situation of the rural land-owning elites was in a sense the opposite. Their control over land and agrarian labour – the vast majority of the labour force – gave them substantial power. Much of the Congress organisation in the rural areas was dominated by this group.<sup>21</sup> However, what limited the influence of the rural elites in the Constitution-making process was the fact that, unlike the other two groups, they lacked an 'alternate coherent vision' which they could posit as a vision of 'national interest'.<sup>22</sup> Added to this was the fact that their influence and organisation was local and internally differentiated due to the vast diversity in land holding patterns across India. Furthermore, they did not possess the necessary technical skill or language with which to control the levers of the state. The most they could do was act as a 'persistent undertow' to the dominant developmental vision. The centralised architecture of the Constitution, with more power allocated to the national as opposed to the provisional governments (where the landowning elites had more influence), was a mark of their relative weakness regarding the constitutional project.

The group that supplied much of the vision, the language and the terms of public justification for the Constitution was the professional elites. The professional elites did not constitute a class by virtue of their control of the production process or material resources. Rather, their position was derived from their role in managing the state institutions and their mastery of forms of knowledge and skills suited for that task. The colonial regime created limited opportunities for westernised education for a section of the indigenous elites. Although a miniscule proportion of the population, this class consisted of a substantial number who went into professional services like law, bureaucracy or academia. The nature and interest of the colonial state – the professional sphere of activity for this class – was related only minimally, if at all, to the interests of Indian capital. As a result, this class developed a distinct sphere of its own, without 'much of a direct stake in the fortunes of private capital'.<sup>23</sup>

#### 20.4 THE ADMINISTRATOR AS THE AUTHOR OF THE CONSTITUTION

What made the class of professional elites prominent was both the nature of the post-colonial transition and the complexity of post-colonial regime formation. The fact that the transition did not happen through a disruptive revolutionary process and hence left the infrastructures of the state nearly intact meant that the task of building and maintaining the nascent post-colonial regime fell primarily to this group. Specialised knowledge of the workings of state institutions was highly prized, as evidenced by the overwhelming presence and influence of the members of this class in the Constituent Assembly. Beyond the affairs of managing the state, the professional

<sup>21</sup> E. Stokes, 'Agrarian Relations: Northern and Central India', in D. Kumar and M. Desai (eds.), *Cambridge Economic History of India*, Vol. 2, c. 1757–c. 1970 (Cambridge University Press, 1983); P. R. Brass, *Fractional Politics in an Indian State* (University of California Press, 1965).

<sup>22</sup> S. Kaviraj, 'A Critique of the Passive Revolution' (1988) 23 *Economic and Political Weekly* 2429, 2431.

<sup>23</sup> P. Bardhan, *The Political Economy of Development in India* (Blackwell, 1984), 52.

class was crucial to the strategy of gradual and controlled social transformation. Development planning, the mode in which that transformation was to be achieved, was the terrain where the specific attributes of this class was most valued. The ‘scarcity value of education’ made the knowledge and expertise offered by the professional class an especially prized asset. Apart from the fact that India had nearly 85 per cent illiteracy at the time of independence, there was no sufficiently developed intellectual apparatus of the peasantry or the working class that could propose and execute an alternative vision of transformation. This lack of alternatives from below, nearly as important as the corresponding weakness of the capitalist class, made the professional elites crucial for the realisation of a planned development.

As freedom came to be defined not just in political but also economic terms, modernisation and productivity increase through planning and the consequent eradication of material deprivation was the basis on which the post-colonial rulers appealed for the continuing support of the masses. They claimed authority not on the basis of force but of knowledge. Colonial rule had deprived India of a sufficient base of engineers and scientists, but it did leave behind an enormous corps of trained administrators. While they had to adjust to a very different set of instruments and language by which to perform their task – from coordinators of coercion to impresarios of democratic order – their basic skill set was critical to the construction and legitimacy of the nascent regime. In India, the pre-eminent constituent subject was the administrator.

This explains a couple of curious facts about the Indian Constitution. The first is that nearly two-thirds of the Constitution was almost a verbatim reproduction of the colonial Government of India Act of 1935. Like all putative constitutional acts of the colonial government this Act was primarily an administrative manual: a comprehensive rule-book for operating the complex and vast machineries of the colonial state and ensuring its functional coherence. The professional elites had been trained in that manual for operating the state machinery. Its language and grammar, levers and pulleys, were familiar to them from experience. So when the time came for them to devise their own institutional architecture, they drew heavily from the text they knew well.<sup>24</sup>

Second, it also explained the extraordinary length of the Constitution, which made it the longest national constitution in the world. This was due to the inclusion of exhaustive details about administrative arrangements, apportionment of various governmental duties, lengthy schedules and so on. These are things that one would not expect to find in a constitution but in less celebrated public law iteration of administrative acts. Ambedkar acknowledged in the Assembly that normally such ‘administrative details’ would ‘have no place in the Constitution’. But, the ‘necessities’ of the Indian condition ‘justifies their inclusion’.<sup>25</sup>

Beyond these particularities, the administrative authors of the Constitution adopted what Martin Loughlin calls a ‘functionalist’ view of public law.<sup>26</sup> They challenged the view that law could be understood as a set of norms that transcend the particularities of its social context and stipulate ideal standards. The functionalist view situated public law within an objective matrix informed by the basic function of the state. In the context of post-colonial India, this was primarily development and planned social transformation. Both the formulation and interpretation of public law had to be purposive. This framing could be contrasted with a rights-based

<sup>24</sup> S. Dasgupta, ‘A Language that is Foreign to Us: Continuities and Anxieties in the Making of the Indian Constitution’ (2014) 34 *Comparative Studies of South Asia, Africa, and the Middle East* 228.

<sup>25</sup> B. R. Ambedkar, *Constituent Assembly Debates*, 25 November 1949.

<sup>26</sup> M. Loughlin, ‘The Functionalist Style in Public Law’ (2005) 55 *Toronto Law Journal* 361.



framing, which focussed on the constraints on the actions of the state. After emerging in the mid-nineteenth century (primarily in continental Europe), by the early twentieth century the functionalist style was a globally influential current.<sup>27</sup> It was coeval with the rise of the administrative state and consequently administrative law.

In India, in the condition of a revolution without revolution, there did not exist a widely shared common political vision that could override or transcend the divisions and fractures of social existence. The unity of the Indian territory was an administrative legacy held together by the force of colonial arms. The creation of a genuine post-colonial unity therefore had to be constituted at the level of the state, as an administrative task. These were the men, the technicians of the state, who sought to construct the architecture of public law in India: one that sought to functionally analyse and perform the task of making a whole out of this fractured society.

‘We have bigger decisions to take, graver choices before us, than those of lawyers’ making’, Jawaharlal Nehru, the First Prime Minister of India, reminded his colleagues in the Constituent Assembly.<sup>28</sup> Public law had to be imagined outside the orthodoxies of legal thought. Not as general rules standing above society, but as precise mechanisms based on analysis of particular social condition. To control and manage this complex condition, one had to anticipate the possible ways the transformational project could unfold in practice – the various authorities that might be involved, the cohesiveness of their actions, the potential interpretations of the text and probable obstacles. This required a calculation of mechanics, techniques and scenarios. Indian constitution-makers studied recent constitutional experiences across the world – searching for precise parts of the machine and seeking insights into how they operated in practice.<sup>29</sup> The aim of this impressive comparative analysis was to analyse the particular problems that develop through constitutional practice, especially the possible meanings phrases can assume, and to identify provisions that could fit India’s needs. There was an explicit focus in these studies on technical solutions and phrasings – that is functions – rather than any general principles or abstract ideals. Global constitutional practices were analysed from the point of view of an expert administrator.

## 20.5 THE PARLIAMENT AND THE PLANNERS

The Indian constitution-makers chose to have a parliamentary, as opposed to a presidential, system of government. Parliament was envisaged as a mediating institutional mechanism for the two most significant, and potentially destabilising, elements of the new order – deliberate state-led socio-economic transformation (i.e., development planning) and universal adult franchise. There is an analytically trivial explanation for this choice. Most post-colonial countries, at least initially, adopted the institutions of their former colonial rulers.<sup>30</sup> Though several former British colonies would later shift from a parliamentary to a presidential system, almost none went the other way. But a story of institutional legacy is complicated by the fact that the state that the post-colonial rulers inherited, namely the colonial state, was a model of unfettered executive authority.

<sup>27</sup> M. Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992).

<sup>28</sup> J. Nehru, *Constituent Assembly Debates*, 21 July 1947.

<sup>29</sup> G. Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1972).

<sup>30</sup> A. Przeworski, *Democracy and the Limits of Self Government* (Cambridge University Press, 2010); Go, ‘A Globalizing Constitutionalism?’, 71.

There was a further reason why India could have moved toward an empowered executive-driven presidential model, as many of its post-colonial peers. The inherent institutional unity of the presidential system was far better equipped to handle the complex task of managing a planned transformation. From Bismarck's Germany to Stalin's Soviet Union to Meiji Japan, all the late developing economies followed such a path, as did India's Third World contemporaries like Nasser's Egypt or Sukarno's Indonesia. The choice of parliamentarism was far from an obvious or standard choice.

For the Indian constitution-makers, however, the problem was a specific one: how to pursue a planned transformation under conditions of mass democracy. In the transitional moment of decolonisation, there was no immediate definable crisis, nor a plan of action to be enforced post-haste. Rather, mass electoral democracy meant the situation in India was 'dynamic and fluid' (to use Nehru's words), with yet unforeseen demands and coalitions that could arise requiring a constant process of calculation and relatively swift adjustments.<sup>31</sup> A parliamentary system with inbuilt mechanisms for negotiations, coalition building, and deliberations was much better suited for such a task than a presidential system. Most importantly these mechanisms were available for use almost continuously and were suitably low key, not requiring the mobilisation of nation-wide elections to achieve their aims. They could act as the node for a two-way process: allowing members of parliament to voice the demands of their constituents, thereby creating an efficient feedback mechanism for development planners and administrators; and on the other hand the parliamentarians with a local base could act as the spokespersons of the state and its developmental agenda, thereby generating legitimacy and stability for it.<sup>32</sup> In its ideal version, the parliament could serve as the mediating plain between the developmental administration and popular political expression. There is a familiar critique of the presidential/executive driven social transformation project in say Egypt or Latin America whereby the rulers were more willing to make expansive social policy statements than to give popular politics any real voice in the affairs of the state.<sup>33</sup> The parliamentary model in India therefore had the potential to be a more democratic form of post-colonial developmentalism.

This ideal was not fully realised, however. The assumption that a robust democratic process that would successfully translate popular aspiration at the level of the state could be achieved merely through institutional arrangements, proved to be wrong. In the absence of a party that was willing to actively engage in popular mobilisation and organisation around the social question, the kind of active feedback mechanism imagined never came to fruition. Any organisation or mobilisation was purely electoral. Consequently, democracy in this context came to stand in purely for electoral competition rather than any expansive sense of popular participation in the developmental agenda. And without that mediating link, parliament's role soon became just one of garnering enough votes to capture the executive. This trend was formalised by the rise of Indira Gandhi in the 1970s as a plebiscitary executive standing above both the party and the parliament and one that has been reproduced with even more favourable institutional balance by the current regime.<sup>34</sup>

<sup>31</sup> J. Nehru, *Constituent Assembly Debates*, 10 September 1949.

<sup>32</sup> S. Dasgupta, 'Parliamentarism, Not Presidentialism: Development and Democracy in India' (2018) 53 *Economic and Political Weekly* 43.

<sup>33</sup> J. Beinlin, *Workers and Peasants in the Modern Middle East* (Cambridge University Press, 2001); R. Gargarella, *Latin American Constitutionalism 1810–2010* (Oxford University Press, 2013).

<sup>34</sup> S. Kaviraj, 'Indira Gandhi and Indian Politics' (1986) 21 *Economic and Political Weekly* 1697.

## 20.6 LAWYERS AND SOCIAL TRANSFORMATION

The decline in the prominence of the parliament opened up space for the third branch of government to play a role that was not initially envisaged by the constitution-makers. The drafters were well aware that one potential obstacle to a constitutional path to social transformation was the judiciary. It was not the familiar concern about the counter-majoritarian power of judicial review that worried them. Unlike in the United States, they explicitly incorporated that power into the Constitution. Rather, what was at stake was the different kinds of expertise and judgement that planner administrators and judges were trained in, and how the former were much better suited to the task of planned social intervention and transformation. Technocrats and administrators, mediated by parliamentary deliberations, had both the necessary knowledge and expertise as well as the proper method for deciding on the various issues that could arise in the course of post-colonial social transformation. Judges, trained in the specialised body of rules and precedents, lacked both that knowledge and the expertise. Second, the very nature of the common law tradition in which all Indian lawyers and judges were raised – an obedience to past norms and precedents – ran counter to the future-oriented project of social transformation that the post-colonial regime was committed to. Finally, judges viewed matters through the lens of specific litigations. The framing of a litigation was fundamentally different from the way the transformational project was meant to be framed. The technocrats and administrators situated individual problems within a larger whole, in a purposive manner. Litigation on the other hand could potentially frame complex issues of social transformation through the lens of the conflict between two parties and their contending rights.<sup>35</sup> The resolution of this conflict had to be found not in the most appropriate solution for advancing the goals of the transformative plan, but in the correct set of legal doctrines and methods of interpretation. True to their functionalist orientation, the constitution makers sought to set up a ‘division of labour’ between the executive/legislature and the judiciary.<sup>36</sup> The executive/legislature was to act on complex social and economic questions facing the country. The judiciary was to act as a watchdog to ensure that such acts never become capricious or arbitrary, instead of judging them on their substance or merits. As Nehru stated in the Assembly regarding the transformational project: “The law should do it. Parliament should do it. There is no reference in this to any judiciary coming into the picture.”<sup>37</sup>

There are three prominent examples in the Constitution of this deliberate attempt to keep the judiciary away from substantive questions of social transformation. First was the list of enumerated rights. Each article declaring the right (say, a right to free speech) was followed by a set of clarifications called ‘permissible limits’ that listed carefully crafted exceptions for actions that would otherwise be construed as a violation of that right (for example, ‘security of the state’ or ‘public order’). Normally, such exceptions to rights are carved out through judicial decisions. The constitution-makers felt that the task of such ‘balancing’ should be left to the legislative and administrative branches rather than the judiciary, given they were better suited to striking the

<sup>35</sup> E. Pashukanis, *General Theory of Law and Marxism* (Pluto Press, 2001).

<sup>36</sup> U. Baxi, ‘The Little Done, The Vast Undone: Some Reflections on Reading Glanville Austin’s *The Indian Constitution*’ (1967) 9 *Journal of the Indian Law Institute* 323.

<sup>37</sup> J. Nehru, *Constituent Assembly Debates*, 10 September 1949.

balance between particular instances of individual rights and the project of planned development.<sup>38</sup>

The second example was the deliberate absence of the phrase ‘due process’ from the property clause of the Constitution. During their comparative constitutional study, the constitution-makers heard from the New Deal justice Felix Frankfurter, who warned that the phrase ‘due process’ opened up the possibility of judges examining the substantive aspects of legislation rather than just its procedural fairness.<sup>39</sup> Worried that this would lead to a pathway for the judiciary to sit in judgement over aspects of the social transformational agenda, the constitution-makers removed the phrase from the draft.

Finally, there was the example of the ‘Directive Principles of State Policy’: a part of the Constitution that included a host of goals for the post-colonial regime – from social welfare to labour conditions, education to women’s empowerment. The reason these were not drafted as social ‘rights’ was to keep them outside the purview of judicial determination. Rather they were framed as explicitly non-justiciable aspirational goals, whose realisation and temporal horizon was to be determined by the administrators and legislatures as they moved along with the transformational project, unencumbered by interference from the judiciary.

The divide between the administrative and judicial power was not simply a matter of abstract institutional analysis. Its social basis lay in a prominent division within the class of the professional elites: lawyers versus administrators. Under colonial rule, while the administrators were tasked with the stability and functioning of the colonial state machinery, the lawyers represented individual interests to, and often against, the state. As a result, the lawyerly standpoint tended to emphasise decolonisation more in terms of the ‘rule of law’. This required some forms of general norms and abstract rights, not just ‘lessons of experience’. Due to the role they played under colonial rule as the most prominent intermediaries between the otherwise estranged colonial rulers and the colonised subjects, the lawyers enjoyed a significant social base and prominence. If the claim to authority of the experts and managers rested on their knowledge and the future progress it could help bring about, the lawyer’s authority was built through a more quotidian experience of mediating disputes between (predominantly upper and middle class) individuals and the state. This social base meant their viewpoint was a counterpoint to the administration – which explains the anxiety about the potential actions of the judiciary. Their relative absence from the life of the subaltern masses – who faced the coercive violence of the colonial state with little mediation or recourse to law – on the other hand underlined the need for more effective administrative interventions. Despite the differences between them, the professional elites in general shared a wariness towards popular mobilisation and class conflict. The administrative viewpoint, with its self-assured confidence that technocratic solutions could successfully rise above the conflict of interests and classes, initially made it more suited for the transitional project. But as that project stalled, the lawyers and their institutional expression – the judiciary – sought to play a larger role in constitutional life.

Constitutional development in India for the first seven decades of the republic can be plotted along the lines of a conflict between lawyers and administrators for the custody of the constitution. As the developmental aspirations of the transitional moment seemed exhausted by the beginning of the 1970s – both in terms of achieving its stated goals and as a result in terms of its

<sup>38</sup> D. Kennedy, ‘The Critique of Rights in Critical Legal Studies’, in W. Brown, & J. Halley (eds.), *Left Legalism/Left Critique* (Duke University Press, 2002), 178–229.

<sup>39</sup> G. Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1972).

political legitimacy – the Supreme Court began playing a more assertive role in claiming the final say over all matters constitutional and by extension most forms of social intervention. Within the professional elites, the administrators and planners had lost their initial prominence to the rural landowning classes due to the latter's ability to successfully capture the electoral machine. They then successfully mobilised that power to frustrate major transformational projects like land reform.<sup>40</sup> At the same time, international developments like sovereign debt and economic dependencies lessened the developmental aspirations and ability of the post-colonial state. While the prestige of the administrative elites diminished and the initial aspirations of the parliament to act as a mediator of popular aspirations was frustrated, the courtroom became the primary site for voicing demands for social policy, and lawyers once again became the primary conveyors of middle class voices to the state. As a result the Supreme Court began adjudicating complex matters of social policy through the vehicle of 'Public Interest Litigation' – in keeping with trends in other post-colonial countries especially in Latin America and Africa.<sup>41</sup> There has been no prominent social movement in the last three decades – whether it be for education, housing, or the environment – that has not filed a case before the Supreme Court to meet its demands. The judicial custodianship of the Constitution was complete when, in a judgement unprecedented in the annals of constitutional law, the Supreme Court asserted that they could exercise power of judicial review even over constitutional amendments. As the material basis of the project of 'social transformation through constitution' shifted, lawyers rather than administrators emerged as the principle post-colonial constituent subjects.

## 20.7 CONCLUSION

Lawyers replacing administrators as the custodians of the Constitution was not just a change in style – from functionalist to legalist. It was the result of a major change in the social basis of the transformational project and, by extension, the Constitution. The decline in prominence of the administrator was conditioned by the corresponding rise of the other two dominant classes: first the landowning classes through their control of the electoral machine; and subsequently of the capitalist class as the country was integrated into the global market. These were, in their respective ways, a signal of the decline of the developmental project that was shared by so much of the Third World. It is only after its passing that the project of transformation through constitution moves from the parliament and planning commission to the courtroom. This shift of location was also a shift of scope. While the original transformational ambitions envisaged projects like land reform and nationalisation of resources, the best that the Courts could offer were targeted rights claims for the remedy of specific misfortunes. The increasing dependence of progressive political actors on the Courts – in India as elsewhere – over the last few decades is in a sense as much a sign of a defeat and a retreat from much more expansive ambitions of the past.

As frustrations with the transformational project grew, the domain of extra-constitutional agitation again resurfaced as part of the repertoire of political action for making material or welfare claims on the state. It is now a common feature of Indian political life to witness blockades of roads or symbolic attacks on government properties to demand better infrastructure, entitlements or jobs. This is what Partha Chatterjee has influentially termed the domain of

<sup>40</sup> A. Kohli, *The State and Poverty in India: The Politics of Reform* (Cambridge University Press, 1987); F. R. Frankel, *India's Political Economy, 1947–2004: The Gradual Revolution* (Oxford University Press, 2005).

<sup>41</sup> A. Bhuwania, *Courting the People: Public Interest Litigation in Post Emergency India* (Cambridge University Press, 2017).

‘political society’, conducted entirely in extra-legal terms, rather than through any formal constitutional paths.<sup>42</sup> On the other hand, the Courts increasingly sought to embody the deliberative transformational domain, instituting social policies, forming expert committees and pronouncing broad developmental plans in the nominal guise of rights claim – from education to electrification. Unsurprisingly, this produced no broad transformational vision but rather a patchwork of committee reports and judgements, focused on particular disputes, often unimplementable. As both these paths show, the constitution makers were correct in their foresight that the social question would remain the central issue of Indian political life. Yet, the conflicts over that question are now fought precisely on the terms that they sought to avoid.

<sup>42</sup> P. Chatterjee, *Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press, 2004).