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# Ch.1 Locating Indian Constitutionalism

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# (p. 1) Chapter 1  Locating Indian Constitutionalism

## I.  Introduction

INDIAN constitutional law is of immense historical, practical, and theoretical significance. Almost all the issues that arise in the course of thinking about law in modern constitutional democracies find their most intense expression in the evolution of Indian constitutional law. India's Constitution was the framework through which the world's largest and one of its most contentious democracies was brought into being. It was the charter through which an ancient civilisation was set on the road to modernity and radical social reform. It is the framework that provides for the management and accommodation of the most complex ethnic, religious, and linguistic diversity of any modern nation-State. It has been the site where different ideas of development have been contested and reimagined. It has been the normative and legal framework through which the world's largest democracy contests its own future. The future of constitutionalism in the world depends a good deal on the future of the Indian experiment.

This Handbook provides a *tour d' horizon* of Indian constitutional law. This is very much a book for scholars and lawyers, in that the focus is on the ideas, doctrines, arguments, and controversies that constitute the terrain of constitutional law in India. But behind these legal arguments are intense political struggles, social stakes, and economic aspirations. Indeed, one of the things we hope will become clear is that a living constitution like India's has the extraordinary capacity to rearticulate—some would say domesticate—social struggles in the language of constitutionalism. This gives Indian constitutional law a variety, a thickness of doctrine and incentives to conceptually innovate in ways that are unprecedented. We hope this Handbook will prove to be an accessible but rigorous guide to the sheer fecundity of Indian constitutional law.

In this chapter, we seek to achieve three outcomes. The first is to explicate the historical commitment to the idea of constitutionalism. What kind of commitment was the commitment to constitutionalism? How did the framers understand the constitutional project? We (p. 2) suggest that more than the content of its substantive provisions, the Constitution was seen as inaugurating a new kind of morality. Further, what made Indian constitutionalism distinctive was its self-consciously cosmopolitan character. Secondly, we turn to some of the major substantive tensions that have defined the contours of constitutionalism in India, and give a brief account of the major axes around which the normative and institutional imagination of the Constitution is articulated. Finally, we consider the character of constitutional development in India, in particular the forces that have shaped its evolution.

## II. The Historical Imagination

The Indian constitutional project can be described in many ways. For its most prominent historian, the project was about 'social revolution'.[1] For others, it was a political project, an expression of the fact that the Indian people were finally sovereign and dedicating themselves to the universal values of liberty, equality, and fraternity. The project does, in some ways, further all these goals. But the backdrop of those substantive aims contains two meta-aims of the Constitution, as it were, that often go unremarked. When the Constitution was enacted there was a self-conscious sense that in writing a text, India was finding a way to resolve major substantive debates and disputes over norms and values. The task of constitutionalism was a morality that transcended positions and disagreements on particular issues; indeed, its strength was that it gave a framework for having a common institutional life despite disagreements. The second aspect of constitutionalism was the ambition that while the Constitution would serve Indian needs, it would not be bound by any particular tradition. It would, rather, reflect and be in the service of a global conversation on law and values. In the debates over particular doctrines, it is easy to miss the distinctiveness of these two ambitions, and the way in which they have informed the practice of constitutionalism in India. In some ways, more than particular achievements, it is the institutionalisation of these practices, against the odds, that constitutes the greatest achievement and challenge of Indian constitutionalism.

### 1. Constitutional Morality

Constitutions endure for a variety of reasons.[2] Some endure because of a deep political consensus. In some societies the sheer balance of power amongst different political groups makes it difficult for any group to overthrow a constitutional settlement. In some cases constitutions provide an artful settlement that does not deeply threaten the power of existing elites, but nevertheless provides a mode of incorporating the aspirations of previously excluded groups. While it is hard, not simply for methodological reasons, to determine what has enabled the endurance of India's Constitution, it is worth reflecting on how the project of constitutionalism was historically understood.(p. 3)

What does it mean for a society to give allegiance to a constitution? India's Constitution bore the imprint of a long nationalist movement that made choices that have shaped its trajectory. The first and most significant choice was the idea of constitutionalism itself. The Indian nationalist movement, while radical in its normative hopes, was self-consciously a constitutional movement. In its early phases, it spoke the language of English law. Even when it acquired, under Gandhi, the character of a mass movement, it was anti-revolutionary. It placed a premium on eschewing violence as a means of overturning social order or advancing political goals. India has been subject to occasional violent political movements, from various secessionist movements to Maoism. But violent revolutionary movements have found it difficult to gain mainstream legitimacy. In that sense, even if not expressed in the formal language of law, a grammar of constitutionalism has marked India's mainstream political choices. Although the idea of non-violence has been associated with

Gandhi's legacy, its greatest political practitioners have been India's most marginalised groups. Dalits, who were India's most unimaginably oppressed social groups, with most reason to resent the structural violence of India's inherited social and political order, have in a sense been at the forefront of owning a constitutional culture. This is in part due to the fact that BR Ambedkar, now iconised as one of the architects of the Indian Constitution, was Dalit; this is partly due to the fact that the Constitution gave political representation and representation in public jobs to Dalits, and partly due to the fact that the Constitution saw itself as a charter of social reform. But given the scale of social violence that Dalits suffered, the degree to which they see the Constitution as their own is remarkable. Constitutionalism at its core signifies a politics of restraint.

This idea was at the heart of one of the clearest expositions of the constitutional project given by Ambedkar. To understand the nature of the commitment to constitutionalism, one might turn to Ambedkar's discussion of the idea of 'constitutional morality', a set of adverbial conditions to which agents in a constitutional setting must subscribe. Ambedkar invoked the phrase 'constitutional morality' in a famous speech delivered on 4 November 1948. In the context of defending the decision to include the structure of the administration in the Constitution, he quoted at great length the classicist, George Grote. For Grote, the prevalence of constitutional morality was 'the indispensable condition of a government at once free and peaceable'.[3] Constitutional morality meant, Grote suggested,

> a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own.[4]

For Grote, 'constitutional morality' was not simply the substantive morality of a constitution, a meaning that is often attributed to the phrase today. It also did not imply the familiar nineteenth-century usage, where constitutional morality refers to the conventions and protocols that govern decision making where the constitution vests discretionary power or is silent. Rather, Grote's use of the term, and Ambedkar's reliance upon it, focused on a set (p. 4) of historical observations about constitutionalism. Both Grote and Ambedkar accepted the rarity of constitutional morality. Grote's *History of Greece* had been motivated, in part, by a desire to rescue Athenian democracy from the condescension of its elitist critics such as Plato and Thucydides, and argued that Athenian democracy had, even if briefly, achieved elements of a genuine constitutional morality. For Grote, there were only two other plausible instances in which constitutional morality had surfaced. The first was the aristocratic combination of liberty and self-restraint experienced in 1688 in England; the second was American constitutionalism. All other attempts had failed. For Ambedkar, this lesson was an important one, adding to the worry of creating democracy in a country like India, whose society was entirely lacking in democratic spirit and experience.

Ambedkar's turn to Grote served to emphasise constitutionalism as a set of practices. At the heart of this set was the idea of self-restraint. The starkest expression of an absence of self-restraint was revolution. The most important goal of constitutional morality was to avoid revolution, to turn to *constitutional methods* for the resolution of claims. The forms of political action that had become so famous during the nationalist movement—satyagraha, non-cooperation, civil disobedience—were all at odds with the idea of constitutional morality. The turn to process meant that constitutional morality recognised pluralism in the deepest possible way. Remarkably, Ambedkar emerges as equally, if not more, committed to a form of non-violence as Gandhi. The respect towards constitutional forms is the singular means through which a non-violent mode of political action can come into being. The key

challenge in any political society is, after all, the arbitration of difference, although Ambedkar had in mind differences of opinion rather than identity. It was the unanimity of constitutional process that respected the plurality of agents. This is how, for instance, Ambedkar defends the exclusion of socialism from the Constitution.[5]

A related element of constitutional morality is the suspicion of dispositive singular claims to represent the will of the people. In part, what troubled Ambedkar about satyagraha was this very fact—its agents saw themselves as personifying the good of the whole. Any claim to hero worship or personification was a claim to embody popular sovereignty; it was to reject the argumentative sensibility that constitutional morality demanded. For the Constituent Assembly, any claim to speak on behalf of popular sovereignty—to represent sovereignty—was a claim to usurp it. No such claim could be permissible, for the chief aim of constitutional morality was to prevent any branch of government from declaring that it could uniquely represent the people.

## 2. The Cosmopolitan Constitution

The Indian Constitution is, in a significant sense, a cosmopolitan constitution.[6] It was a cosmopolitan constitution in its fidelity to the universal principles of liberty, equality, and fraternity. But it is also a cosmopolitan constitution in a second sense. Its text and principles, its values and its jurisprudence, have been situated at the major cross-currents of global (p. 5) constitutional law. The Indian Constitution, when it was promulgated, laboured under the charge of being un-Indian. In the closing debates of the Constituent Assembly, we notice the criticism that the Constitution bore little resemblance to Indian ways of thinking about the law. It jettisoned even the political theory of the man from whom so much of the nationalist movement drew its authority: Gandhi. Instead, it represented an amalgam of many sources and traditions. For instance, it was profoundly shaped by the system of English Common Law that had effectively been institutionalised in India. It bore a deep imprint of the Government of India Act 1935. It borrowed Directive Principles of State Policy from the Irish Constitution, and was influenced by the American debates over due process—all made to serve distinctly Indian political challenges. Even though the Constitution had the political authority of the nationalist movement behind it, it ran the risk of being vulnerable to two charges. The practical accusation was that it was not a constitution suited to India’s needs. The theoretical charge was that the Constitution represented a kind of derivative eclecticism.

This is also a charge often made against the subsequent development of Indian constitutional law. The practical accusation against the Constitution can only be answered historically. At this juncture it is sufficient to say that the Indian Constitution has not just endured and consolidated; it has become as much a part of India’s national identity as any other institution. It has provided a framework for adjudicating deep political disputes. It is a touchstone frequently invoked to make normative claims. But the charge of derivative eclecticism occludes what is interesting about Indian constitutional law. From its very promulgation, the Indian Constitution situated itself at the forefront of universalism. The Indian nationalist movement was self-conscious about the need to transcend nationalism; Indian Independence was instrumental in realising the unity of mankind. For such a project, it did not make sense to limit the possible sources of normative or legal authority. To be free was not to be bound by a particular tradition, or just a particular political contract. It was to be free to take any tradition and history and make it one’s own.[7]

It is for this reason that Indian constitutional law and Indian courts are at the cross-currents of almost all major legal debates. They are not constrained by the sources they cite: they can roam freely over American, English, South African, Israeli, or even Pakistani jurisprudence. They can freely read international law principles into the Constitution. They can read the American First Amendment into the Indian Constitution. While the quality of the reasoning can be disputed in individual cases, there is no question that to enter the

world of Indian constitutional law is not to enter into a world of parochial concerns, derived from the peculiarities of a political tradition; it is to enter a global conversation on law, norms, values, and institutional choices.

This conversation bears the imprint of almost all layers of constitutional transformation. Like many constitutions it concerns itself with the limits and constraints on public power, the ways in which the sovereignty of the people can be preserved against various usurpations. It concerns itself with the recognition and protection of human rights. Indian constitutional law innovated in the expansion of these rights, to make social and economic rights (p. 6) justiciable. But it also bears the imprint of complex debates over development and the place of property rights in that process. This is a body of constitutional law that has also allowed for a transition from a State-led, redistributive model of economic development to a more liberalised and globalised economy. It has dealt with the exigencies of a complex regulatory State and the tensions between legislative authority and delegation that a modern administrative State imposes upon politics.

In any constitutional tradition there is a tension between the backward- and forward-looking aspects of constitutional law.[8] The backward-looking aspects refer to constitutional texts, founders, and intentions. The forward-looking aspects refer to an ongoing conversation on the nature of social contract and the nature of social justice. Even the most entrenched constitution requires relegitimation in the light of changing circumstances, new challenges, and changing social values. In any constitutional tradition, there is a tension in how law positions itself between its authority derived from the past and its utility for the future. Indian constitutional law is fascinating for the way in which the backward-looking aspects of the law—fidelity to a text, the citation of precedent, and the invocation of the spirit of the founders—are invoked in creative reinterpretations of the constitution to make it serve changing needs. The manner in which this tension is negotiated provides an instructive case study of the relationship between constitutional law and political legitimation. It will hopefully invite scholars to consider how constitutional law needs a theory of legitimation that does not reduce it to fidelity to a text or inherited authority on the one hand, or an exogenously given moral and political theory on the other. It will demonstrate how constitutional law *operates* as a point where the authority of the past and the challenges of the future meet, in the context of an ongoing democratic conversation. In this sense, constitutional law is not just a doctrine; it is a site for the mediation of different tensions and conflict.

When India’s Constitution was promulgated, it was often criticised for its distance from Indian society. Even as recently as the fiftieth anniversary of the Constitution, political scientists were arguing that the Indian Constitution was not a reference point for Indian political culture.[9] But the chapters in this Handbook convey the opposite impression. The greatest success of constitutionalism in India is now the promiscuity of the language of constitutionalism. Tocqueville had suggested that in the United States political questions were often apt to become judicial questions. In India, by extension, a vast range of political, administrative, and judicial matters have become constitutional questions that are routinely brought to the courts. Both citizens and judges invoke constitutional values and doctrine not just when claiming rights, determining jurisdiction, or limiting governmental power. They invoke constitutional values in a variety of claims: from protecting ecology to allocating natural resources, redressing grievances against governments, and bringing ordinary tort claims. Indian constitutional law is interesting precisely because it has constitutionalised so much of Indian life. Indeed, one of the major contributions of this Handbook, through its treatment of most areas of Indian constitutional law, is to document the staggering breadth and depth of Indian constitutional jurisprudence. Moreover, although the (p. 7) Supreme Court features centrally, there is a vast High Court jurisprudence as well. Future accounts of the reasons for India’s surprising success as a

consolidated democracy that surmounted improbable odds will now have to incorporate the pervasive institutionalisation of legal disputation against State power.[10]

## III. Constitutional Tensions

In its very design, many of the major tensions that have characterised Indian politics and the formation of the Indian State have actually been codified into law. Some of these tensions are familiar in constitutional law, such as the tension posed by the separation of powers. In India, this tension was centred on the very existence of a text. The formal amendment process, by which Parliament was empowered to amend the text in most instances, coupled with the recognition of judicial review, meant that the Constitution pulled itself in both the direction of written constitutionalism and parliamentary sovereignty.

Rights too navigated competing impulses. If we take the conception of rights, for instance, we find that even within the text these rights have been situated at the axis of two tensions: rights and qualifications. The project of universalism had to negotiate the brutal realities of freedom and partition; the Constitution bears traces of that historical trauma. As regards rights, there was the further innovation in the form of the Directive Principles of State Policy. These were contrasted with the fundamental rights, which unlike the Directive Principles were judicially enforceable. While the Directive Principles suggested that constitutional law was meant to promote substantive welfare outcomes, fundamental rights, as rights classically are, emphasised the importance of means. The recognition of the right to property but also the State's responsibility for land redistribution, for example, placed the tension between means and ends in law.

The debate between centralisation and decentralisation was another source of friction. At the founding, two pressures led to a centralising vision: a concern for the security of society, and the belief that localism was a threat to the emergence of a modern conception of citizenship. The State needed to emancipate individuals; it needed to liberate them from their parochial concerns. Yet, over time there has been a constant clamour for power from below, and a constant pressure to renegotiate power between different levels of government (the Centre and the States; and the States and local bodies). Several constitutional devices, from regional emergency powers to the concurrent list, meant that the tensions between functionalism and participation found constitutional manifestation.

Finally, the Constitution was a charter of individual liberty. It promised freedom for individuals, but it also recognised the salience of community identities, both to redress historical injustices and to protect minorities. This inherently set up a tension in the constitutional project, on matters ranging from affirmative action and reservations to minority (p. 8) educational institutions. Were minorities an exception, or was their recognition simply a heightened effort at equal protection? Did reservations serve to transcend identities like caste, or did they instead consolidate permanent identities? Was the ultimate constitutional project one of power sharing between different group identities, or one built around the liberation from identity?

As the chapters in this Handbook show, the Indian constitutional experience presents rich and fascinating material on how these tensions have worked out.

## IV. The Character of Indian Constitutionalism

### 1. State Failure

The expanding scope of constitutionalism merits some reflection, and provides an interesting window on to the setting of Indian constitutional law. There are several pressures that have led to an ever-expanding constitutional discourse. For one thing, the Indian Constitution is itself one of the longest constitutions in the world. A striking feature of the founding imagination was a penchant for codification.[11] Many routine administrative

matters, like service rules for public employees, for example, find their way into the Constitution. The Constitution itself was not just concerned with the rights of citizens, the limits of government power, democracy, or social justice. It was also very much part of a State building project, where the framers wanted to protect many institutions of the State from the vagaries of ordinary politics. It is almost a tautology to suggest that a long constitution will vastly expand the scope of constitutional adjudication. But the expanding recourse to the Constitution was inherent in its length.

The second reason for the expansion of constitutional language was, paradoxically, the opposite. It bears reiterating that India is a poor developing country, with relatively low State capacity.[12] The background condition of State capacity has a great bearing on how constitutional law evolves. Low State capacity expresses itself in many ways. The State does not address citizens' grievances effectively. Often, political gridlock prevents legislation from being enacted. Indian courts are also themselves an example of low State capacity: underfinanced, understaffed, and struggling to keep up with the sheer volume of demands placed on them. But society's demands and sufferings cannot wait for the glacial pace of change in State capacity. Courts have often found themselves mediators between this vast array of (p. 9) demands and low State capacity. They have had to step in where other institutions could have done the task; they have had to craft remedies in the absence of any administrative backup; they have had to bear the weight of sending a signal that the Indian State has some forum where it responds to human suffering and injustice.

Many of the innovations and peculiarities of Indian constitutional law come from these demands: necessity is indeed the mother of invention. The public interest litigation movement, for example, where courts relaxed the rules of standing for litigants and often intervened in matters of public interest that normally should have been within the domain of the executive, is one such example of innovation. Another example is the fact that India has a very underdeveloped system of tort law. Tort law requires not just background legislation, but also a sophisticated State apparatus that can adjudicate claims. In the absence of available tort remedies, courts have had to use constitutional remedies to provide relief that would normally have been available in tort law. Or faced with severe cases of breakdown of administrative accountability of the executive, courts have often taken recourse to constitutional law to craft remedies. If judicialisation has been one of the major themes in recent Western constitutional theory, constitutionalisation appears to be the phenomenon most visible in India.

This attempt to use constitutional law to compensate for massive State failure is not without its costs. Some argue that it is somewhat paradoxical that an already overburdened Supreme Court would choose to take on greater burdens by stretching constitutional law in this way. It invites scepticism about constitutional law in two ways. First, there is the scepticism whether Indian law too easily breaches the boundaries between constitutional and other forms of law. This introductory chapter is not the place to settle this debate. Many contributors offer different points of view on this matter. But what is of interest is the way in which the Indian material opens up a new inquiry into how the domain of constitutional law is conventionally defined; what are the forces that explain its scope and reach. Secondly, it opens the question of the extent to which providing constitutional remedies can effectively compensate for State failure. Many critics have pointed out that the Supreme Court's reliance on stretching constitutional law—by discovering new rights, for example—is relatively ineffective in addressing the sufferings it purportedly claims to address. Often the grandiosity of constitutional doctrine is not matched by the strength of the remedies. But, regardless, the Indian experience provides a fascinating window on the possibilities and limits of constitutional discourse in bringing about substantive justice. It

demonstrates the ways in which constitutional doctrine is shaped by background institutional capacity, not just by normative or formal legal considerations.

## 2. Design and Structure

The coherence and stability of a body of constitutional law also depends on the character of the institution from which it emanates. In countries like India, with a written constitution that provides for judicial review, that institution is the judiciary. The American constitutional experience has shown that constitutional courts where judges have extremely long tenures, and the modes of appointment depend on direct accountability to the political executive, will produce a certain kind of jurisprudence. We can expect political cleavages or political philosophies to be very clearly expressed. We can also expect them to be articulated in strikingly consistent terms over the lifetime of decisions.(p. 10)

The Indian Supreme Court looks very different in comparison. Historically, appointments to the Court have had very little to do with the political ideology of individual judges. There is a relatively high turnover of judges; the judges do not sit *en banc* but on separate benches; cases which make it to large constitutional benches are often a function of the exercise of power by a small group of judges; such benches are often constituted at the discretion of the Chief Justice; and finally the identity of the Court itself is complicated by its dual appellate and constitutional roles. In such an institutional setting, there is not as much internal coherence in constitutional jurisprudence as we would like to see. The system as a whole also lacks the classic rule of law characteristics—consistency, a strict application of *stare decisis*, and so forth. The extent to which this worry is real or imagined is a matter of debate, and varies across different areas of law. But it does mean that internally within the court system, Indian constitutional law is probably shaped by more judges than is the case in any other jurisdiction.

Another feature of the Indian case has been the position of the Supreme Court in comparison with the High Courts. In matters of day-to-day justice, both in terms of access and ease of disposal, there has always been a major concern about the Indian judiciary's capacity to deliver. One of the ways in which the Supreme Court has tried to compensate for potential miscarriages of justice is by increasing its jurisdiction and by a liberal approach towards admitting appeals from lower courts, thereby implicitly diminishing their constitutional status and role. This has been made possible, in part, by the constitutional text itself, which allow the Supreme Court to exercise jurisdiction on a range of grounds. The credibility of the Indian system rests much more on the Supreme Court than it does on other courts. In the long run, we might find that what seems like a compensatory mechanism against State failure can also exacerbate it. But the more important point is that the legitimacy of constitutional law has come to be invested in the Supreme Court.

The development of constitutional law is almost invariably viewed externally—that is, in how it interacts with other institutions—but several chapters in this Handbook demonstrate that internal features cannot be ignored in the Indian case.[13] The aforementioned features of India's constitutional system may certainly mean greater incoherence and instability. Yet, they also have the potential advantage of ensuring that the judiciary is never captured by particular ideological tendencies; and, even if it is, the capture is short-lived. One expects far more suspense in Indian constitutional adjudication. While that may not be conducive to the stability of doctrine, it may well have helped to secure the stability of the system as a whole.

## 3. Law and Democracy

One standard way of describing the evolution of Indian constitutional law is as a transition from black letter law to a more structural reading of legal materials.[14] A second way has been (p. 11) to see it as a product of political compromise and negotiation.[15] While both these outlooks have much in their favour, neither fully captures the relationship between law and democracy in India. Indian constitutional law is not simply the site of a preconceived normative yardstick, nor is it a distinctive form of reasoning we can call purely legal, or a mask merely covering hidden political acts and agendas. Rather, it has always been marked by the need to take into consideration not just its inner structural coherence, but also the way in which law will be rendered legitimate in society.

In such a context, one aspect that shapes constitutional doctrine is the idea of compromise. A constitutional culture can be subject to three kinds of compromises. The first is a compromise between norms and social forces. In examining doctrine we are tempted to ask how the logic of a particular normative principle or the text of a statue plays itself out in constitutional adjudication. But the particular way that our understanding of a normative principle or a statute is shaped can itself reflect something deeper: it can reflect a compromise of competing social forces. The tension between the normative and realist reading of constitutional law, between the logic of moral claims and the logic of social forces, has been a feature of all constitutional law scholarship. The second kind of compromise can be a compromise between competing and sometimes incommensurable values. Should individual rights or group rights be given equal normative weight? Sometimes these compromises are enshrined in a constitution itself. The third kind of compromise often arises in the context of judging the suitability of law to particular situations, where there are differing assessments of what the *consequences* of law might be. This is a compromise forced, as it were, by a gap between an assessment of social reality and desired norms.

What makes this Handbook interesting is that, unusually for a book on constitutional law, the chapters *thematise* the issue of constitutional compromise, and in doing so open up a new and interesting way of looking at constitutionalism. The idea is not so much to say that Indian constitutional law does not aim for coherence or principle; the activity of litigants and judges would be unintelligible without some such presumption. But the chapters are striking in capturing the degree to which constitutional law is shaped by the necessity for all three kinds of compromises. These compromises are not dilutions of the constitutional agenda; they are a means of advancing it. The judgement on the nature of these compromises varies. Some scholars think these compromises give Indian constitutional law an unusual degree of heterogeneity; others think they provide creative ways of reconciling competing demands in ways that keep the constitutional project alive and expand its reach. They faithfully reflect the need to build legitimacy for a constitutional project in a diverse society.

At one level, it is easy to argue that the Supreme Court has become the final arbiter of the Constitution; it can even pronounce duly enacted constitutional amendments (p. 12) unconstitutional if they violate the basic structure of the Constitution. But, as these chapters also demonstrate, the competition over who is the final custodian of the Indian Constitution remains very much an open question. The Constitution has evolved through both partnership and contestation between different branches of government. The Supreme Court, may, on occasion, draw a red line through what legislatures can do; it can claim adjudicatory supremacy. But equally the legislature can deeply transform the shape of the Constitution, as it has done through a hundred amendments. Importantly, however, the Constitution is not solely shaped by duly instituted branches of government. Both legislatures and courts also respond to what might be understood as their readings of popular constitutionalism. There is a productive tension between the formal and legalistic understandings of constitutional law and the popular expectations and demands on

constitutional law.[16] As Ambedkar had envisaged, constitution is not just a noun; it is also a verb. It is co-produced by the collaboration and participants of different actors, where any claims to authority will always be contested.

If this is correct, then one needs to see the actors in a democracy as participants in a dialogue on public reason. It is often asked what canons of reasoning discipline judges. Are they bound by normative considerations they import into interpretations? Are they bound by theories of interpretation? As constitutional law has expanded in scope and thickness, these questions are raised with even more urgency. One way of thinking of proper judicial behaviour is to invoke a set of formal considerations. On this view there are certain formal restraints on judicial behaviour. Judges are bound by the text of the constitution. In traditional legal conceptions, courts are disciplined by a set of formal techniques. These techniques also form the basis of the authority of their decisions. Despite their ubiquity, however, these are not so much normative constraints on judicial behaviour as they are forms in which judges express their opinions. Constitutionalism is a practice that is constantly being created and recreated through the actions of concrete agents, including judges.

If Ambedkar is right, then the idea of constitutional morality cannot be reduced to pure normativity, on the one hand, or pure legal form, on the other. Instead, his emphasis on public criticism, and the need to maintain the conditions for it, points to a different role for constitutional law. It is not the site for dialogue between different branches of government. It is simply a node in a conversation between law and democracy. The effort at public reason involves judges thinking of the legitimacy of their own decisions. Apart from formal legal techniques—the engagement with precedent, texts, etc—the task involves thinking what reasonable people would accept and agree upon. This is not crude consequentialism, where judges simply gauge which decisions people would obey, but rather a genuine inquiry into what reason demands against extraordinary background social pressures. It is an effort to bridge the gap between representation and legitimacy. The compromise that occurs is a compromise aimed at deepening the constitutional project.[17]

## (p. 13) V. Coda

The study of Indian constitutional law has proceeded, by and large, in two ways. One way to approach the field has been through careful and technical analyses of legal doctrine, aimed largely at the legal profession. The last definitive contribution of this kind was the fourth edition of HM Seervai's multi-volume *Constitutional Law of India*, which appeared nearly two decades ago.[18] Another mode of engagement with the field has been more academic in nature. It has ranged from monographs and books to edited volumes and journal articles. Despite the richness and brilliance of several academic contributions, this scholarly literature has been somewhat disorganised. It has struggled to receive institutional anchoring, has ebbed and flowed with the passage of particular scholars, and has focused on certain areas of constitutional law, while largely ignoring others. As a result, Indian constitutional law has found it hard to consolidate as a field of intellectual inquiry. One ambition of this Handbook is to remedy this misfortune. The chapters in the Handbook are not burdened by a specific editorial outlook. Each chapter aims to provide a comprehensive picture of the legal position, but also to articulate the individual author's distinctive voice and perspective. We hope that this will allow for the chapters to be both a resource and a source of debate.

That debate will involve both the descriptive character and prescriptive ambition of Indian constitutionalism. How is India's constitutional journey to be judged? India's Constitution has provided some kind of an enduring framework. The fact that intense social conflicts are resolved through constitutional means must be regarded as one of its major achievements. It has seen limited but clear moments of breakdown, namely, the Emergency of 1975–77 and the use of regional emergency powers; periods during which constitutional morality has

been kept in abeyance. Constitutional success might also be considered through the lens of social change. Here the record is less promising. Putting aside the methodological question of how much a constitution can compensate for exogenous factors, has the Indian Constitution served the task of social transformation? While it has certainly led to democratic empowerment and the inclusion of certain marginalised groups in society, it is less clear whether it has contributed in a substantive way to redressing structural inequality or served as a consistent, overarching weapon against discrimination. Similarly, if we focus on the outcome of particular institutions like the Supreme Court, we can acknowledge limited success. The Court has often played a crucial part in changing the public discourse on particular matters, but it is not certain that it has had any major systemic impact. The question of success and failure is, in part, a question of what we expect from constitutionalism and what we hope for it to achieve. Important as this question is, it should not distract us from the importance of the cementing of constitutionalism. One of the things that helps constitutionalism to take root is a critical culture of constitutional argument. The heartening news is that, whatever our individual yardsticks for measuring success and failure may be, the chapters in this Handbook confirm that constitutional argument in India is intense, diverse, and alive.(p. 14)

## Footnotes:

**1** See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) xxi.

**2** The section draws extensively on Pratap Bhanu Mehta, ‘What is Constitutional Morality?’ (2010) 615 Seminar 17.

**3** Cited from *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 38, 4 November 1948.

**4** Cited from *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 38, 4 November 1948.

**5** See *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1986) 975–76, 25 November 1949.

**6** This conception of cosmopolitanism overlaps with Somek’s, though Somek is less concerned with the diverse sources and authority of law, which is a second sense of cosmopolitanism that we focus on. See Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

**7** Two initial and path-breaking efforts at understanding the sources of Indian law are Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* (NM Tripathi 1977) and Marc Galanter, *Law and Society in Modern India* (Oxford University Press 1989).

**8** See Lawrence Sager, ‘The Domain of Constitutional Justice’ in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 235.

**9** See Sunil Khilnani, ‘The Indian Constitution and Democracy’ in Zoya Hasan, E Sridharan, and R Sudarshan (eds) *India’s Living Constitution: Ideas, Practices, Controversies* (Permanent Black 2002) 64.

**10** This institutionalisation has received less attention than one might expect in even the most important and sophisticated studies of India’s democratic career. See, for example, Ramachandra Guha, *India After Gandhi: The History of the World’s Largest Democracy*

(Picador 2007); Ashutosh Varshney, *Battles Half Won: India's Improbable Democracy* (Penguin 2013).

**11** See Madhav Khosla, 'Modern Constitutionalism and the Indian Founding' (draft on file with authors).

**12** See generally, Devesh Kapur and Pratap Bhanu Mehta, 'Introduction' in Devesh Kapur and Pratap Bhanu Mehta (eds) *Public Institutions in India: Performance and Design* (Oxford University Press 2005) 1; Lant Pritchett, 'Is India a Flailing State? Detours on the Four Lane Highway to Modernization' (HKS Faculty Research Working Paper Series RWP09-013, John F. Kennedy School of Government, Harvard University 2009) <http://www.hks.harvard.edu/fs/lpritch/India/Is%20India%20a%20Flailing%20State_v1.doc>, accessed October 2015.

**13** Another kind of internal courtroom dynamic that deserves more attention, both in India and elsewhere, is the interaction between lawyers and judges. In many ways, the articulation of constitutional law takes place through a judge–lawyer dialogue—not just a dialogue between the judge and other branches of government—and attention towards the practice of constitutional advocacy can help shed light on this phenomenon. Unfortunately, no chapter in this Handbook is devoted to this task.

**14** See SP Sathe, 'India: From Positivism to Structuralism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 231. Sathe's thesis is in part about constitutional evolution and in part about the practices of constitutional interpretation. While dated, the most important study of the latter theme in the Indian context remains P Tripathi, *Spotlights on Constitutional Interpretation* (NM Tripathi 1972).

**15** See Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 2003). For a more nuanced account of the interaction between law and politics (though limited to specific decades), see Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980); Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (NM Tripathi 1985).

**16** See Upendra Baxi, 'Outline of a "Theory of Practice" of Indian Constitutionalism' in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 92.

**17** For an elaboration of the Supreme Court's role in democratic engagement, see Pratap Bhanu Mehta, 'The Indian Supreme Court and the Art of Democratic Positioning' in Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 233.

**18** HM Seervai, *Constitutional Law of India*, vols 1–3 (4th edn, Universal Book Traders 1991–96).