HUMAN RIGHTS INTERVENTIONS

EDITED BY

TATSUYA YAMAMOTO

AND TOMOAKI UEDA

# LAW AND DEMOCRACY IN CONTEMPORARY INDIA

## Constitution, Contact Zone, and Performing Rights

Human Rights Interventions

The traditional human rights frame creates a paradigm by which the duty bearer's (state) and rights holder's (civil society organizations) interests collide over the limits of enjoyment and enforcement. The series departs from the paradigm by centering peripheral yet powerful actors that agitate for intervention and influence in the (re)shaping of rights discourse in the midst of grave insecurities. The series privileges a call and response between theoretical inquiry and empirical investigation as contributors critically assess human rights interventions mediated by spatial, temporal, geopolitical and other dimensions. An interdisciplinary dialogue is key as the editors encourage multiple approaches such as law and society, political economy, historiography, legal ethnography, feminist security studies, and multi-media.

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Tatsuya Yamamoto • Tomoaki Ueda
Editors

# Law and Democracy in Contemporary India

## Constitution, Contact Zone, and Performing Rights

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*Editors*
Tatsuya Yamamoto
Shizuoka University
Shizuoka, Japan

Tomoaki Ueda
Toyo University
Tokyo, Japan

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# List of Contributors

**Kenta Funahashi** Ryukoku University, Kyoto, Japan

**Shinya Ishizaka** Ehime University, Matsuyama, Japan

**Kazuhiro Itakura** National Institute of Technology, Nara College, Nara, Japan

**Makiko Kimura** Tsuda University, Tokyo, Japan

**Kodai Konishi** Tokyo Gakugei University, Tokyo, Japan

**Maya Suzuki** Tokyo University of Foreign Studies (National Institute for the Humanities), Tokyo, Japan

**Tomoaki Ueda** Toyo University, Tokyo, Japan

**Tatsuya Yamamoto** Shizuoka University, Shizuoka, Japan

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# Introduction

Tatsuya Yamamoto

## Aims of This Book

This book is an achievement of the research project "interdisciplinary study of dynamics of law and rights in contemporary India", consisting of cultural anthropologists, sociologists and political scientists. The essays in this book share two points as a common theoretical perspective: first, legal order's "institutionalization from above" at the macro level and "institutionalization from below" through people's everyday practices at the micro level meet in everyday life by being mediated with the concept of "rights"; second, in everyday life there are contact zones of these two institutionalizations, a site where we witness social dynamics. This book provides descriptions of social dynamics in contemporary India by analyzing diverse cases with the viewpoint that it is the contact zone that "institutionalization from above" and "institutionalization from below", mediated by the concept of "rights", that reflect the ongoing democracy in contemporary India.

T. Yamamoto (✉)
Shizuoka University, Shizuoka, Japan



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Since their independence in 1947, people in India have been consistently in a democratic regime, though they experienced a state of emergency declared by Indira Gandhi from 1975 to 1977, and they have struggled to deal with several problems throughout their history. In a country called "the largest democratic country in the world" democracy has been deepened through parliamentary democracy led by some elites, and participatory democracy through social movements, in order to add to the politics opinions and voices of those who cannot directly make claims in parliament. Since economic liberalization and economic development in the 1990s, people's participation in politics to seek dignity, fair redistribution and their places in Indian society have been increasing in an unprecedented way.

This book clarifies the relationship between legal order and democracy in India, with the focus on the concept of "rights" and people's practices concerning the concept. The legal order here means a bundle of diverse laws represented by the Indian Constitution as the apex and the practices based on these laws, and "the lived governance" directing people's practices and cognitions. However, it is obvious that people have been raising their voices against suppression—justified by such laws and administrations—by the government, and such movements have resulted in an improvement in their conditions by forcing the government to constitute new laws while people often conform to the legal order through their everyday practices. In this sense, we need to understand the legal order as being inevitably renewed and revised by people's everyday practices. This book analyzes the dynamics of the legal order in contemporary India, and focuses on conflicts and negotiations between the legal order's "institutionalization from above", consisting of multi-layered rules constituted by the central government, state governments and other polity such as local assemblies, and legal order's "institutionalization from below" by people's everyday practices. Finally, this book aims to show how diverse actors activate Indian democracy on a daily basis by participating in politics in different ways.

The republic of India, where more than a billion people live, implements politics at two levels: first, the central government; second, the governments of twenty nine states and seven union territories. It has been struggling to include people in different categories into the nation-state.

Each state and union territory government has legislative, administrative, judicial and financial functions according to the entitlement of the Indian Constitution, and each government constitutes different political situations because of this system. In addition, decentralization in India has been prompted. For instance, the 73rd amendment of the Indian Constitution in 1992 commanded the set up of self-governing, elected village councils called "panchayat" and the 74th amendment declared the set up of elected municipalities, which is a similar system to panchayat, in urban areas (Singh 2015: 453; Sivaramakrishnan 2015: 560). These expansions of decentralization have enabled people to experience voting, and ensured accessibility to politics for the socially vulnerable with the help of the reservation system prescribed in the Indian Constitution. As a result, this direction has achieved a certain degree of success so far. Thus, the political context concerning contemporary India consists of a three-tiered structure—central government, states and panchayat—and in each tier, the politics proclaimed by the people has brought about social dynamics. However, in order to understand Indian democracy, it is necessary to pay attention to, first, both national politics led by the central government and politics promoted by the state governments, and second, the hybridization of politics and rules between pre-modern laws and modern laws.

However, the central government still has an overwhelming influence on state governments from the viewpoint of law, though decentralization, which has supported people to participate in politics in different ways, shows a decrease of central government's influence on state governments. The source of its influence is, needless to say, the Indian Constitution, and it strongly influences the political direction of state governments. For instance, though each state is allowed to constitute state laws in state legislatures, these state laws must be under the Indian Constitution. And in the amendment to the Constitution in 1992, the position of local governments was enforced, but "while their elections, constitution, and composition are couched in imperative terms, their functional and financial powers remain limited and optional" (Sivaramakrishnan 2015: 576). Thus, the Indian Constitution is the root of legal order in India and has been strongly influencing state-level politics.

While the huge influence of the Indian Constitution at the administrative level is apparent, we should carefully analyze how the Indian Constitution has been actually put into practice in order to see whether people have found meaningful provisions in the Constitution, such as the description about the reservation system. The adaptation of legal activism by the judiciary from 1978 to 1980 offers a referential point. The judiciary was attempting to establish a stable structure based on the support of Indian citizens in order to face a strong government, namely Indira Gandhi's regime, which declared a state of emergency and justified political interventions on judiciary personnel and amendments of the Constitution. In this situation, the judiciary utilized Public Interest Litigation (PIL). According to Divan, "Front and centre, PIL now occupies an unrivalled space in Indian constitutional law that bridges the citizen, the court, and the State. It arose in response to citizens seeking to curb widespread human rights violations or illegalities in government functioning that harmed public administration or the environment… PIL has become a vehicle of choice for those seeking redress of public grievances" (Divan 2015: 663–664). PIL in the Indian context gives citizens and organizations the right to file cases on behalf of victims and for public interest, and is well known for its flexible position in standing up for victims themselves. Consequently, PIL set by the judiciary has widened the role of the judiciary in political matters, and prompted the "judicialization of politics". Similarly, it has been functioning as a source for many Indians seeking redress. It can be said that this situation, where the judiciary has urged the political participation of the people through the active use of provisions in the Constitution, has a strong linkage to the expansion of the political realm that people can participate in and the deepening of Indian democracy.

However, it does not mean that people's lives are affected only by implementations of the Indian Constitution by the central judiciary, the parliament as legislator and the administration as executor. As written above, not only the Indian Constitution and the state laws, but also the customary laws in villages, which influence arbitrations of conflicts and decision-making in everyday contexts and are sometimes incompatible with the provisions in the Constitution, direct people's practices in their everyday lives. In other words, the multi-layeredness of laws consisting of modern laws and customary laws constitutes the legal order in which

people live. It is the legal order that prescribes forms of people's imagination and participation in politics. This book regards multi-layered rules as an indispensable facet of legal order. We cannot avoid paying attention to the legal order which sets up the Indian Constitution as its supreme rule, in order to clarify the contemporary form of Indian democracy which people in India actually experience. The main theme of this book is to analyze the legal order, and this book looks at practices of the central and state governments in India utilizing laws in a multi-layered way and realizing the legal order as "institutionalization from above".

On the other hand, the law cannot be separated from people's daily activities. As detailed later, the legal order is realized through people's practices in concrete contexts. Everyday practices are sites for the visualization of the dynamics of law and democracy, whether people ratify the present legal order or seek a new one. This book regards issues concerning laws emerging from people's practices as an important component of the legal order. And it situates people's practices concerning rights, such as human rights, citizenship and the right to information at the moment of visualizing the dynamics of the legal order, and then attempts to clarify some aspects of contemporary India concerning laws and democracy. People in India have acquired the tools to express their predicament to the world through rights, and these "rights" concepts have been drastically transforming their everyday lives and sometimes influencing legal systems in the central and state governments. This book regards loyalty for, and its use of, or decent (voice) against, the legal order through people's practices surrounding rights as "institutionalization from below".

The chapters in this book deal with multiple issues from the perspective of people having been driven by their rights and being directed by the legal order stemming from "institutionalization from above" and, at the same time, constructing the legal order through participating in politics in the form of "institutionalization from below". This book finally aims to show some parts of Indian democracy that people in India actually experience on a daily level. It is said that the everyday lives of people are a site for maintaining the status quo but sometimes objecting to it using the concept of "rights". Those sites should be the contact zone conflicting these two institutionalizations and bringing dynamics into Indian democracy.

## Arguments About Rights

Before the arrival of the western modern concepts of rights, practices, conventions and politics relating to rights, such as vested water rights and concession, were concomitant with people's lives in India. In this book, the authors focus especially on how rights stemming from modern legal systems have been embedded or utilized within Indian contexts, and how these modern rights and indigenous rights have conflicted, while paying attention to indigenous rights rooted in people's lives in an inseparable way.

While the concept of "rights" in a modern western context assumes human beings in general as the point of attribution of each right, it has presumed the individual to be autonomous and liberal as a right holder and user. Each individual with these rights has been supposed to participate in a domain called a civil society that seeks for respect and qualifications for such individual's rights, in the category of a citizen that takes the attributes and belongings of members away. And especially after World War Two, concepts of "rights" with such an implication have been widespread in the lives of people and have had a huge influence on the formation of their imagination, which cannot be overlooked. In imbuing processes of rights, it has been said that so many cases are beyond previous assumptions presuming that an individual as a right holder and abstract citizen should make claims on their rights. For instance, in India, not only individuals but also diverse groups have been making commitments for their rights, and such subjects of claims are not based on the abstract category of "citizen". And, in India, the Indian Constitution has assumed both an individual and a community as a right holder, and this particular legal background has been facilitating the participation of multiple political actors, despite the existence of many voiceless actors because of many reasons such as political oppression and economic and educational inequality. As Anupama Roy says, "The subject of rights in the Indian constitution, however, is not just the individual, but also cultural and religious communities and social groups…Thus, while the masked citizen persists as the bearer of rights within the constitution, the community is also recognized as a relevant collective unit of social and

political life of the nation, and seen as relevant for differentiation among citizens", and "A closer scrutiny would, however, show that there is in fact no segmentation or dichotomization, and what may appear to be individual-catering rights are in fact interwoven with a commitment to community and group rights" (Roy 2016: 70–71). There are active arguments concerning rights in India under this situation, and arguments relating to human rights have been increasing recently. Especially, cultural anthropologists have dramatically changed their attitude to human rights through its history.

Arguments concerning human rights in cultural anthropology started after the UN adopted the universal declaration of human rights after World War Two. Anthropologists belonging to the American Anthropological Association took a negative stance towards the Universal Declaration of Human Rights because they regarded human rights as originating from modern western societies and insisted that its imposition on societies with different values was incompatible with the anthropologists' "cultural relativism" philosophy (American Anthropological Association 1947; cf. Goodale 2008). However, they gradually came to realize that there were huge gaps between anthropologists with a "cultural relativism" philosophy presuming closed cultures and societies from outside, and the actual situations of people living in non-western societies who have been experiencing an influx of diverse materials and concepts from western countries. In these situations, the import of human rights into such societies was not exceptional, and some anthropologists witnessed how locals recontextualized the concept and utilized it to achieve their multiple goals. Anthropologists could not help correcting their understanding of cultures and societies as being closed, and this tendency was in accordance with a time when post-modern anthropologists such as James Clifford and George Marcus harshly criticized anthropological perspectives and practices inheriting colonial power relations between researchers from developed countries and the researched in developing countries (ex. Clifford and Marcus 1986). As a result, the American Anthropological Association qualified Terence Turner's and other anthropologists' reconceptualization of human rights as protecting human differences in the world, and issued its statement about human rights in 1999 (Committee for Human Rights, American Anthropological Association 1999). Thus, "the anthropology of

human rights and citizenship has been a growing field of anthropological enquiry since the mid- to late 1990s" (Wilson and Mitchell 2003: 1).

Re-evaluation of "human rights" among anthropologists inevitably included arguments which attempted to grasp how people in different contexts have adapted themselves to "human rights". "The anthropological critique of the convergence of sociological and legal positivism in rights discourses expresses a scepticism[*sic*] of the manner in which positivism relies upon categorizing and counting a social reality that is complex, fluid and in motion, as well as the ways in which positivism cannot seem to account for human subjectivity and intentionality" (Wilson and Mitchell 2003: 6). Wilson and Mitchell say that "anthropologists portray human rights as embodied in social persons and embedded in social network" (Wilson and Mitchell 2003: 8) and "abstracted and universal forms of human solidarity must arise from these everyday forms of compassion and empathy which necessarily involve a recognition of the other" (Wilson and Mitchell 2003: 9). It can be said that this sort of argument attempts to understand "human rights" as taking diverse forms in people's everyday lives, rather than imposing the prescriptive and universal definition on locals without any doubt. This direction has been explored by some outstanding scholars such as: Upendra Baxi, who decentralizes normalized "human rights" understanding in international human rights law by taking a discursive approach (Baxi 2002); Merry, who insists on the "vernacularization of Human rights" (Merry 2006); Kurasawa, who claims the importance of seeing "Human rights as practice" in articles pursuing global justice (Kurasawa 2007); and Goodale.[1]

In his arguments, Goodale, who has been leading anthropological studies on human rights, claims to distinguish human rights universality from human rights universalism. Goodale says that "Human rights universality refers to the claims at the core of the modern idea of human rights". That implies the sameness of all humans because we share common humanness having normative implications with each other, and one

[1] [W]e draw attention to both the diversity of ways and places in which the idea of human rights-again, in its legal, conceptual, and discursive forms- emerges in practice, and the fact that the practice of human rights is always embedded in preexisting relations of meaning and production. (Goodale 2007: 24)

of the specific manifestations of its normative implications is "rights" (Goodale 2009: 15). Human rights universalism, by contrast, refers to the complicated discursive presence of these claims as they are acted upon within existing legal, moral and political practices (Goodale 2009: 15). In other words, human rights universalism is a form that enables locals to organize movements by utilizing human rights discourses based on its transcendent universal claim. Goodale says "actual human rights practices… unfold transnationally through concrete encounters in particular places and times" (Goodale 2007: 16) and he appreciates the importance of human rights ethical stakes—while he urges us to pay attention to the multiple forms that localized human rights concepts take (Goodale 2007, 2008, 2009, 2013). Thus, recent anthropological studies have argued that the human rights concept not only keeps on holding its aspirational and normative aspects but is also the vernacularized concept because it is always and already embedded within human practices and relationships in different local contexts.

## Arguments Over the Political Sphere in India: Appadurai and Chatterjee

This book follows the arguments written above and focuses on and analyzes how the human rights concept has been embedded within people's everyday practices and local relationships in India, and how the legal order has been experienced in local contexts. In order to clarify our argument's implications in Indian contexts, we review Arjun Appadurai and Partha Chatterjee's arguments, which have been influencing our understanding of human rights matters and participation in politics. Appadurai argues that links between international non-governmental organizations (NGOs) and slum dwellers enhance people's capacity to aspire, and the democratic form of political participation in global civil society through such links is a "deep democracy", while Chatterjee rejects a civil society linking modernity as a possible option for the majority in India because the civil society is a realm of "citizen", the elite. Rather, Chatterjee sees the potential of political interventions by a non-elite majority in a political society where people lack access to civil

society as constituting "population" and exerting influences on the central and state governments. First, we briefly review the arguments of both scholars and then show our basic theoretical perspectives.

In his influential works such as *Modernity at Large* (1996), Appadurai claims the importance of people's transnational network, transborder imagination and the capacity to aspire which has a close relationship to people's imagination. Transnational networks supported by migration and the spread of electronic media have drastically transformed the imagination of many people; and imagination formed through consuming electronic media and contents offered by such media "especially when collective, can become the fuel for action" (Appadurai 1996: 7). Globalization undoubtedly has brought about unexpected changes and uncertainty among neighbourhoods and locality, and urged people to maintain locality more seriously than ever before. The imagination of ordinary people arising from such globalization might have prompted people to purchase products from the West and turned out to be the obvious popularization of consumerism all over the world.

However, Appadurai hopefully evaluates the potentiality of consumption enabled by globalization. He says "consumption in the contemporary world is often a form of drudgery, part of the capitalist civilizing process. Nevertheless, where there is consumption there is pleasure, and where there is pleasure there is agency" (Appadurai 1996: 7). Appadurai sees the potential of human capacity stimulated by pleasure as bringing about something new. Such an attitude is obvious in his description of cricket. Appadurai argues that cricket is what it is in India today as the result of indigenization of colonial culture brought by the British government. According to Appadurai, cricket's popularity was proof of loyalty to the British empire, went through vernacularization, and as a result of it, has become "so profoundly Indianized and de-Victorianized" (Appadurai 1996: 111–112). Showing some examples, Appadurai insists that locals are obviously agents capable of appropriating these colonial cultures as "means of modernity".

Appadurai affirms the capacity of people to read cultures coming from outside to communities in unintended ways. As with his arguments, such as on hope for a grassroots globalization constituted by cellular organizations in *Fear of Small Numbers* (2006), and on political spheres, which

alliances of slum dwellers and international NGOs set up, in *The Future as Cultural Facts* (2013), his perspective on trusting human capacity has been extended to modern concepts such as "rights". Appadurai claims the importance of the "rights", which are not given in a top-down approach by international NGOs, but stem from "cross-national politics" consisting of alliances or cooperation between such NGOs and locals. For instance, Appadurai says that a growing gap between the globalization of knowledge and the knowledge of globalization is a recent situation in the world, and, in order to improve this situation, he proposes that we extend the "research" concept as "the capacity to systematically increase the horizons of one's current knowledge, in relation to some task, goal, or aspiration" and regard such a right to research as a human right. Appadurai says "the capacity to aspire and the right to research are necessarily and intimately connected…It is an argument for how we might revive an old idea—namely, that taking part in democratic society requires one to be informed. This is doubly true in a world where rapid change, new technologies, and rapid flows of information change the playing field for ordinary citizens every day of the week" (Appadurai 2013: 283). Appadurai goes on to say that actors, who succeeded in the extension of the capacity to aspire through enacting such rights, are likely to visit other areas facing similar problems and cooperate with locals to solve such problems. Appadurai affirms such a virtuous spiral as stemming from the extension of the capacity to aspire. Thus, the mode of politics on which Appadurai focuses is not a closed area of the nation-state, but the politics of hope "beyond nation". Even if people seek for reforms of situations which they experience in local contexts such as slums surrounding a metropolis, the imagination and collective actions of people living there are not closed in the nation-state. Slum dwellers with different backgrounds actually live what he calls "cosmopolitanism from below" and construct transnational networks with international NGOs. What Appadurai evaluates is a political mode called "deep democracy" that dwellers explore to achieve through their "capacity to aspire" enhanced through these processes. It seems that his arguments imply rights provided for people should be the foundation for these hopes and democracy, and a global civil society moving beyond closed nation-states should be a sphere in which people with rights participate.

On the other hand, Chatterjee says that "our attitude to modernity, therefore, cannot but be deeply ambiguous" (Chatterjee 2010 (1994): 152). He emphasizes the fact that modernity was brought to India in the colonial era.[2] Chatterjee aims at civil society as the sphere of modernity. He regards "civil society as bourgeois society" (Chatterjee 2004: 38), and "a narrow domain where citizens related to the state through the mutual recognition of legally enforceable rights" (Chatterjee 2011: 13). And he says that institutions associated with civil society "embody the desire of this elite to replicate in its own society the forms as well as the substance of Western modernity" (Chatterjee 2010 (1997): 170). Chatterjee regards civil society as an elitist zone and claims that "civil society as an *ideal* continues to energize an interventionist political project, but as an *actually existing form* it is demographically limited" (Chatterjee 2004: 39) and "the actual 'public' will not match up to the standards required by civil society" (Chatterjee 2010 (1997): 171).

What Chatterjee problematizes through his arguments could be reread as follows: who are "ordinary citizens" in Appadurai's argument (Appadurai 2013: 283)? The "public" excluded from civil society constitutes "population" that is "differentiated but classifiable, describable, and enumerable" and "descriptive and empirical, not normative" (Chatterjee 2010 (1997): 170). "These groups on their part accept that their activities are often illegal and contrary to good civic behavior, but they make a claim to a habitation and a livelihood as a matter of right" (Chatterjee 2004: 40). As clearly shown here, Chatterjee focuses on population that sometimes engages in illegal or para-legal activities, and on the political society that such a population sets up. According to Chatterjee, political society is a realm where population demands administrative reactions and compensations by states, "a domain of institutions and activities where several mediations are carried out" (Chatterjee 2010 (1997): 169), and "a site of negotiation and contestation opened up by the activities of governmental agencies aimed at

[2] [T]his ambiguity does not stem from any uncertainty about whether to be for or against modernity. Rather, the uncertainty is because we know that to fashion the form of our own modernity we need to have the courage at times to reject the modernities established by others. (Chatterjee 2007 (1994): 152)

population groups" (Chatterjee 2004: 74). He says that what happens in the realm of political society established between the developmental state and population is an "administrative processes that are paralegal and of collective claims that appeal to ties of *moral solidarity*" (Chatterjee 2004: 74), and "to deliver specific benefits or services through a process of political negotiation" (Chatterjee 2011: 14). As a result, such a political negotiation in political society "can be seen as an attempt to find new democratic forms of the modern state" (Chatterjee 2010 (1997): 173). And because "populism is the only morally legitimate form of democratic politics under these conditions" (Chatterjee 2011: 15), Chatterjee evaluates political society activated by population as a site showing the potentiality of Indian democracy, and says that "We could say that political society, operating under conditions of electoral democracy in India, affords the possibility of inviting the arbitrary power of government to mitigate the potentially tyrannical power of the law" (Chatterjee 2011: 17). By arguing in these ways, Chatterjee shows readers his distrust of legality with its potential threats to civil society and what laws bring to people in reality. To Chatterjee, civil society is a realm of compliance where elitist and right-bearing citizens, whose specific attributes are omitted, lead legal arguments and do not reflect the non-elite majority's voices. On the other hand, political society is a domain where people are not necessarily expected to behave legally. And politically mobilizing people includes eagerness to transform groups of people as population into moral communities, and moral appeals and moral justifications by such communities force governments to realize the duties that governments have to take responsibility for the poor and weak while understanding the balance of fairness. According to this understanding, Chatterjee says "this obligation may be seen as part of the general democratic temper of our age"(Chatterjee 2011: 15). And Chatterjee thinks that the character of Indian democracy mobilizing many actors into politics is "the continuing social legitimacy of arbitrary power" (Chatterjee 2011: 18) giving people spaces to activate political society. This is the point where Chatterjee sees the potentiality of Indian democracy mobilizing the weak and minorities into politics.

Chatterjee's position focusing on a population demanding social welfare from governments through political society is against Appadurai's

position claiming "beyond the nation". "A considerable part of transnational activities today takes place in the domain of non- state institutions under the sign of the modernization of civil social formations. These are the activities of a transnational public sphere whose moral claims derive from the assumed existence of a domain of universal civil society" (Chatterjee 2010 (1997): 176), according to Chatterjee. He says that these international NGOs "occupy the critical moral position of a global civil society assessing the incomplete modernity of particular national political formations" and criticize states which have not been able to reconcile their standards with globality and modernity through the universal concepts of rights presuming autonomous and self-determinable individuals and communities (Chatterjee 2010 (1997): 176). In contrast, "The framework of global modernity will, it seems to me, inevitably structure the world according to a pattern that is profoundly colonial" and "the proposals to 'move beyond the nation' are quite likely to strengthen inequalities and defeat the struggle for democracy the world over" (Chatterjee 2010 (1997): 177). Therefore, Chatterjee clearly regards chanting of "participation of civil society through NGOs" as "the new-liberal dogma" (Chatterjee 2004: 69). According to Chatterjee, while rights in legal system are pre-supposed as related to universal civil society and as held by citizens in civil society, populations under situations of "subaltern" find more important entitlements guaranteeing such populations can gain "assistance in rebuilding a home or finding a new livelihood", regardless of legal and illegal procedures (Chatterjee 2004: 68–69).[3] Because of his political stance, Chatterjee cannot accept Appadurai's argument presuming the practicality of global civil society for the minority and the weak.

## This Book's Perspective

While we can learn so many things from these two outstanding scholars' arguments about modernity, the concept of rights stemming from the western modern legal system has come to be popular for many people

[3] Interestingly, Chatterjee in 2011 uses "right" as the concept to support people's demands in political society, not "entitlement".

and has mediated many movements, as the chapters in this book feature. People activate the concept of rights on a daily level in a different way from Chatterjee's caution. People's usages of the concept are not necessarily the same as post-colonial elites' way of usages. Readers can even find processes that the concept itself builds up people in cities and villages as local elites in this book, rather than the scheme that elites take advantage of the concept as they like. Furthermore, another scheme regarding rights as legal, and discourses in civil society and claims of entitlements as illegal or paralegal, does not necessarily correspond to Mangubhai's argument and the case studies in this book. We find that people classified as population pose their challenges in a civil society supposed to be the realm of rights through PIL mediated by supporters, and some make their claims concerning rights in order to expand their entitlements.

In addition, opposition concerning civil society and political society represented by Appadurai and Chatterjee emerge differently in the case studies in this book. For instance, we agree with Nivedita Menon's following statement about civil society and political society; "the two terms should be understood as conceptual distinctions rather than as actual empirical groupings. I wonder if it is not more productive to think of civil and political society as two *styles of political engagement* that are available to people—the former style is more available to an urbanized elite, the latter to the rest. The availability is fluid and contextual, not fixed by class" (Menon 2010: 11–12). On the other hand, once focused on people's practices concerning rights, it seems that these two domains cannot be clearly separated, as Chatterjee and Menon pre-suppose, and have been actualized as mutually mixed in people's practices.

As a representative study with such a perspective, let us take Jayshree Mangubhai's argument. Mangubhai is a scholar who has been influenced by Amartya Sen, and has been working on an ethnographic study about an NGO's cooperation projects to improve living standards for untouchable women in Tamil Nadu. Mangubhai insists "De jure rights, however, become realized through a concrete act of acquisition or claiming as 'entitlements', referring to actual protected access to resources" (Mangubhai 2015: 11). In other words, as with anthropological studies working on human rights issues, she focuses on not only rights at a concept level but also entitlements as a condition in which people can share

benefits in their daily lives from the perspective of "human rights as practice". Mangubhai struggles to clarify phases where women establish their collective identity and utilize legal and illegal strategies in accordance with situations in village lives, in order to acquire entitlements as the realization of rights leading to improvements in their living standard (Mangubhai 2015: 9–10). In the argument, she "highlights the links between rights and entitlements sourced from different institutional arrangements such as national laws, state schemes, and human rights norms as the basis for the women's political struggles" (Mangubhai 2015: 12), and this book shares much of her perspective.

On the other hand, this book insists that it is important to see both collective movements concerning rights and how each actor experiences group-based rights such as allotments stemming from the reservation system in a concrete context. As Itakura describes, the reservation system prescribed in the Indian Constitution has been supporting the claims of rights which supposed communities as its subject. As a result, many actors have banked on "identity politics" in order to secure allotments based on caste and other backgrounds, and many scholars have featured such trends. However, previous studies have insufficiently focused on how the concept of rights transformed each actor's recognition and their experiences belonging to groups qualified as beneficiaries of the reservation system and other legal decision-making.[4] Penetration of the concept of rights such as human rights into multiple actors has brought drastic transformations among such actors, especially about their accessibility to resources and other issues on a daily level. This book focuses not only on how people set up collective identities through the concept of rights, but also how people are individualized by the concept.

Furthermore, we insist the concept of rights claimed in a local context is an important agent that activates many actors in a concrete situation. Scholars such as Mangubhai put an emphasis on a phase that people take actions with the concept of rights in order to improve their living standards, but, in fact, we should recognize that the concept of rights itself

[4] Tatsuro Fujikura's *Discourse of Awareness,* focusing on "awareness" brought to locals by contact with international NGOs providing the concept of rights and scientific knowledge in Nepal greatly inspired this book's perspective.

transforms people's worldview and drives people to act in different ways. In other words, the concept of rights that has been directed in the legal systems is an accelerator motivating people's practices. While people think and practice with concepts, concepts themselves prescribe people's cognition and force people to practice. This is applicable to the concept of rights the authors in this book focus on. People work on actors or situations surrounding them with the concept of rights, and the concept of rights provides imagination for people and impels them to action. While people perform the concept of rights, the concept of rights itself performs people.

However, we have to recognize that the legal order in contemporary India not only facilitates people to participate in politics with the help of the concept of rights, but is also likely to erase the voices of minorities mercilessly. Moyukh Chatterjee, who has been working on court cases concerning the anti-Muslim riot in Gujarat in 2002, says "Instead of 'vernacularizing' human-rights discourses within the legal context in Gujarat, pursing the pursuit of justice had the opposite effect: the legalism of the trial disabled accountability" (2017: 128). He shows us that laws and litigations do not support the Muslim minority to achieve justice and fairness in the cases of Gujarat. He describes how the Hindu majority's manipulation of the legal procedure disables the minority to win a fair ruling and to compensate their rights, and how these situations victimize the minority and exacerbate its social position in a local context. People's practices driven by the concept of rights in Indian legal order are stultified in the legal order. It can be said that this legal order both gives minorities voices through widespread understanding of the concept of rights and continuously produces voiceless subalterns. As Konishi and Yamamoto's chapters show, not only people given voices by the concept of rights but also people kept in silence emerge from the Indian legal order and people's practices supporting such an order.

With these perspectives, the chapters in this book have in common a theoretical perspective: the legal order's "institutionalization from above" at the macro level and "institutionalization from below" developed at the micro level through people's practices mingling in everyday lives mediated by the concept of rights. We insist that people's everyday lives as the contact zone of these institutionalizations are a site visualizing social

dynamics in contemporary India. The contact zone, mediated by the concept of rights, between "institutionalization from above" and "institutionalization from below" reflects a shape of democracy in contemporary India.

## The Chapters

This book has eight chapters after this introduction. Although every chapter features both facets of institutionalizations, they have different stances about which institutionalization should be emphasized in their contributions. The first two chapters, Itakura and Ueda's chapters, focus on the cases that line especially with "institutionalization from above".

Itakura's chapter argues that India embarked on a unique political and institutional path that included the introduction of special arrangements made for "minorities" when drafting a new Constitution. The author re-examines the Constituent Assembly debates with specific interest regarding the introduction of the reservation system. Building on previous studies on the politics of Constitution-making in India, the author focuses on the adaption of minority leaders to an independent India amid rapidly changing conditions. This chapter will offer an historical viewpoint to understand what "institutionalization from above" meant for subsequent political development as implement through the creation of the Constitution. This is accomplished through the exploration of multiple opinions, ranging from those at the political forefront to those held by discriminated groups.

Similarly, Ueda's chapter analyzes political relations between the Indian government and the Supreme Court of India over judicial appointments and explains the judicial system reforms that have occurred under the Manmohan Singh and Narendra Modi governments from the point of view of judicial democratization. The Modi government sought to achieve greater democratic control over the courts and make the judiciary less independent by setting up a commission to administer judicial appointments to higher courts to include a member selected from groups experiencing social discrimination. The commission can be viewed as a "contact zone" between institutional democratization of the judiciary from above

and the democratic institutionalization of human rights from below. Whether institutional democratization of judicial appointments from above eventually crystallizes will have a profound impact on how the institutionalization of human and collective rights from below, examined in other chapters of this book, proceeds.

While Itakura and Ueda especially focus on the facets of "institutionalization from above", Yamamoto's chapter pays attention to both "institutionalization from above" and "institutionalization from below". It features the cases with regard to Tibetan refugee societies in India and parts of Nepal, and explores how citizenship-related issues have been causing controversies and revisions of legal interpretations and policies with regard to Tibetan refugees under a dual legal system of the government of India and the Central Tibetan Administration (CTA) since the 2010s. Yamamoto clarifies matters with regard to getting Indian citizenship which have legally split between Tibetan refugees who can be Indian citizens and Tibetan refugees who cannot be, and thus has made the existence of Tibetan refugees without Tibetan citizenship invisible. These "unofficial" Tibetan refugees have been seeking Tibetan citizenship in both substantive and religious senses. However, these Tibetan refugees' wish to hold Tibetan citizenship has become more difficult since the 2010s because of the many Tibetan refugees legally seeking Indian citizenship and the CTA's reactions to them. Through the chapter, Yamamoto shows how the Indian legal order consisting of the dual legal system not only enables some Tibetan refugees in India to participate in Indian democracy as Indian citizens but also disables other Tibetan refugees in India to be legally and officially recognized as Tibetan refugees. Yamamoto's argument implies what the concept of rights can make possible and impossible.

In Ishizaka's chapter, he clarifies the role that the Right to Information (RTI) movement played in the institutionalization process of the right to know in India. The chapter reveals that the RTI movement in India started as part of the peasant empowerment movement and that under the latter movement, the institutionalization process of the right to know continues today. Ishizaka also shows that an activist organization supporting the peasant empowerment movement has been incorporated into the institution as an indispensable agent that mediates the gap between

the right to know and the right to live in contemporary India. Ishizaka concludes that the enactment of the RTI acts or the "institutionalization of the RTI from below" were unintended outcomes of the broader peasant empowerment movement, which has a wide support from people in the locality.

Funahashi's chapter focuses on the issues surrounding the reservation system in contemporary India, particularly investigating situations after the enforcement of the 73rd Amendment Act in 1992, which appointed the quotas to women, the Scheduled Castes and Scheduled Tribes in the village panchayats. He deals with a case in Uttar Pradesh, and considers the effects of the reservation system from a local point of view. According to him, the reservation system has resulted in the situation that some "elite" people have appeared among lower-strata people, including Dalits. The reservation at the local panchayat level has created Dalit-Pradhans and Dalit-members of village panchayats. People must regard the Dalits as important actors who have the right to vote and also have the right to be voted into village politics. He insists that one of the most remarkable effects of the reservation system is that it has caused a transformation of the relationships between Dalits and non-Dalits in the context of local politics, and strong consciousness of "equal relationships" as basic human rights among Dalits.

Kimura's chapter focuses on human rights violations and protests against them in northeast India. In Manipur and India's other northeastern states, human rights violations are being perpetrated by army, security personnel and police forces during counterinsurgency operations since the Armed Forces Special Powers Act was enacted and enforced in 1958. The issue has become widely known since the 2000s when the anti-militarization movement became active in the area.

In the chapter, Kimura focuses on two prominent cases of protests against human rights violations in the state of Manipur. Incidentally, in both, women played an important role in very different ways. Kimura discusses how the anti-militarization movement in Manipur has achieved certain success in reducing human rights violations perpetrated by the army, paramilitary forces and police in the region through both "institutionalization from below" and "institutionalization from above."

Suzuki's chapter examines the current socio-political dynamics of caste, based on justice and human rights, with regard to judicial empowerment in the Dalit community in contemporary India. With an increase in the educational, economic and political empowerment of the Dalits, they have risen to challenge existing policies and demand an equal share of state resources. The results of her fieldwork show that while most people tried to keep their caste hidden, a number of them asserted their caste in order to obtain benefits from welfare schemes (reservation policies in particular) and to protect their rights by approaching the judicial system through PILs. By focusing on Balmikis, she clarifies that there are (of course) changes among the people who are deemed to be vulnerable, and the PIL movement has become very active and what we call "institutionalization from below" in recent years. Through the argument in the chapter, she attempts to critically analyze the unequal social structure of an Indian society in which social movements are censured.

If we regarded these chapters mentioned above as describing how actors utilize the concept of rights in different ways, it can be said that Konishi's chapter focuses on the germinating processes of how actors come to realize the concept of rights. Konishi attempts to clarify the distortion of rights and laws in the context of the developmental process of sustainable wind energy in India. This is in relationship to people's senses within multiple codes, which leads to controversies among each of the actors connected to the developmental scheme. This chapter observes the germination of institutionalization of rights from its organization as an underground movement, focusing on the various practices and narratives of the people involved, with an emphasis on the relationship of these narratives to sacredness. This is an attempt to reorganize the thoughts of a high social status in society who generate hegemonic discourse against the notions prescribed by a grassroots movement.

All these chapters show the dynamics of contemporary Indian democracy by paying attention to how people perform acts of the concept of rights under the Indian legal order. Performing acts of rights under the legal order may enable some actors to widen their accessibility to the political sphere, and some cases featured in this book show that the concept of rights has brought a new imagination (Appadurai 1996) to actors seeking alternative in their lives. However, at the same time, other cases

in this book visualize others excluded from participating in it. In that sense, not all contributors take an optimistic views of the functions of concept of rights in Indian contexts. What we should do is to recognize situations in which people have acquired both advantages and disadvantages brought by the concept of rights. And I believe all contributors in this book have succeeded in dispassionately describing what contemporary democratic India is like.

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# 2

# Inventing Rights in the Indian Context

Kazuhiro Itakura

## Introduction

It is said that classic liberalist thought assumes that the individual is a bearer of rights. In the Indian context, this concept uniquely considers 'rights' or 'citizenship' in both the collective and individual sense. That is, rights are not solely claimed by individuals, but also by various communities that share collective identities based on language, religion, or caste. In fact, the Constitution of India, which was promulgated in late 1949, provided access to cultural autonomy and extensive political affirmative action in consideration of the anxieties experienced by certain communities.[1] India's founding fathers made concessions in consideration of the national social reality when seeking the establishment of a modern liberal

[1] Because of the Constitutional framework providing protection to minorities, some scholars regard India as a typical example of a multicultural state, but admit that there is a gap between theory and practice (Acharya 2012).

K. Itakura (✉)
National Institute of Technology, Nara College, Nara, Japan
e-mail: kitakura@libe.nara-k.ac.jp


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state. India thus embarked on a unique political and institutional path that included the introduction of special arrangements made for 'minorities' when drafting a new Constitution.

In this chapter, the author discusses the differences between two minority groups (i.e. Muslims and Scheduled Castes) from two aspects. One difference exists in the treatment of these two communities under the new Constitution. The Constitution of India contains special arrangements that were introduced for the protection of minority interests; for example, Muslims are granted a certain amount of cultural autonomy as a religious minority community. As a fundamental right of Indian citizenship guaranteed by the Constitution, this group is allowed to establish and administer their own educational institutions. They can also abide by their community's religious laws.[2] In addition, they are granted the right to profess, propagate, and practice their religion. However, they are not afforded political safeguards. Only the Scheduled Castes and Tribes are institutionally guaranteed a certain number of representatives in the legislative bodies and civil services through the reservation of seats or quotas.[3]

In India, special arrangements made for lower castes and tribal groups are generally referred to as 'reservations' or the 'reservation system'. Such arrangements were initially introduced to the Scheduled Castes and Tribes. Some of these measures (e.g. civil service quotas and reservations in educational institutions) have been extended to other lower caste groups as a response to their increasing political advancements. However, seat reservations in the legislative bodies are still limited to the above two categories. In the case of the Scheduled Castes, it is said that the 'backwardness' they faced convinced the constitutional framers to reserve seats to help equalize their status to the general conditions (Jha 2008). However, the social

[2] There was a claim for making a Uniform Civil Code in the Constituent Assembly. However, the work was postponed by incorporating the relevant article in the Directive Principles of State Policy. Although Article 44 prescribes that 'the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India', successive governments have not made serious efforts in consideration of the reaction from Muslim society to secure legal plurality.

[3] Part XVI of the Constitution provides 'Special Provisions Relating to Certain Classes', and contains articles on the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People and the Legislative Assemblies of the States.

condition of backwardness is not only experienced by the lower caste groups. In fact, many have argued that the Muslims of India exhibit continuous social and economic backwardness. The plight of the Muslims is not a recent phenomenon. Muslim figures had already lamented the exclusion of Muslims from the public sector and called for measures to remedy this condition during the 1950s. Nevertheless, such a policy has not been extended to Muslims. When viewed in hindsight, this decision has resulted in the marginalization of the Muslim community up to the present. Another difference can be found by examining the trajectories of the two communities subsequent to Indian independence. Political developments following this event consolidated the marginalization of Muslims in the political sphere (Ansari 2006). Muslim underrepresentation in the legislative bodies and administrations has been normalized, although this problem had existed since the 1950s. On the other hand, the Scheduled Castes have become more assertive in benefiting from the advantages of the reservation system (Pai 2013). There is still a prevalent socio-economic gap among castes. Yet, castes are no longer simply the basis of discrimination; rather, they have become tools of political mobilization.

The following chapter begins by tracing the history of Indian institutional development under colonial rule to understand the problems faced by the founding fathers during the drafting of the new Constitution. There will then be a discussion of the 'changed condition' surrounding the Constituent Assembly after the Indian partition. The author re-examines the Constituent Assembly debates with specific interest regarding the introduction of the reservation system. Building on previous studies on the politics of creating the Constitution of India, the author focuses on the adaption of minority leaders to an independent India amid rapidly changing conditions. This chapter will provide a historical viewpoint to understand what 'institutionalization from above', through the creation of a new Constitution, meant for subsequent political development. This is accomplished through the exploration of multiple opinions, ranging from those at the political forefront to those held by discriminated groups. The author will also scrutinize the points of the arguments and the intent behind the decisions.

## The 'Minority Question' in India

As an administrative term in contemporary India, the word 'minority' refers to religious communities, specifically non-Hindu. In fact, the National Commission for Minorities, which is one of the national commissions inaugurated under the Union Government of India, handles problems concerning six religious communities, including Muslims, Christians, Sikhs, Buddhists, Parsis, and Jains. However, the term 'minority' is generally used to refer to (or is claimed by) other communities formed through aspects of language, caste, and tribe. Therefore, some argue that India is a society consisting of various 'minorities'. This chapter discusses the 'minority question', which was confronted during the creation of the Constitution of India with a focus on the fates of two minority groups: Muslims and the Scheduled Castes. Before exploring the Constituent Assembly debates, I would like to address some problematic questions. For instance, who is considered a minority in the Indian context? What is the 'minority question'? Furthermore, why is the 'minority question' important?

There are some premises to the discussion of the minority in the Indian context.[4] First, each community has a nature of inner diversity. For example, Hindu is the majority community in India in terms of religion; however, it can be divided into various linguistic groups (e.g. Hindi and Tamil). The same type of division can be applied to Muslims. Although many Muslims living in Hindi-speaking regions can speak Urdu, Muslims in the Bengal region speak Bengali. Linguistic diversity can drive a wedge between members of the same religious community. Second, minority status depends on residence. For example, in contemporary India, Muslims are seen as religious minorities amid the dominant Hindu population; however, Muslim populations are the majority when counted at certain state or district levels (e.g. the Muslim populations of the Jammu and Kashmir state). Third, the general perception regarding social

[4] Some excellent work has been conducted on the 'minority question' in India. For example, an article written by Miron Weiner provided a basic understanding of Indian minority problems. I follow Weiner's idea that numerical status is not an indicator of minority status by itself (Weiner 1989). Mohapatra also argues that numerical weakness alone does not define a minority, and minority status is essentially fluid (Mohapatra 2014).

minority status varies according to the times. Thus, one important aspect to consider when defining a minority in the Indian context is that the minority status is not static; rather, it is dynamic.

If minority status is observed in such a way, how it can be defined? Weiner (1997) provides a useful insight into this problem. He argues that minorities are self-defined by the community itself. Claiming minority status is 'a political act' and 'a way of calling attention to a situation of self-defined deprivation' (Weiner 1997). By this definition, Weiner highlights possible cases in which communities may regard themselves as minorities. One involves a distinctive group identity that the community feels is eroding. Another involves those that regard themselves as socially and economically subordinate to others. There are also those who believe that they suffer from discrimination (Weiner 1997). Numerical weakness is therefore an element leading to status as a minority community. However, this is not a sufficient condition by itself. What is more important is the perception of themselves to the state of communities. Another important aspect of the term 'minority' as it is used in India is that it alludes to a political concept. In other words, the communities themselves assert this status to protect their own rights and interests, in addition to confronting problems. It is not simply a passive label. If the term is defined as such, the genesis of the minority question in contemporary India can be traced to the colonial period. It can more specifically be traced to a time in which the British government introduced the representational system.

Some argue that the 'minority question' is a product of the colonial state's 'divide and rule' policy. In fact, this view was voiced in the Constituent Assembly as an opposing argument to claims protecting minority rights. Colonial rule may have prompted the formation of community awareness based on religion and caste; however, this issue cannot be reduced to a mere product of colonial rule. Minority status was claimed by locals in the face of the gradual introduction of the modern Western political system into colonial India. During the 1880s, Syed Ahmad Khan raised fears about Hindu majoritarianism in the context of the Colonial State's policy of introducing native representation at the local level (Mohapatra 2014: 232). When the colonial government later considered a constitutional reform in 1906, a deputation of prominent

Muslims visited Viceroy Minto and pled that Muslims should be given special consideration in view of their minority status and historical significance to Indian society (Tejani 2008: 114). This move led to the formation of the All India Muslim League in December of the same year. Combined with the British government's intention to bring stability to the colony (Tejani 2008: 116–121), this reform resulted in the introduction of 'communal representation' (or 'separate electorates') in the Indian Councils Act 1909. This representational system was a departure from the conventional electoral system, which was based on territorial representation; namely, it was an electoral system designed to elect representatives from within the group only by members of the group. Muslims were granted a separate political category distinct from other religious communities through this reform. This event can be seen as a typical case in which the colonial government exploited an existing Indian social cleavage for political purposes.

Since the adoption of the Indian Councils Act 1909, the benefits of communal representation were extended to other religious communities, including the Sikhs and Christians. The extent of this representation was further expanded by introducing it to a historically discriminated community (i.e. the untouchables) during the 1930s. B. R. Ambedkar strongly appealed the introduction of separate electorates for the untouchables. His first opportunity to argue for such electorates emerged when the Southborough Committee met him as a prominent person of the community in 1917. For Ambedkar, the untouchables were a community that required different treatment. He argued that social divisions in India existed not only between religious communities (e.g. between Hindu and Muslims), but also within the Hindu community (i.e. between the touchables and untouchables). In addition, Ambedkar did not consider that the separate electorates would result in the division of Indian society; rather, communal electorates were thought to have a cohesive effect that would bring men of diverse castes into the Legislative Council, especially those who would not otherwise mix[5] (Moon 1991, Vol. 1: 266). However, the Committee did not adopt Ambedkar's proposed

[5] Separate electorates were not considered the only method required for securing minority representation. At the time, Ambedkar presented two possibilities. One was to reserve seats in plural constituencies, and the other was communal electorates.

approach because the untouchables were not sufficiently educated to provide an electorate. Thus, instead of providing them with reserved constituencies, they were assured a certain number of representatives through nomination (Tejani 2013a: 716).

Ambedkar was given another opportunity to argue for separate electorates at the Round Table Conferences in London (1930–1932). These conferences were called for by the British government to consider Indian constitutional reform. Ambedkar attended the conferences as a representative of the depressed classes. In a series of conferences divided into three sessions, the second conference was particularly significant for developmental reforms with special regard to minority representation. M. K. Gandhi joined the conference by agreement of the 'Gandhi-Irwin Pact';[6] he was the sole representative of the Indian National Congress. This conference revealed the conflicting views of Gandhi and Ambedkar regarding the way to improve the plight of the untouchables. While giving representational concessions to Muslims and Sikhs, Gandhi firmly opposed the recognition of any other community for special political representation. On the other hand, Ambedkar claimed that the depressed classes must be granted special representation as a separate Indian community. In the conference, Ambedkar joined a collective effort to claim the rights of minorities in an attempt to acquire such a political safeguard. Members of minority communities, including Ambedkar, jointly submitted the 'Provisions for a Settlement of the Communal Problem' to Prime Minister Ramsay Macdonald. The Provisions claimed that minority communities required representation through a separate electorate (IRTC 1932: 68–70). The conflict of opinions were clear; consequently, the conference was fated to disintegrate. Against this background, Macdonald issued an award (the so-called Communal Award) to resolve the problems concerning minority representation in 1932, which granted separate electorates to minorities, including the untouchables.

Gandhi launched a 'fast-unto-death' protest to press for the withdrawal of separate electorates for the depressed classes. He began this fast on 20 September of the same year. This protest eventually resulted in the dilution

[6] Gandhi was absent from the first conference because the Indian National Congress was conducting a nationwide non-cooperation movement against British rule at that time.

of the Award through an agreement between Gandhi and Ambedkar (known as the 'Poona Pact'). Ambedkar was compelled to retract his claim for separate electorates, and finally surrendered his idea in return for higher numbers of reserved seats than the originally proposed in the joint electorates. The untouchables were granted 148 reserved seats under the Poona Pact as against the 78 seats in the joint electorate proposal. Ambedkar had to compromise, and this decision proved ineffective in securing true representation of the untouchables. He gave up the right of the untouchables to elect their own representatives; consequently, the right was transferred to the Hindus. Ambedkar later made the accusation that the procedures of the electoral system under the Poona Pact prevented the election of true representatives of the untouchables. The results showed that those who were elected remained faithful to the parties and leaders who adopted them as candidates and funded their election[7] (Das 2000). However, debates that the political rights of the untouchables during the early 1930s influenced the subsequent constitutional debates. A new administrative category, the Scheduled Castes, was assigned to them when the Government of India Act 1935 was promulgated. These groups were given special consideration by the government. Following this, the Government of India (Scheduled Castes) Order of 1936 drew up a list of castes to receive the benefits of the reservation. Later, when the Constituent Assembly of India was inaugurated in December 1946 and appointed a committee on the minority question, Scheduled Caste members were represented along with other communities, such as the Muslims and Sikhs; problems of the Scheduled Castes and Muslims were jointly considered in the Constituent Assembly of India.

[7] The Poona Pact contained the following clause:

> 'All members of the depressed classes, registered in the general electoral roll in a constituency will form an electoral college, which will elect a panel of four candidates belonging to the depressed classes for each such reserved seat, by the method of the single vote; the four persons getting the highest number of votes in such primary election shall be candidates for election by the general electorate.'

Ambedkar later made the criticism that this panel system produced results in which a candidate who garnered the highest number of votes in the primary election from the depressed classes would lose in the final voting by the general electorate in which both caste Hindus and the Scheduled Castes voted. See the discussion on a memorandum on the safeguards for the Scheduled Castes which Ambedkar submitted to the Constituent Assembly on pages 36 and 37—in this chapter.

## Constitution-Making in India

To understand the outcomes produced by the Constituent Assembly of India, two aspects must be considered. First, the Indian Constitution-making process began before the country gained independence. The Cabinet Mission Plan provided a basic framework for proceeding with the Constitution-making process. This plan was developed to reach an agreement between conflicting parties and prevent national division. It resulted in both continuity and discontinuity in the new Constitution. Second, despite the Cabinet Mission Plan, independence was accompanied by the partition of India into two countries (i.e. India and Pakistan). As later argued, this partition had negative consequences for Indian Muslims. For example, it caused suspicion regarding Muslims' loyalty toward India and produced anti-Muslims sentiments among the Hindu majority. It was in this environment that Muslim politicians were required to decide their position in independent India. Ambedkar was also affected by the partition in his fight to secure political representation for the Scheduled Castes. The partition threatened the loss of Ambedkar's seat in the Constituent Assembly, because he held a seat in Bengal. He was required to find a new base through which he could justify his claims about the political safeguards of the Scheduled Castes. Facing the departure of the British government (the patron of these group interests), Ambedkar developed a conciliatory attitude toward the Congress.[8] Instead of fighting, Ambedkar was relegated to cooperating. Moreover, he, as the chairman of the Constitution Drafting Committee, sought 'backwardness' as a base through which to justify the introduction of special treatment.

[8] Before the transfer of power to India began, Ambedkar was more cooperative toward the British government than toward the Congress party. When the Congress party, under Gandhi's initiative, launched a national mass protest—the 'Quit India' movement, in August 1942, following the Cripps Mission's failure—Ambedkar was appointed as a member of the Viceroy's Executive Council in 1942. His acceptance to join the Viceroy's Council implied that he favored the British government that was demanding the cooperation of India in its war efforts. Ambedkar had made this decision to ensure that his demands for the political rights of the Scheduled Castes were included in the institutional reform. He submitted a memorandum titled 'On the Grievances of the Scheduled Castes', detailing their grievances and demands, including reservation in public services, scholarships and stipends for study within the country and abroad, and a share in contracts. It yielded a successful outcome in part. In 1942, the Scheduled Castes were allowed 8.5% reservation in central services and other facilities for the first time in the history of India (Das 2000).

Based on a Cabinet Mission Plan clause, an election for the members of the Constituent Assembly was held in July 1946. The Congress captured 201 of the 212 general seats allotted to the Provinces. Out of the remaining 11 seats, the Unionist party obtained 2, the Communists 1, the Scheduled Caste Federation 1, and the others 7. The Muslim League obtained 73 of the 78 reserved seats for Muslims, while the Congress won 3 and the Unionist and Praja Parties obtained 1 each. Only 31 of the 296 total seats belonged to the Scheduled Castes; of these, 29 belonged to Congress. The other 2 belonged to the Unionist party and the Scheduled Caste Federation (Vundru 2018: 122–123). During this election, Ambedkar obtained a seat in Bengal.[9] The Congress thus boasted a majority (i.e. 212 out of 296 seats allotted to the Provinces). The announcement that the British government would transfer power to two independent states was made after the election ended. The composition of the Constituent Assembly was vastly changed as a result of this partition. Punjab and Bengal (the two Muslim majority regions) were divided to form Pakistan, while another part was integrated into India. The League's representatives fell to 28 as a consequence. Thus, League influence was heavily curtailed in the Constituent Assembly debates. On the other hand, the Congress party's dominance over the Constituent Assembly became greater through its 80% share of the total seats allotted to the Provinces.

Change was not limited to the composition of the Constituent Assembly. The partition also resulted in a change in tone among members of the Constituent Assembly regarding the new Constitution's ideal form. For the majority of its framers, the maintenance of political safeguards for religious minorities was thought to be inadequate in post-partition India. These were items that required consideration by politicians who represented the fates of minorities in the altered conditions of independence, both for Muslims and the Scheduled Castes. With the exception of the Scheduled Castes, this resulted in the withdrawal of the seats reserved for minorities initially recognized in the Draft Constitution.

[9] It is believed that J. N. Mandal, the leader of Bengal unit of the All India Scheduled Caste Federation, helped Ambedkar to be elected (Bandyopadhyay 2000).

However, the Congress had taken a moderated step rather than a hasty one in conceding seat reservation to all minorities, including Muslims. Yet, minority leaders must have known the extent to which they could expect to gain through debate in the Constituent Assembly, which was dominated by the Congress. There was no room for Muslims to claim separate electorates. The Scheduled Castes also had to compromise on their demands. This was particularly true for Ambedkar, who was required to give up the separate electorates he thought provided the best protection for the rights of the Scheduled Castes. Two elections held under the Government of India Act 1935 gave Ambedkar a lesson in how the decision made by the Poona Pact was useless for securing their true representation.[10] He also suggested that candidates of a majority community should poll a minimum number of votes from the minority communities in their constituencies before being declared elected. This proposal was rejected by a large majority at the early stage of the Constitution-making process, and he withdrew it later (Rao 1966, Vol. 2: 398–408). Some argue that Ambedkar's stance on political safeguards and the Congress changed in the face of the partition. In fact, his claim for political safeguards for the Scheduled Castes became moderate, and his relationship with the Congress became cooperative rather than confrontational.[11]

The Constituent Assembly was convened on 9 December 1946. A resolution, moved by Nehru on 13 December, outlined the assembly's general aims and objectives. However, debate on the resolution was postponed because of the absence of the League's representative. Although they were also absent at the second session in January 1947, the Constituent Assembly commenced debate on its aims and objectives. The resolution was accepted in the same month. One clause stated that 'safeguards shall

[10] Ambedkar argued that a Scheduled Caste candidate who topped the primary election poll by receiving votes from untouchables would fail to succeed in the final election because such voters would be outnumbered by caste Hindus. Thus, he concluded that the Poona Pact should be abrogated and that the system of separate electorate should be introduced.

[11] To understand his changed stance requires tracing the last moments of the move to independence. During the last legislative elections held in British India in the winter of 1945–1946, Ambedkar's All India Scheduled Caste Federation could only return one representative. It failed to prove that the party was the only organization able to represent all Scheduled Castes. This defeat resulted in his decreased influence during the power transfer process (Bandyopadhyay 2000).

be provided for minorities, backward and tribal areas, and depressed and other backward classes'. The protection of minority rights became an officially recognized object of examination by the Constituent Assembly through this move. For this purpose, the Advisory Committee on the rights of citizens, minorities, and the like was elected on 24 January 1947. The Congress must have given sufficient consideration to the composition of the committee to justify their claim that the committee represented the voices of all minorities. However, Govind Ballabh Pant warned against minorities by arguing that Indians had to think in terms of individual citizenship rather than their affiliation to a community (CAD 1989, Vol. 2: 310–312). Vallabhbhai Patel was appointed as chairman of the Advisory Committee, and sub-committees were appointed as lower bodies of the Committee. The Minority Sub-Committee took the initial role in deciding the rights of minorities; however, its activity was constrained because of the absence of Muslim representatives.

In March 1947, Ambedkar submitted a memorandum on safeguards for the Scheduled Castes to the Constituent Assembly (Ambedkar 1947). According to him, the memorandum was prepared in response to the request of the working committee of the All India Scheduled Castes Federation. Because of its timing, the memorandum helps in identifying Ambedkar's claims on the political safeguards of the Scheduled Castes, just before the Minority Sub-Committee began a full-scale discussion. In the memorandum, Ambedkar attacked the method of election to the seats allotted to the Scheduled Castes as set out in the Poona Pact, which provided for two elections through the primary and final voting. The primary election was a qualifier to determine four candidates who would represent the Scheduled Castes in the final election. The election was conducted by a separate electorate of the Scheduled Castes. Different from the primary election, the final election was conducted by a joint electorate where both caste Hindus and the Scheduled Castes could vote. One objection to the retention of the primary election was on its consequence. It did not help the Scheduled Castes to elect a man who was their best choice. Ambedkar claimed that the Scheduled Caste candidate who topped the poll in the primary election failed to succeed in the final election and the Scheduled Caste candidate who failed in the primary

election topped in the final election (Ambedkar 1947: 44).[12] Therefore, to ensure real representation of the Scheduled Castes, the abolition of the primary election and the substitution of separate electorates were proposed.

Furthermore, he rebutted each of the five major arguments generally made against the demand of the Scheduled Castes for separate electorates. First, to a claim that the Scheduled Castes are not a minority, he argued that it was misunderstanding of the meaning of the word minority. In his opinion, separation in religion was not the only test of a minority, but social discrimination constituted the real test of a minority. Second, he refuted the argument that the Scheduled Castes are Hindus, and therefore cannot have separate electorates, by stating that this claim overlooked the fact that religious affiliation was accompanied by social separation and discrimination. Muslims were given separate electorates not because they were just religiously different from Hindus, but because the social relations between the Hindus and the Muslims were marked by social discrimination.[13] Third, to the view that separate electorates prevent solidarity between the untouchables and the Caste Hindus, he argued that it was difficult to understand how social solidarity between the Hindus and the untouchables could be promoted by their devoting one day for voting together in the joint electorates when during the other five years they were leading separate lives. Fourth, to the argument that separate electorates create anti-national spirit, he insisted that nationalism and anti-nationalism have nothing to do with the electoral system. Fifth, in response to the argument that separate electorates enable the British government to influence the communities having separate electorates to act against the interests of the country, he retorted that such objection to separate electorate would become groundless by gaining independence (Ambedkar 1947: 45–47). Despite these arguments, Ambedkar had to compromise on

[12] Another objection to the primary election was for its uselessness. Ambedkar claimed that in the previous election there were primary elections only for 43 out of the 151 seats reserved for the Scheduled Castes. The reason was the difficulty for the Scheduled Castes to bear the expenses of the two elections, i.e. the primary and final (Ambedkar 1947: 44–45).

[13] In this context, to illustrate his argument, he referred to an example of the arrangements made under the Government of India Act 1935 for the Christian community in India. Despite the fact that three sections (i.e. Europeans, Anglo-Indians, and Indian Christians) belonged to the same religion, each section was given a separate electorate. This showed that social separation was a decisive factor of a minority.

some demands which he believed would be most effective in protecting the rights of the Scheduled Castes to draw the concession of the Congress leaders in the face of changed conditions.

The Minority Sub-Committee fully began operating as the Indian partition became decisive and the Muslim Leaguers began to participate in the Constituent Assembly in July 1947. Separate electorates were overwhelmingly rejected. The Sub-Committee decided that there should be no separate electorate by majority, in a meeting held in the same month. While rejecting separate electorates, the Sub-Committee supported the reservation of seats for minorities under the joint electorates, including religious communities.[14] It also decided that reservations should be held for 10 years and that the position was only up for reconsideration at the end of that period (Rao 1966, Vol. 2: 392). The Sub-Committee also accepted minority job reservations. Then, the recommendations of the Sub-Committee were accepted at the Advisory Committee and later were embodied into the Draft Constitution compiled until February 1948 as Part XIV of the draft. Reservations were extended to a range of minorities, from Muslims to the Scheduled Castes. Meanwhile, there was an effort in the Constituent Assembly to redefine the term 'minority' as well as its purpose. K. M. Munshi represented the Congress' position. For Munshi, the use of the term 'minority' by the Scheduled Castes was a 'mischievous extension'. He argued that the untouchables were 'part and parcel of Hindu community'. Munshi said that the purpose of the safeguard was 'to protect their rights only till they are completely absorbed in the Hindu community' (CAD 1989, Vol. 5: 227).

## The Indian Partition and Its Effects on the Politics of Constitution-Making

One of the results of the Indian partition was the dissolution of the Muslim political party. The All India Muslim League held its last meeting in Karachi in December 1947. It decided to divide its organization into

[14] According to a speech of H. J. Khandekar in the Constituent Assembly on 28 August 1947, Ambedkar did not demand separate electorates for the Scheduled Castes at the meeting of Minority Sub-Committee in July 1947. Khandekar stated that Ambedkar 'did not the press the claim further but withdrew it' (CAD 1989, Vol. 5: 266).

two parts. This decision led to the dissolution of the national political platform of Indian Muslims. Such a move was prompted by the departure of prominent Muslim politicians for Pakistan. This loss of leadership meant that Leaguers became unable to act as a united force.

In accordance with the Congress policy, but in a rigid tone, Sardar Patel called on Muslims to clearly indicate loyalty to India. After the partition, the question of the minority no longer simply involved the treatment of a particular community in one state, but became associated with security concerns. As the minister of internal affairs, Patel called for action to dismiss the doubt regarding Muslims. In a speech at a public meeting in Lucknow on 6 January 1948, he stated that mere declarations of loyalty to India would not help them and demanded practical proof of their declarations. He asked why they did not denounce Pakistan for attacking Indian territory, and why they did not discuss Kashmir in the recent All India Muslim Conference. Patel argued that these things were creating doubt in the minds of the people (Patel 1967: 67). In the same speech, he also voiced his stern position on the political demands of Muslims, as evident in the following statements from his speech:

> *In the Constituent Assembly, one of the Lucknow Muslim Leaguers pleaded for separate electorates and reservation of seats. I had to open my mouth and say that he could not have it both ways. Now he is in Pakistan. Those who want to go to Pakistan can go there and live in peace. Let us live here in peace to work for ourselves.* (Patel 1967: 67)

This was the condition that Muslim politicians had to consider when claiming their political demands, and it was significant, as Patel was the chairman of the Advisory Committee that discussed minority rights issues.

Muslim League members of the Constituent Assembly met in that context in New Delhi on 29 February 1948, at which point they decided to dissolve the League Party in the Constituent Assembly (Noorani 2003: 69–70). This decision was not simply seen as an outcome of the leadership loss, but was also an adjustment to an arising situation. In the face of growing anti-Muslim sentiments in India, the majority of Muslim Leaguers who stayed in India chose to join or act in cooperation with the

Indian National Congress in response to a call from Congress leaders. Maulana Azad, one of the most influential figures in the Congress and probably the most prominent Muslim politician in independent India, called on Indian Muslims to break away from any communal organizations and join the Congress. Azad showed his clear opposition to communalism. He clearly stated that he did not favor the idea of forming a new Muslim organization and left no room for any new communal, political party.[15]

Calls for a secular India were significant in the Constituent Assembly debates. Making India a secular state was a widely shared goal among Congressmen. Initially, the term 'secular' was utilized to warn against the anti-Muslim sentiment growing among Hindus in reaction to the formation of a Muslim state in Pakistan. The partition of India created space for the formation of Hindu nationalist groups, who advocated for a Hindu nation against Pakistan. Nehru thus warned against 'communalism'[16] by majority. Nehru expressed a desire to create a secular state in which 'one community or group or party will not be permitted to usurp the rights of another' (Nehru 1984–90, Vol. 5: 44). This terminology provided a normative base for the protection of religious minorities and assured their coexistence in Hindu society. However, a worsening communal relationship and the demise of Gandhi forced Nehru to take a stricter stance on communalism. The step toward a secular India was spurred by the assassination of Mahatma Gandhi that occurred on 30 January 1948, thus adding a new element to its meaning. The term 'secular' provided normative grounds to eliminate all elements seen as causes of separatism. A significant step was taken by a resolution to secularize politics that was adopted in the Constituent Assembly (Legislative) in April 1948. With this resolution adopted, seat reservations were put under review in terms of building a secular state, particularly in connection with the appropriateness of its adoption for religious communities.

[15] For example, a Muslim conference organized under the Azad leadership in December 1947, called for the dissolution of the Muslim League and appealed its members to join the Congress (*The Hindustan Times,* 28 December 1947).

[16] The term 'communalism' either refers to the discord between Hindus and Muslims, or the movement to claim exclusive interests for a particular community.

The resolution, moved by M. A. Ayyangar, called for communalism to be eliminated and stated that 'no communal organization should be permitted to engage in any activities other than those essential for the bona fide religious, cultural, social and educational needs of the community' (*The Statesman,* 4 April 1948). It also sought all legislative and administrative actions necessary to prevent such activities.

In response to this move, Nehru stated that the government would do everything in its power to achieve its objective. This resolution also might have affected the work of the Constituent Assembly. Nehru gave the impression that the Constituent Assembly and the Legislative Assembly were the same body. Thus, the Constituent Assembly was also able to operate under the resolution's consideration. Speaking on the adopted resolution, Nehru also said that the Draft Constitution contained a communal element and added that 'less reservation is better'. He asserted that the best way to raise the level of all who had been denied past opportunities was to advance them in the economic and educational spheres. For Nehru, reservations were not as important as real education, culture, and economic advancement. However, he conceded that 'in the present context of affairs, special attempts should be made not only in the educational and economic field but even in the political field' (Nehru 1984–90, Vol. 6: 82–84). His statement alluded that some reservation would be retained as an exception in consideration of the state of backward groups. This requires consideration of how the exception was justified and how 'less reservation' was achieved. These questions are addressed in the following section.

On another front, Ambedkar, a prominent leader of the Scheduled Castes, seemed to have responded to a disagreement within his party. According to him, his joining the Congress government 'created a great amount of confusion among the Scheduled Castes' (Das 1969: 82). A speech at Lucknow on 25 April 1948 was intended to clear suspicion and doubts among the Scheduled Castes; a few prominent lines from the speech are as follows:

> *I am asked why after a fight for 25 years against the Congress I choose to remain silent at that crucial juncture. After all it is not the best strategy to fight all the time. We have also to restore to other measures.…We followed the policy of*

> *conciliation and have attained success to a great extent.…This is not the time to come to a conflict with the Congress and we should get as much as we can by conciliation and cooperation.* (Das 1969: 82)

The departure of the British and Ambedkar's weak political foundation compelled him to adopt an alternative strategy to fulfill his demands of protecting the rights of the Scheduled Castes. Ambedkar believed that they would not gain any safeguards without cooperating with the Congress. He chose to join the Congress government believing that he could serve the interests of the Scheduled Castes better from within the government than from being outside.[17]

## The Minority Question Redefined

Post-partition India experienced increasing criticism against Muslim political claims and the maintenance of political safeguards for minorities. Thus, the reservation was soon put under pressure by calls for its abolishment. Those who claimed that political safeguards were needed had to find a new basis to justify their position.

The item concerning political safeguards in public services originally adopted at the Advisory Committee prescribed: 'Nothing herein contained shall prevent the State from making provisions for reservations in favor of classes who, in the opinion of the State, are not adequately represented in the public services.' The Drafting Committee added the phrase 'any backward' before 'classes'. The change in the clause caused an uproar in the Constituent Assembly, because it was thought to contradict a decision it made regarding political safeguards in public services for minorities. Eventually, reflecting a decision of the Constituent Assembly,

[17] After the speech at Lucknow, Ambedkar issued a statement in order to clarify the intent of his speech. In the statement he asserted that he had two reasons for accepting the offer to join the Congress government: one reason was that the offer had no condition; the other reason was his belief that he could serve the interests of the Scheduled Castes better by being within the government rather than remaining outside (Das 1969: 85). Reconciliation between the Congress and Ambedkar developed rapidly after India's independence, which, accompanied by the partition, was decisive. In a letter dated 30 July 1947, Nehru informed Patel about Ambedkar's acceptance of the post of law minister (Nehru 1984–90, Vol. 3: 25).

the Drafting Committee produced Article 296, which provided that 'the claims of minority communities shall be taken into consideration consistently with the maintenance of efficiency in the administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State'. In response to a doubt expressed by certain members of the Scheduled Castes, Munshi, a member of the Drafting Committee and an influential person in the Congress, posited that he could not imagine that members of the Scheduled Castes should feel that they would not be included in the backward classes. He also said that he could not imagine a time in which any backward class in India would not include the Scheduled Castes (CAD 1989, Vol. 7: 696–697). Munshi must have made these statements to relieve members of the Scheduled Castes. Meanwhile, as chairperson of the Drafting Committee, Ambedkar explained the Committee's intention to insert the term 'backward'. He said that it was aimed at reconciling three points of view: (1) There shall be equality of opportunity for all citizens, and (2) there ought to be no reservation of any sort for any class or community. The second view was a natural conclusion to the first view. However, he also indicated that there were massive claims for (3) a provision given to provide entry to certain communities that had thus far been outside the administration (CAD 1989, Vol. 7: 701–702). The Drafting Committee therefore needed to reconcile the principle of equality of opportunity for all citizens and create a reservation for the excluded. To safeguard two principles of equality of opportunity and satisfy the demands of communities who were not thus far afforded State representation, it was necessary for the Drafting Committee to insert 'backward' as a qualifying term. The problem of the backward class was primarily connected to the Scheduled Castes, just as Munshi had argued in the Constituent Assembly. Although there was caution about the existence of the backward class in non-Hindu religious communities (this included the Muslims), this view was not taken seriously even among co-religionists. Backwardness was regarded as a characteristic basically held by lower caste communities. The term was utilized to justify an exception for the Scheduled Castes.

The final step toward the abolition of seats reserved for religious minorities was taken at the end of 1948. Patel called for a meeting of the Advisory Committee on 30 December of the same year. This meeting was supposedly held to discuss a report submitted by the Special Sub-Committee;[18] however, it resulted in reopening deliberation about political safeguards for minorities. In the meeting, some members submitted a motion seeking the abolishment of seat reservations altogether. Ambedkar raised a point of order to the move to discuss the resolved problem again. He suggested that the proper procedure was to move amendments to the provisions contained in the Draft Constitution in the Constituent Assembly. As chair of the Advisor Committee, Patel resolved that the committee could reconsider the matter. However, the Committee did not take any decision to the motion submitted on the day. Patel considered that 'the representatives of the minorities on the Committee should have adequate time both to gauge public opinion among their people and to reflect fully on the amendments that had been proposed' (CAD 1989, Vol. 8: 311). He also presented his view that 'a change, if effected, would be one sought voluntarily by the minorities themselves and not imposed on them by the majority community' (CAD 1989, Vol. 8: 311). The Committee met on 11 May 1949, and a resolution calling for the abolition of seat reservations was moved. An amendment was submitted against the move by Muniswamy Pillai, a Scheduled Caste member. The Committee accepted the amendment through a resolution abolishing seat reservations for minorities other than the Scheduled Castes.

Muslim politicians must have perceived a change in conditions. Debates in the Constituent Assembly revealed that the existence of a Muslim party and the retention of seat reservations were considered drawbacks, because they gave 'no chance to the minorities to win the good-will of the majority' (CAD 1989, Vol. 8: 300). The abolition of seat reservations was not unanimously accepted among Muslim members of the Constituent Assembly; in fact, Muslim Leaguers from Madras continuously claimed a separate electorate for themselves. A situation then

[18] The Sub-Committee was appointed to discuss the questions of Sikhs and minority problems in Punjab and West Bengal. When the Advisory Committee discussed the rights of minorities in 1947, two areas were set aside owing to the confusion ensuing from the partition.

arose in which Patel could claim that Muslims had agreed to the move in May 1949. The creation of India as a secular state had directed the course of these events. In a report submitted to the President, Patel observed that some members of the Committee felt that 'conditions have changed' since the Advisory Committee's first report in August 1947. He wrote a reason for the abolishment of seat reservations for religious minorities. It said that 'the abolition of separate electorates had removed much of the poison from the body politic, the reservation of seats for religious communities…did lead to a certain degree of separatism and was to that extent contrary to the conception of secular democratic state' (CAD 1989, Vol. 8: 311).

Seat reservations for the Scheduled Castes were retained as exceptional. 'The peculiar position of Scheduled Caste' required them the affordance of reservations with 10-year limits. In Nehru's words, this meant of 'helping backward groups in the country' (CAD 1989, Vol. 8: 331). However, it was incorporated into the new Constitution as a political consideration for the most 'backward' section of the society rather than granting them minority political rights. As Bajpai argued, it was produced as a political affirmative action and temporary measure (Bajpai 2008). The term 'minority' was redefined to primarily refer to the religious communities when creating the new Constitution. It also labeled the Scheduled Castes as a 'backward' group regarding their socio-economic position. By the Constituent Assembly completing its work, these problems came to be separately considered.

## Conclusion

A globalizing world requires changing political thoughts in the face of increased population migrations. In recent years, the term 'citizen' has come to refer to a person belonging to a particular community rather than one living in independence. Minority recognition and protections have become important issues in many societies. There has been increased scholarly attention given to India's experience with creating special arrangements for minorities through such developments (Gorringe et al. 2016).

Because the country has inherited many legacies in its administration, the minority question was the most crucial problem during the nation-building process. Such a perception may have been held among the framers of the new Constitution. Thus, the Constitution was the conclusion to the question raised when the British government introduced the modern Western system to India during the late 19th century. However, the question involves a period of history in which the partition of India significantly affected the creation of the Indian Constitution. It altered the conditions surrounding the Constituent Assembly in addition to its composition. New conditions required minority leaders to reconsider their stances and actions in addition to their views of the Congress politicians. The partition of India also created suspicion about Indian Muslims, while the departure of prominent political figures for Pakistan resulted in the loss of a unified Muslim political front. Eventually, these Muslims concluded that they needed to prove loyalty to India by surrendering all political safeguards and entrusting their protection to the actions of the Congress leaders. This decision was expected to result in greater benefits through the political considerations of the Congress leaders. The success of this decision presupposed that the Congress rule would sustain; however, it was fated to collapse. Different from institutional guarantees given to the Scheduled Castes in the form of seat reservations, political assurance given to Muslims would not endure in the face of the Congress decline. As Tejani (2013b) argues, Constitutional limitations have given Muslims the status of 'permanent minorities'. Muslim backwardness is now perceived in a variety of fields. Nevertheless, suggestions to improve their plight have not yet resulted in specific policies. On the other hand, Muslim assertions for representation have not been attempted subsequent to the dissolution of the Muslim League. The lack of such assertions by Muslims, in contrast to the Scheduled Castes, is a problem that is not taken up in this chapter. What matters is the 'institutionalization from below' through which Muslim representation has not been achieved.

Meanwhile, a reconciliation between the Congress leaders and Ambedkar resulted in political safeguards in the form of seat reservations. However, arrangements introduced into the new Constitution also entail limitations, compared with Ambedkar's original goals. These arrangements were introduced as tentative measures instead of basic permanent

rights. The Scheduled Castes were not given status as a distinct community, but instead regarded as backward groups within Hindu society. Thus, they are not a distinct community but a special category. Ambedkar was compelled to compromise his original claims because of the political circumstances. He chose to cooperate with the Congress leaders to create concessions in the form of special arrangements introduced as transitional measures that have remained until the present. However, it seems that their necessity is widely agreed upon by the people. At least, the abolition of these measures is unrealistic in the recent political situation in which the Scheduled Castes are no longer an entity subject to caste Hindus. The Constitution has developed differently from the intentions of its founders. This dynamism provides evidence of a 'contact zone' in which a variety of differing opinions are voiced as well as an 'institutionalization from below'.

Some argue that reservations caused a division between the elites and others who have not received any benefits from within the same caste group. However, the long-term political landscape has drastically changed, especially regarding Scheduled Caste participation. Voices calling for livelihood improvements have been expressed in various ways. On the other hand, the plight of Muslims has become consolidated without serious efforts having been taken. Since the 1990s, Indian politics has undergone a major transformation as seen in the rise of Hindu nationalism, regional parties, and caste parties. Would such transformation have any positive influence on Muslim's political position? Or, has it resulted in further exclusion? These questions will be addressed in future research.

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# 3

# Who Appoints Judges? Judicial Independence and Democratisation of the Judiciary in India

Tomoaki Ueda

## Introduction

The purpose of this chapter is to trace political relations between the executive and the judiciary over judicial appointments and to explain the judicial system reforms that have occurred under the Manmohan Singh and Narendra Modi governments from the point of view of judicial democratisation. India has been a liberal-democratic state since decolonisation in 1947, except during the Emergency from 1975 to 1977, though political democratisation has either never occurred or failed to continue in most ex-colonial states. In contrast, the success of Indian liberal democracy is strongly reflected in the *judicialisation* of the country's politics (Hirschl 2004; Issacharoff 2015; Shankar 2012). Hoque (2015: 265–266) defines this term as the 'phenomenon of judicial adjudicative engagement with political or politically loaded constitutional issues' '[i]n the context of the escalating trend of political issues being dragged to court for judicial answer'. He points out that South Asian countries have

T. Ueda (✉)
Toyo University, Tokyo, Japan
e-mail: ueda049@toyo.jp



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had different degrees and types of judicialisation of politics. According to him, the Indian judiciary, despite increasing judicialisation of politics, has maintained a balance between intervention and abstention regarding political questions. In Pakistan, on the other hand, over-judicialisation of politics has presented a threat to democracy, and Bangladesh has recently seen unprincipled and unpragmatic judicial intrusion into politics.

As explained here, the judicialisation of politics in India has entered a new phase since the Narendra Modi government took power in 2014. The Modi government sought to achieve greater democratic control over the courts and make the judiciary less independent by setting up a commission to administer judicial appointments to higher courts (the Supreme Court of India and high courts) that included one or two members selected from groups experiencing social discrimination. The commission can be viewed as a 'contact zone' between institutional democratisation of the judiciary from above and democratic institutionalisation of human rights from below.[1] On the other hand, the active judiciary has played an important role since 'the Emergency' in protecting the socially and economically disadvantaged and establishing new human rights claimed through public interest litigation (PIL). Law courts in India have also functioned as a contact zone where judicial activism and social movements intersect.

These issues are addressed in six sections. The first section explains general aspects of the Indian judiciary. The second section describes the rivalry between the executive and the judiciary over constitutional amendments during the Indira Gandhi era from 1966 to 1977, along with the consequent judicial turn to activism and frequent uses of PIL. The third section explains how the authority to appoint higher court judges moved from the government to the Supreme Court as a 'collegium system', in which judges appointed other judges, was established after the *Second Judges* case decision of 1993. The fourth section describes the political and social background against which the National Judicial Appointments Commission (NJAC) Bill and the Constitution (121th Amendment) Bill were passed unanimously, both in 2014. The fifth section discusses the provisions of the Judicial Appointments Commission

[1] The term 'contact zone' is explained in Chap. 1 in this book.

(JAC) Bill, 2013 and the sixth section provides a detailed explanation of the NJAC Act and the 99th Constitutional Amendment. The conclusion of the chapter notes that the NJAC Act and the 99th Amendment were declared unconstitutional and void by the Supreme Court in 2015, and it depicts the relationship between the Modi government and the Court since that decision.

## The Judiciary System in India's Constitution

India's federal government is a parliamentary system in which the Prime Minister, elected by and responsible to the lower house of Parliament (the Lok Sabha), leads the cabinet and is in charge of the administration. This is why the executive and the legislature are at least theoretically not opposed, but fused and integrated, and the Prime Minister can hold strong political leadership in India. Therefore, the judiciary is required to play a crucial role in preserving the separation of powers. For this purpose, the Constitution gives the Supreme Court and high courts the power of judicial review to make 'checks and balances' work between powers and to prevent the tyranny of the majority. India's presidency is a largely honorary position with extremely limited political power.[2]

The number of sanctioned judges in India's Supreme Court has increased from 7 in 1950, when the court was initially set up, to 31 in 2018, including the Chief Justice of India (CJI).[3] The judges of the Supreme Court and the high courts are strongly protected by the Constitution. They cannot be removed unless a majority of the total membership of each house of Parliament supports said removal; moreover, at least two-thirds of those actually voting on the matter must support removal (see Articles 124(4) and 217(1)(b) of the Constitution). No judge has ever been removed by means of these provisions. Privileges, allowances, leave of absence, and pensions of a higher court judge may not be reduced after his or her appointment (Article 125(2) and 222(2)

[2] The President of India is elected indirectly by an electoral college consisting of the elected members of the Parliament and the state legislative assemblies, including those of Delhi and Puducherry.

[3] As of May 2018, the Supreme Court actually had 24 serving judges including the CJI.

of the Constitution). However, the earnings and pensions received by judges of the Supreme Court and high courts have been (and still are) so low that it seems hard for them to live well.[4]

The retirement age of the Supreme Court's judges, including the Chief Justice, is 65 years.[5] The average tenure of Supreme Court members from 1950 to 2011 was just 5.53 years, mainly because the average age upon appointment was 59.19 (Chandrachud 2014: 166). As we will see below, almost all CJIs have been appointed on the basis of their seniority in the Supreme Court, which means that the most senior judge of the Court is normally appointed as the next CJI. As a result, CJIs have had an average tenure of only one and a half years, and the 22nd CJI, K. N. Singh, held that position for just 18 days. In all, the Supreme Court has had 45 CJIs from the first one (H. J. Kania, appointed in January 1950) to the present one (Dipak Misra, since August 2017). By way of comparison, Japan's Supreme Court has had 19 chief justices, who retire at the age of 70, from 1947 to 2018, and the US Supreme Court, on which justices serve for life, has had only 17 chief justices in 229 years since 1789. Because their terms have been so short, CJIs have seldom had a powerful influence over the courts. Nevertheless, their role is by no means insignificant, as the CJI has the authority to determine the composition of each bench and the type of cases that each bench or panel typically hears (Chandrachud 2014: 83, 183n95).

The Supreme Court of India has been composed largely of upper-caste male Hindus, with extremely few religious minorities, lower-caste Hindus, and women. Whereas approximately 16% of the Supreme

[4] Higher court judges have suffered because their salaries and conditions of service were not improved to keep up with rising prices. However, they were substantially increased in 2009 as follows: for the CJI, from Rs. 33,000 to 100,000 per month; for Supreme Court judges and the Chief Justice of the high courts, Rs. 30,000 to 90,000 per month; for high court judges, Rs. 26,000 to 80,000 per month. Furthermore, the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2017 provides another considerable increase: for the CJI, from Rs. 100,000 to 280,000 per month; for other Supreme Court judges and the Chief Justice of high courts, Rs. 90,000 to 250,000 per month; for high court judges, Rs. 80,000 to 225,000 per month. Their sumptuary allowances are also to increase about 2.25 times and maximum pensions will become approximately 2.8 times greater.

[5] The retirement age of high court judges including the Chief Justice was raised from 60 to 62 by the 15th Constitutional Amendment in 1963. Although the government, in 2010, proposed raising these judges' retirement age from 62 to 65 and told the Supreme Court in 2015 that it was considering the same increase, their retirement age is still 62.

Court's judges appointed in the 1950s were Muslims, that portion declined to 4% in 2000s. The religious composition of the apex court's judges from 1990 to 2009 included only 4–8% Muslims, 2.6–4% Christians, and fewer than 2% Sikhs, even though the 2001 census showed that 13.4% of the Indian population was Muslim, 2.3% was Christians, and 1.9% was Sikh. Not until 1980 was a judge appointed to the Supreme Court from one of the backward castes, including the Scheduled Castes (SCs), the Scheduled Tribes (STs), and the Other Backward Classes (OBCs), who account for about half the population. Since then, between one-tenth and two-tenths of the Court's judges have come from backward castes. The Court has had only six female judges between 1989 (when a woman judge was nominated for the first time) and 2016 (Chandrachud 2014: 254–258). As of May 2018, there are two women judges on the apex court.

## The 'Basic Structure' of the Constitution and Judicial Activism

### Legislative Power to Amend the Constitution and Judicial Power to Review

Cases concerning property rights pitted governments and the judiciary most clearly against each other from the 1950s to the early 1970s. The central and state governments tried to reform agrarian land ownership by abolishing the colonial land systems, including the *zamindari* system, and redistributing land to the landless and poor peasants. But the Supreme Court ruled that the agrarian reform laws were unconstitutional, on the basis that they violated the constitutional duty to properly compensate landowners whose lands the governments were taking. The central government restricted the property rights of absentee landowners by exempting their land from compensation and making the amount of compensation a matter not eligible for legal disputation, under the 1st (1951), 4th (1955), and 17th (1964) amendments to the Constitution. Moreover, it was provided that none of acts and regulations specified in

the 9th Schedule of the Constitution shall be declared void even if they infringed the 'fundamental rights' conferred by Part III of the Constitution. These provisions had stated that land reform acts enacted by the central and state governments were exempt from judicial review.

The Supreme Court of India, in reaction to these amendments, decided in the *Golaknath* case in 1967 that a constitutional amendment under Article 368 of the Constitution shall be void if it curtails the fundamental rights provided by Part III of the Constitution.[6] The Indira Gandhi government countered by giving Parliament the power to abridge fundamental rights under Article 368 through the 24th, 25th, and 26th amendments to the Constitution in 1971 and the 29th amendment in 1972. These amendments freed the nationalisation of banks in 1969 from judicial review and abolished Privy Purse for the former rulers of princely states. Indira Gandhi adopted a policy of deep restriction of fundamental rights, such as property rights, for the purpose of both socialist economic reforms and realisation of the 'Directive Principles of State Policy' contained in Part IV of the Constitution.

## The Doctrine of the Basic Structure of the Constitution

The Supreme Court's 1973 judgement in the *Kesavananda Bharati* case, also called the '*Fundamental Rights* case', was decisive in putting an end to the struggle between amendments of the Constitution and judicial review that declared those amendments unconstitutional.[7] The apex court ruled by a paper-thin majority of seven to six that the legislative power to amend the Constitution was subject to judicial review based on the doctrine of

[6] *I. C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

[7] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461. Since the verdict, the doctrine of 'basic structure', meaning that the parliamentary power to amend the Constitution under Article 368 shall not infringe the basic structure of the Constitution, has often been applied in important cases (Ramachandran 2000). But there is no consensus about what 'the basic structure of the Constitution' consists of. Even if defined narrowly, it is generally thought to include constitutional supremacy, republican and democratic government, secularism, separation of powers, judicial independence, and federalism (Choudhry 2015: 21–22). However, Sathe (2002: 97–98) points out that the doctrine cannot even be called *obiter dicta*, and it has also been applied in cases where the constitutional validity of amendments was not in question, even though, strictly speaking, this was the ground for deciding whether the basic structure was violated.

the 'basic structure of the Constitution', even though Parliament was allowed to amend it to a considerable extent. This decision meant that the Supreme Court could declare unconstitutional and void any amendment that was contrary to the basic structure. As we will see later, this doctrine of basic structure played an especially significant role after the declaration of the Emergency by Indira Gandhi on 25 June 1975.

Notably, this basic structure doctrine was not broadly supported by judges, jurists, and the public when the Court initially pronounced it. Not until the *Prime Minister's Election* case[8] on the validity of Indira Gandhi's victory in the 1971 Lok Sabha general election was the doctrine's legitimacy widely established (Sathe 2002: 73–77; Krishnaswamy 2009: 225–227). The Allahabad High Court invalidated Indira Gandhi's election on the ground of malpractice and disqualified her from holding any elected post for a period of six years. Indira Gandhi appealed to the Supreme Court, which stayed the high court's verdict. She went on to add the 39th amendment to the Constitution in August 1975, during the Emergency; this amendment placed the election of the prime minister and the speakers of both houses of Parliament beyond the courts' jurisdiction. But a five-judge bench of the Supreme Court unanimously held this amendment to be unconstitutional in the following year. Among the five judges, only Hans Raj Khanna in the *Kesavananda Bharati* case, but Kuttyil Kurien Mathew and Yeshwant Vishnu Chandrachud, along with Khanna, in the *Prime Minister's Election* case set a strict limitation on the legislative power to amend the Constitution on the ground of its basic structure.

## Indira Gandhi's Interference in the Supreme Court

It was important that two other judges—Chief Justice Ajit Nath Ray and Justice Mirza Hameedullah Beg—denied the 39th amendment's constitutionality on grounds other than the basic structure. Previously, in April 1973, Justice Ray had written a dissenting opinion in the *Kesavananda Bharati* case, stating that the legislature could amend the Constitution with no limitation. He was appointed CJI by the Indira

[8] *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299.

Gandhi government soon afterwards, marking the first deviation from the seniority rule in 23 years, as he was only the fourth most senior judge on the Court. He was chosen over three more senior judges, Jayendra Manilal Shelat, Kawdoor Sadananda Hegde, and Amar Nath Grover, who had decided against the Indira Gandhi government in many important cases, including the *Kesavananda Bharati* case. Justice Hegde was a particular target of this deviation from normal practice because he accepted evidence against Indira Gandhi in the case of her electoral malpractice (Chandrachud 2014: 90–91). The 'supersession' was a substantial rebuke by the Prime Minister. The three superseded judges resigned immediately after Ray's elevation to CJI. Ray, in contrast, was Indira Gandhi's preference for CJI because he had written dissenting opinions supporting her government in cases of bank nationalisation and former princes' privilege (Ranjan 2012: 212–213). But even Ray ruled the 39th amendment to the Constitution to be void.

The other judge, Justice Beg, was subsequently nominated as CJI by the Indira Gandhi government, again contrary to the seniority rule, over the more senior Justice Khanna when Ray retired in January 1977. Earlier, Justice Beg had joined Ray in writing the minority opinion in the *Kesavananda Bharati* case,[9] which argued for placing no restriction on constitutional amendments by Parliament, in contrast to the majority opinion that established the basic structure doctrine. On the other hand, Justice Khanna not only agreed with the majority opinion but also wrote the lone dissenting opinion in the *Habeas Corpus* case of April 1976, courageously criticising Indira Gandhi for flagrantly violating the rights of life and liberty through detention without writ and imprisonment without trial under the Emergency regime. His resignation on the day of Beg's appointment as CJI was in response to his de facto punishment by the Indira Gandhi government.[10]

In summary, both before and after the *Prime Minister's Election* case, Indira Gandhi appointed two judges whom she considered preferable as

[9] *A. D. M., Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

[10] The Indira Gandhi government transferred 16 high court judges, including chief justices, to other high courts without their consent because they had decided cases against the government. Transfer of high court judges without their consent had seldom occurred previously (Chandrachud 2014: 93–94).

CJI, even though they were not the most senior members of the Supreme Court at the time, superseding more senior judges who had refused to take her side in court cases. But even these two very pro-government judges did not support the 39th amendment to the Constitution, which put the election of the Prime Minister beyond the jurisdiction of courts. This case led to a broad acknowledgement that the basic structure doctrine was effective and necessary to prevent the legislature from abusing its power of amendment. This protection became even more crucial as the Indira Gandhi government interfered more deeply in judicial appointments to the Supreme Court and high courts.

The basic structure doctrine was again applied to void a constitutional amendment in the *Minerva Mills* case[11] in 1980 (Sathe 2002: 86–87). In this verdict, the Supreme Court declared unconstitutional two clauses added to Article 368 of the Constitution by the enormously broad 42nd amendment in 1976. Clause (4) of this amendment provided that no amendment of the Constitution under Article 368 shall be called into question in any court on any ground. Clause (5) stated that there shall be no limitation whatsoever on the power of Parliament to enact amendments under that article. The Supreme Court declared Clause (4) void on the grounds that it destroyed the basic structure of the Constitution, and it further ruled that Clause (5) was valid if and only if the basic structure was not broken down. This decision concluded the lengthy conflict pitting the executive and legislative branches against the judiciary concerning the parliamentary power to amend the Constitution. Although Indira Gandhi rose to power again in 1980 after her loss in the 1977 general election, she took no further risks of challenging the judiciary or the basic structure doctrine (Ramachandran 2000: 120).

## Judicial Activism and PIL

India's judiciary adopted an activist posture in 1978 after the Indira Gandhi government interfered in it through the judicial appointment and constitutional amendment (Sathe 2002: 262). The courts did so because they needed strong public support for their efforts to oppose the

[11] *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

exercise of strong executive and legislative power. The judiciary's main vehicle to attract social support for its political positions was PIL, which began in the late 1970s.

The PIL is litigation that a third party files on behalf of the public interest, in the place of an aggrieved party who is not able to seek judicial remedy from the court for social and economic reasons. The PIL is based on Article 32 of the Constitution, which provides judicial remedies to enforce the fundamental rights conferred by Part III. Clause (1) of this article guarantees 'the right to move the Supreme Court by appropriate proceedings for the enforcement' of fundamental rights. Clause (2) gives the Court 'power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari'. Article 226 of the Constitution confers on every high court the same powers to issue directions or orders or writs throughout its territorial jurisdiction for the enforcement of rights as Article 32 confers on the Supreme Court.

Legal theory and practical procedures concerning PIL in India were established in the mid-1980s. Of critical importance, the rules of standing required for filing PIL were significantly relaxed. A citizen or a group of citizens may file PIL not only in the place of an aggrieved victim but also for the purpose of realising the public interest or correcting public evils. The standing to sue in Indian PIL is one of the broadest in the world. As a result, PIL has been widely used to address human rights problems including sexism, child labour, indebted labour, and abuse by such governmental agencies as police and jails.

Another reason for the frequent use of PIL in India is that the scope of public concerns and evils regarding which they could be filed gradually widened. Initially, PIL aimed to protect, through the relaxed rules of standing to sue, the fundamental rights of socially and economically excluded people. PIL expanded to include environmentalism and ecological protection in the 1980s, and then in the 1990s to encompass governance problems such as corruption and abuse of power. This expanding role of PIL created more room for judicial activism in India.[12]

[12] On PIL filed by the disadvantaged people such as SCs, poor farmers, and refugees for the purpose of the institutionalisation of human rights from below, see the chapters by Suzuki, Ishizaka, and Yamamoto in this book.

The wider use of PIL in India occurred against the background of concern for alarming political interference in the judiciary during the Indira Gandhi era. The courts sought to build a base for protest against political intervention by gaining a social reputation as guardians of the public interest and justice. Since judicial independence and separation of powers had faced unprecedented threats under the Emergency regime, when democracy in India came to a halt, the judiciary turned to activism in pursuit of greater public support and trust. This judicial shift from champions of the Constitution's fundamental rights and basic structure to guardians of far-flung public interests enlarged the political role of the courts and drove judicialisation of politics forward in India.

But the development of judicial activism based on PIL in India did not necessarily lead to direct confrontation between the government and the courts. From the late 1980s to the 1990s, the Supreme Court upheld neoliberal laws including the Armed Forces (Special Powers) Acts[13] (AFSPA), the Terrorist and Disruptive Activities (Prevention) Act (TADA), and the Prevention of Terrorism Act (POTA), which imposed excessively strict control on people's liberties (Singh 2014). It appears that the Court preferred law and order as enforced by the government over broader guarantees of human rights. One possible reason why the judiciary felt willing to render these surprisingly passive decisions on security-related laws at this time was that judicial independence had become very robust by the 1990s, as seen in the following section concerning the judicial appointment system.

## From Government Control to Judicial Independence: The Advent of the Collegium

India obtained its independence from Britain in August 1947 and its Constitution came into effect on 26 January 1950, when the Supreme Court of India was set up. During the Supreme Court's first decade, the practice of awarding the position of Chief Justice to the most senior judge became an informal norm. However, this practice did receive some

[13] On AFSPA, see Kimura's chapter in this book.

criticism. For example, the Law Commission of India, an expert legal advisory body of the government, recommended in its 14th report in 1958 that the CJI should be selected on the basis not of seniority but of merit from among distinguished jurists, including chief justices and judges of the high courts and barristers (Chandrachud 2014: 74–79).

Not until February 1964 was this seniority principle ignored. When Bhuvaneshwar Prasad Sinha retired as CJI, Syed Jaffer Imam was the next most senior judge. But Prime Minister Jawaharlal Nehru persuaded him to resign because he was too seriously ill to serve as CJI. Instead, P. B. Gajendragadkar, the most senior judge after Imam, was appointed CJI (Gadbois 2011: 55). This was the first case of supersession, though not by political force, in the Supreme Court's history.[14] Such supersession, however, remained quite exceptional, as the following six CJIs were appointed on the basis of seniority (Chandrachud 2014: 82). As discussed above, two cases of supersession in the Court happened later as reprisals against judges who had made rulings unfavourable to the Indira Gandhi government. Nonetheless, it is enormously significant that supersession has occurred only when the executive intervened. The seniority norm has been observed since then.

The appointment process for Supreme Court judges is provided in Article 124 (2) of the Constitution. This article says that the President appoints every judge of the Supreme Court 'after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose'. It further states that 'in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted'. As for the appointment of high court judges, Article 217 (1) of the Constitution indicates that the President appoints every judge of a high court 'after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court'.

How the term 'consultation' in these articles should be interpreted became a critically important issue with regard to judicial independence

[14] On the other hand, the high courts strictly followed the seniority norm between 1950 and 1985 (Chandrachud 2014: 84–86).

during the 1980s and 1990s. As the Supreme Court changed its interpretation of the word, the authority to appoint judges passed from the executive to the judiciary. While the government was relatively weak, the Court seized the opportunity to increase its own power by changing its constitutional interpretation.

## The 'First Judges' Case: Predominance of the Government Over the Court

Although the most important cases concerning the appointment of higher court judges and judicial independence are three so-called '*Judges* cases', the earlier *Sheth* case[15] also addressed the issue of the meaning of 'consultation'. This case involved the transfer of a Gujarat High Court judge, Sankal Chand Himatlal Sheth, to the Andhra Pradesh High Court without his own consent during the Emergency.[16] At issue here was whether the President of India must be bound by the CJI's opinion. Article 222 (1) of the Constitution provides that 'the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court'. The dispute was over whether 'consultation' in this provision meant concurrence. In other words, does the article require the CJI's consent for the transfer of a judge between high courts? The Supreme Court held on this point that the President was not bound by the CJI's advice, although consultation was an important safeguard against arbitrary transfers (Chandrachud 2014: 96–98). The verdict thus gave the government substantial authority to transfer high court judges.

The judgement in the *First Judges* case,[17] in December 1981, held that the CJI's opinion also did not bind the President's decision on the appointment of a high court judge as well as a transfer (Chandrachud 2014: 101–111). The case concerned the new judicial policy of Indira

[15] *Union of India v. Sankal Chand Himatlal Sheth*, (1978) 1 SCR 423; AIR 1977 SC 2328. This case was decided by a five-judge bench in which the CJI did not participate.

[16] The Janata Party defeated the Indira Gandhi-led Congress in the general election in March 1977 after the Emergency was lifted.

[17] *S. P. Gupta v. Union of India*, (1982) 2 SCR 365: AIR 1982 SC 149.

Gandhi, who returned to power by winning 66.7% of the seats in the 1980 general election, which matched the two-thirds necessary to pass a constitutional amendment. Her judicial policy prevented a high court puisne judge from serving as Chief Justice in the same high court but permitted transferring a judge to another high court with a promotion to Chief Justice. The Indira Gandhi government, in fact, transferred Chief Justice Muhammad Kassim Muhammad Ismail of the Madras High Court to the Kerala High Court and Chief Justice Krishna Ballabh Narayan Singh of the Patna High Court to the Madras High Court in January 1981 (both still as Chief Justice). In addition, Indira Gandhi suggested in March 1981 a major reshuffling of administrative and judicial services for the purpose of overturning appointments made by the Janata Dal (JD) government between 1977 and 1979. Thus, political intervention in the judiciary resumed under the new Indira Gandhi government.

Although the *First Judges* case directly concerned transfers of high court judges, the Supreme Court took up the issue of the appointment of a high court judge. The point in question was, once again, the interpretation of the word 'consultation'. According to Article 217 (1) of the Constitution, the President shall appoint every Chief Justice of a high court after consultation with the CJI and the Governor of the state, and every high court judge other than the Chief Justice after consultation with the CJI, the Governor, and the Chief Justice of that high court. Two points in question regarding this article were whether the CJI's opinion took precedence over that of the other two persons and whether the CJI's advice bound the President. A seven-judge bench, not including the CJI of the Supreme Court, answered the first question in the negative by a majority of five to two, stating that the CJI's opinion had no primacy and that the President was free to make a decision when the three did not agree. The second question was unanimously answered in the negative, that is, that 'consultation' did not mean concurrence and accordingly the President was not bound by the CJI's advice.

The decision in the *First Judges* case concerning high courts had a significant impact on judicial appointments and on judicial independence as well. It was epoch-making in denying the primacy of the CJI in

appointment decisions and in establishing the government's paramount role in selecting members of the courts. It followed that democratic control took precedence over judicial independence as the executive, elected by and responsible to the people, had political supremacy over the unelected judiciary.

## The 'Second Judges' Case: Weak Government and Independent Court

The period of governmental predominance, however, did not last long. Between the conclusions of the *First Judges* case in December 1981 and the *Second Judges* case in October 1993, strong government faded away and weak ones succeeded. Soon after Indira Gandhi's assassination in October 1984, her son, Rajiv Gandhi, was sworn in as the next Prime Minister and his party, the Indian National Congress, won an overwhelming victory in the 1984 general election, claiming 404 seats or a 78.6% share of the Lok Sabha, more than the two-thirds needed to amend the Constitution. But the Congress lost power and the JD-led National Front government was launched in 1989, even though the JD had won just 143 seats and the Indian National Congress 193 in the general election. This was the first time in India when the largest party did not win a single majority in a general election.

From 1989 to the end of the 1990s, a series of unstable minority governments followed, the first of which was the National Front government led by Vishwanath Pratap Singh that managed to retain parliamentary confidence with support from the opposing camps of the Bharatiya Janata Party (BJP) and the Left Front. The subsequent Chandra Shekhar Singh government, established with minority support in November 1990, collapsed in March 1991. The Congress, whose president, Rajiv Gandhi, was assassinated during the next campaign, won sympathy votes and rose again to power in the 1991 general election. The Congress, however, gained just 232 seats or 44.5% of the Lok Sabha, which meant that the new Prime Minister, P. V. Narasimha Rao, led a minority government and had to deal with two no-confidence votes, in July 1992 and July 1993.

It is of crucial importance that the Supreme Court's decision in the *Second Judges* case[18] occurred in October 1993, during this period of unstable and weak governments. The government's fragile support base gave the judiciary a good opportunity to be more independent. The bench of the Court hearing the *Second Judges* case consisted of nine judges, which indicated that the Court aimed at reversing precedent because overruling a previous decision, in the Indian court system, requires a bench composed of more judges than the one making the previous decision. The Indian judicial norm is that only a bench of a larger strength has authority to override a precedent, regardless of how narrow the difference between the majority and minority opinions is. Therefore, a bench of nine judges deciding the *Second Judges* case could overrule the five-judge bench of the *Sheth* case and the seven-judge bench of the *First Judges* case (Chandrachud 2014: 120).

The main question at stake in the *Second Judges* case was whether the CJI's opinion was predominant in decisions on appointing or transferring a higher court judge. The points of the Supreme Court's verdict were as follows (Chandrachud 2014: 121–125): (1) in appointments of a Supreme Court judge, the CJI must consult (a) the two most senior judges of the Court other than the CJI, and (b) the most senior judge of the Court whose opinion was 'likely to be significant in adjudging the suitability of the candidate'; (2) in appointments of high court judges, the CJI must ask for the opinions of (a) the Court's judges 'likely to be conversant with the affairs of the concerned high court', (b) the Chief Justice of the high court, (c) the governor of the state, and (d) the high court judge(s), if the CJI so desired, whose opinions were 'likely to be significant'. Moreover, the Court held that the CJI's opinion binds the President as the word 'consult' in the Constitution was now interpreted as 'concur with', consequently overruling the previous decision.

In this way, the apex court, for the first time in Indian history, assumed the authority to control appointments to higher courts and established its dominance over the executive branch. But considerable attention should be paid to the Court's interpretation that the President shall not be bound

[18] *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441: AIR 1994 SC 268.

by the CJI's opinion when either the CJI and the two most senior judges of the Court do not agree on an appointment to the Supreme Court, or the CJI and the Chief Justice of the high court do not agree on an appointment to a high court. The judgement left room for presidential rejection of the CJI's recommendation, although the President could not appoint a judge to the Supreme Court or high courts against the CJI's will. Nonetheless, the *Second Judges* case was extremely significant in vesting authority to appoint a higher court judge in a small number of the most senior judges of the Supreme Court including the CJI—a group that would later come to be called 'the collegium'.

## The 'Third Judges' Case: Enlargement of the Collegium

The collegium system formed by the *Second Judges* case in 1993 was solidified and reorganised by the decision in the *Third Judges* case[19] in October 1998. Weak, fragile, and short-lived minority governments succeeded one another in national politics during the intervening five years. Following the Congress government led by Narasimha Rao, a BJP-led coalition government launched after the 1996 general election lasted for only 13 days because it could not demonstrate a majority in the Lok Sabha. JD governments took over but survived for only two years under two prime ministers. The National Democratic Alliance (NDA) government led by the BJP, which captured power again in the 1998 general election, failed to survive a trust vote in April 1999 because a major partner broke away from the coalition. A stable central government finally emerged after the 1999 general election returned the NDA to power, and this administration continued until 2004.

As the government remained weak throughout the 1990s, the judicial branch was expected to take on an expanded political role, such as combatting corruption through PIL. On the other hand, allegations of judicial corruption, including a case that led to a judge's resignation from the Bombay High Court in March 1995, attracted criticism. In addition, the opaque nature of judicial administration generated growing distrust and

[19] *In re: Presidential Reference*, (1998) 7 SCC 739: AIR 1999 SC 1.

discontent. Against this background of widespread distrust of the judiciary, the Supreme Court's decision in the *Third Judges* case enlarged the collegium. It could be thought that the Court increased the number of judges involved in judicial appointments for the purpose of reducing the influence of corrupt and nepotistic judges (Chandrachud 2014: 130–133).

The *Third Judges* case, which began with a presidential inquiry about judicial appointment procedures, was heard by a bench of nine judges. This number, not eleven but nine, was profoundly significant because it meant that the Court did not intend to overrule the precedent decision from the *Second Judges* case. Nevertheless, the judgement in the *Third Judges* case contained two important changes from the *Second Judges* case (Chandrachud 2014: 137–142). First, the number of the most senior judges of the Court whom the CJI had to consult about appointments to the Supreme Court rose from two to four.[20] This group, composed of the CJI and the four most senior judges, was specifically called a 'collegium' for the first time.[21] Second, the President was required to reject the CJI's recommendation if a majority of the collegium disagreed with the CJI, whereas the previous decision held that the President could choose either to accept or to refuse the CJI's advice when the collegium did not agree. These changes reduced, at least in procedural terms, the influence of the CJI over judicial appointments.[22]

The Supreme Court's verdict on the *Second Judges* case in 1993 established the precedent that the President should be bound by 'consultation' with the CJI on appointments to higher courts. This is why the collegium composed of the CJI and the most senior judges has had de facto authority of judicial appointment. Now, a small number of Supreme Court judges has been able to appoint higher court judges, free from democratic control by the elected legislature or the executive. This collegium system, without any constitutional grounds, in which judges appoint judges is extremely unusual worldwide (Ranjan 2012: 208–210).

[20] In appointing a high court judge, the CJI shall, as before, consult only the two most senior judges of the Court.

[21] The incoming CJI on the basis of seniority must be a member of the collegium even if the judge was not one of the four most senior judges.

[22] It has been pointed out, however, that the collegium was not always consulted by the CJIs and has lost its substance in actual practice (Ranjan 2012: 193–197).

The following sections of this chapter examine the JAC Bill, 2013 and the NJAC Bill, 2014, which aimed to reform this practice by which higher court judges were appointed by the collegium, based only on the Supreme Court's interpretation of the word 'consult' in the Constitution.

## The Narendra Modi Government and the Reform of Judicial Appointments

The BJP-led NDA won 336 of the Lok Sabha's 543 seats in the 2014 general election, after which the Narendra Modi government was launched. The BJP itself gained a single majority with 282 seats, representing the first time in 30 years that the largest party secured a majority all by itself. With this strong political base, the Modi government submitted the NJAC Bill and the Constitution (121st Amendment) Bill to the Lok Sabha on 11 August 2014, seeking to radically reform the collegium system in which judges appoint judges.[23]

### Judicial Insufficiency and Unanimous Amendment of the Constitution

The Modi government needed support from the opposition as well as its coalition partners because a two-thirds majority of all members present and voting is required for a constitutional amendment. The government succeeded in passing the constitutional amendment Bill unanimously, both in the Lok Sabha on 13 August and in the Rajya Sabha (the Upper House) on the next day. Then, the 99th amendment of the Constitution was enacted in April 2015 after the legislatures of half of the states ratified it and the President assented. It was particularly significant that the Rajya

[23] The BJP-led NDA government had introduced in 2003 the Constitution (98th Amendment) Bill to set up the National Judicial Commission (NJC) which would make recommendation to the President concerning the appointment and transfer of higher court judges. This bill's purpose was to eliminate the collegium system, but it failed. The proposed NJC was composed of five members: the CJI (as chairperson), two other most senior judges of the Supreme Court, the Union Minister of Law and Justice, and one eminent person to be nominated by the President after consulting the Prime Minister. It was provided the NJC's recommendation shall bind the President.

Sabha passed the Bill quickly and with little resistance. Since the members of the Rajya Sabha (except for 12 persons nominated by the President) are elected by the legislative assemblies of the states and the union territories, a regional party with a solid power base in a specific state can have considerable influence in the Rajya Sabha. The Modi government, in fact, faced a divided Parliament as the NDA, the ruling coalition, did not have a majority of the Rajya Sabha. Due to the parliamentary system, even Prime Minister Modi, who gave the BJP an overwhelming victory on a 'Modi wave' of fervent popular support, faced great difficulty in persuading Parliament to introduce new policies such as tax reforms.

The NJAC Bill and the Constitution (121st Amendment) Bill, however, passed smoothly and unanimously in both houses. As almost all the influential opposition parties including the Samajwadi Party, the Bahujan Samaj Party, the All-India Anna Dravida Munnetra Kazhagam (AIADMK), the Dravida Munnetra Kazhagam (DMK), and the All-India Trinamool Congress took an early stance in favour of the bills,[24] the Congress, the largest opposition party, which had been against them was isolated and had no choice but to reverse its position. The widespread discontent with opaque and nepotistic administration and corruption within the judiciary caused the regional parties that competed against the BJP or its coalition partners in their base states and seemed not to have a good relationship with the Modi government to support the bills nonetheless (Mehta 2015: 244; Ranjan 2012: 200–202).

In addition, long backlogs and delays in court cases have also promoted social discontent with the courts. Since many vacant seats caused by the retirement and transfer of judges have not been filled, almost all courts including the high courts are short of judges. This is why court cases take excessively long to resolve in India. As of 1 April 2018, 410 posts (232 permanent judges and 178 additional judges) were vacant across the 24 high courts.[25] For example, in the Calcutta High Court, which has an approved membership of 54 permanent and 18 additional judges, 31 permanent and 8 additional positions are vacant. This vacancy

[24] The AIADMK members of the Lok Sabha abstained from voting.

[25] Department of Justice, Government of India, "Vacancy Positions", http://doj.gov.in/appointment-of-judges/vacancy-positions (accessed 24 April 2018).

problem has not been improving very quickly, considering that one and a half years earlier (1 October 2016), there were 464 vacancies in all (255 permanent and 209 additional).

The very high number of vacancies in many high courts has caused court cases to last longer and has greatly increased the number of cases filed but not heard.[26] For example, 61,344 cases were pending in the Supreme Court at the end of March 2017, whereas 20,699 cases were initiated and 21,892 cases were disposed of between January and March 2017. Moreover, 4,063,293 cases were pending in India's 24 high courts at the end of March 2017, with 443,533 cases freshly initiated and 408,990 cases disposed of during the first quarter of the year. In addition, as many as 28,563,615 cases were pending in the district and subordinate courts at the end of the quarter, with 4,982,986 cases newly initiated and 4,667,227 cases disposed of (Supreme Court of India 2017). Over 100,000 cases have been pending for more than 10 years in the 24 high courts, many of them for 20 years or more. Cases pending for at least five years constitute almost 50% of the total of more than four million cases yet to be disposed of in the 24 high courts.[27] Popular dissatisfaction with the insufficient number of judges and long-lasting legal cases helped the NJAC Bill and the Constitution (121st Amendment) Bill to pass unanimously.

## The Manmohan Singh Government and the JAC Bill

Considering these factors, it seems natural that almost all the opposition parties, as well as the ruling parties, were in favour of the NJAC Bill and the accompanying constitutional amendment bill to reform the judicial appointment system. Moreover, the previous government had also proposed changing the rules of judicial appointments. The Congress-led United Progressive Alliance (UPA) government under Manmohan Singh submitted the JAC Bill and the Constitution (120th Amendment) Bill to the Rajya Sabha in August 2013. The Upper House passed the

[26] Alok Prasanna Kumar, "Beyond Rhetoric", *Frontline*, Vol. 33, Issue 10, 27 May 2016; V. Venkatesan, "Collegium Concerns", *Frontline*, Vol. 33, Issue 19, 30 September 2016.

[27] "Over 10 Lakh Cases Pending in HCs for 10 Years", *The Times of India*, 26 March 2018.

constitutional amendment bill, but it lapsed with the dissolution of the Lok Sabha in the next year. The JAC Bill was withdrawn on 11 August 2014 after the general election. Although the Manmohan Singh government failed, it was significant that the Congress also attempted to reform judicial administration. Political intervention in judicial independence regarding the appointment of judges, which had been substantial in the Indira Gandhi era, thus did not resume abruptly with the Modi government but under the preceding Manmohan Singh government. In other words, the need for judicial reform was shared across all parties.

The NJAC Act and the 99th constitutional amendment [the Constitution (121st Amendment) Bill] had much in common with the JAC Bill and the Constitution (120th Amendment) Bill. Both the NJAC Act and the JAC Bill proposed setting up a commission to make recommendations for appointments to the Supreme Court and high courts. This commission would abolish the judicial administration procedure in which judges appointed judges, weaken the collegium, and reduce the independence of the courts. It was not because of Modi's accession as Prime Minister or because of the BJP's strong rule that the Modi government moved the NJAC Bill (quite similar to the JAC Bill) soon after its swearing-in and gained a unanimous vote in both houses; rather, a great number of political parties and leaders shared a sense of distrust in the highly independent judiciary. The executive branch successfully, for the moment, interfered in the judicial appointment process.

## The JAC Bill, 2013 and Democratisation of the Judiciary

### Composition and Functions of the JAC

What provisions did the JAC Bill and the NJAC Act contain regarding judicial appointments? These provisions and the differences between them are examined in the next two sections.

We will begin with the JAC Bill and the Constitution (120th Amendment) Bill, introduced in the Rajya Sabha in August 2013. These bills provided that the JAC shall comprise six members: the CJI

(as chairperson), two other most senior judges of the Supreme Court, the Union Minister of Law and Justice, and two eminent persons, whose membership is to be for a three-year period without possibility of renomination, to be nominated by the Prime Minister, the CJI, and the Leader of Opposition of the Lok Sabha. The composition of the JAC was prescribed not in the constitutional amendment but only in the JAC Bill, thereby making it possible for Parliament to change its make-up by a simple majority of each house.

The functions of the proposed JAC concerned the appointment and transfer of higher court judges, including the CJI and the chief justices of the high courts. The functions included: (1) making recommendations for the appointment of the chief justices and judges of the Supreme Court and the high courts, (2) giving advice on transfers of the Chief Justice and other judges from one high court to another, and (3) ensuring that the person recommended is of ability, integrity, and standing in the legal profession. For short-listing of candidates appointed to the higher courts, the JAC was to invite recommendations from the chief justices of high courts, the central government, and the state governments. For appointments to a high court, the JAC would elicit, in writing, the views of the governor, the chief minister, and the Chief Justice of the high court of the concerned state.

Procedures for filling vacancies were also provided as a means of easing discontent with the courts. Under this legislation, the central government would make references to the JAC on vacancies arising in the Supreme Court and the high courts. Intimation of existing vacancies was to be made within three months after the Act took effect; referrals were to be made two months prior to the occurrence of any vacancy due to completion of a judge's term and within two months after the occurrence of any vacancy due to death or resignation.

It is difficult to judge whether the JAC would have undermined the exclusive authority of the collegium to appoint judges. Half of the members of the JAC, or three of the six members, would have been the CJI and the two most senior Supreme Court judges, who constitute the collegium. Among the other members, the Union Minister for Law and Justice would certainly act in accordance with the government, but we cannot know which side the two eminent persons nominated by the

Prime Minister, the CJI, and the Leader of Opposition of the Lok Sabha would take. On the other hand, solidarity among the three JAC members from the Supreme Court would have made it impossible for the JAC to recommend judges whom the CJI did not approve. The JAC Bill and the Constitution (120th Amendment) Bill would not have gone so far as to destroy the collegium system but could have made the judiciary less independent to some extent. Even if the Congress had won in the 2014 general election and the JAC Bill had been enacted, the collegium system would have remained potent.

## Reservation and Democratisation of the Judiciary

The report of the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice in the Rajya Sabha made some recommendations regarding the JAC Bill in December 2013.[28] Regarding the composition of the Commission, it presented suggestions that would be reflected in the NJAC Act, 2014 (as seen in the following section). It recommended that the number of eminent persons on the Commission should be raised from two to three and that at least one of them should be nominated from, by rotation insofar as possible, the SCs, STs, OBCs, women, and minorities. On the basis of the huge difference between the social compositions of the population and judges in India (as a great majority of the judges continue to be male upper-caste Hindus), the report recommended that the judicial nomination process should take into account the opinions and interests of socially and economically disadvantageous people such as lower castes, women, and religious minorities like Muslims, Sikhs, and Christians.

Affirmative action, known as reservation in India, for the socially oppressed has been implemented for a long time in India. The Constitution provides that seats in the Lok Sabha and the state legislative assemblies are reserved for SCs and STs in proportion to the population, meaning that only SCs and STs, respectively, can run for these reserved seats. A

[28] Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha, Parliament of India, *Sixty-Fourth Report, The Judicial Appointments Commission Bill, 2013*, 9 December 2013. Available at the website of the Rajya Sabha, http://rajyasabha.nic.in

constitutional amendment in 1992 concerning the three-tier Panchayat system (local self-government) reserved seats for SCs and STs proportionately and allocated one-third of seats to women. In addition, SCs, STs, and OBCs have quotas for admission to higher education institutions and government jobs. Some religious minorities are recognised as OBCs and thus enjoy the benefits of reservations. The reservation of seats in the Union Parliament and state legislatures for women has been discussed, although not yet enacted, in Parliament. The reservation has been extended in India for the purpose of both encouraging political and social participation by long-time victims of discrimination and mobilising its beneficiaries in election.

Political and social pressure to expand reservation has grown, although some doubts and criticisms have been raised regarding the policy's effectiveness in eliminating discrimination.[29] Therefore, it was not surprising that the Parliamentary Committee report recommended introducing a kind of reservation into the JAC controlling judicial appointments to higher courts. If democratisation means bringing an increasing number and range of participants into decision processes, the entry of economically and socially disadvantaged groups into the JAC could help to democratise the Indian judicial system through reforming the judicial appointment process. The recommendation to reserve a seat on the JAC for social minorities including women could be thought of as legally institutionalised democratisation of the judiciary from above. In other words, the report implied downward institutionalisation of promoting participation by heretofore excluded groups in the judicial process.

## The NJAC Act, 2014 and the (Brief) Collapse of the Collegium System

### Composition and Functions of the NJAC

The JAC Bill, the Constitution (120th Amendment) Bill, and the Parliamentary Committee report were followed by the NJAC Act, 2014

[29] See Funahashi's chapter in this book.

and the 99th Constitutional Amendment. This Act gave the NJAC the same six-member composition as had been proposed for the JAC.[30] However, it stated that one of the eminent persons shall be nominated from among the SCs, STs, OBCs, religious minorities, or women, accepting in part the recommendation in the Parliamentary Standing Committee report. The NJAC was also to have the same three functions as described above regarding the JAC. This time, the composition and functions of the Commission were harder to change than those of the JAC because they were also stipulated in the 99th Constitutional Amendment, reflecting a criticism in the Parliamentary Committee report.

It was provided that the NJAC shall play the following parts in judicial appointment: (1) The NJAC shall recommend the most senior judge of the Supreme Court for appointment as CJI if he or she is considered fit to hold the office. A member of the NJAC who is a candidate for CJI shall not participate in that meeting. (2) The NJAC shall recommend a person for appointment as a judge of the Supreme Court on the basis of ability, merit, and other criteria of suitability as may be specified by regulations. (3) The Commission shall recommend a judge of a high court to be Chief Justice of a high court on the basis of inter se seniority of the high court judges as well as ability, merit, and other criteria of suitability as may be specified by regulations. (4) The Commission shall seek nominations from the Chief Justice of the concerned high court for the purpose of recommending a person to be a judge of the high court and shall also nominate persons for appointment as a judge of the high court on the basis of ability, merit, and other criteria of suitability, and it shall forward the names to the Chief Justice of the high court for his or her views. Before making any nomination or giving his or her views, the Chief Justice of the concerned high court shall consult two most senior judges of the high court and such other judges and eminent advocates of the high court as may be specified by regulations. In addition, the Commission shall elicit in writing the views of the Governor and the Chief Minister of the concerned state before making a recommendation. After receiving these

[30] If the position of Leader of Opposition of the Lok Sabha is vacant, then the leader of the single largest opposition party in the House may fulfil this role.

views and a nomination, the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit, and other criteria of suitability as may be specified by regulations.

Importantly, the Act provides that the President, who shall appoint the chief justices and judges of the higher courts based on the recommendations by the NJAC, may require the Commission to reconsider a recommendation. If the Commission makes a recommendation after reconsideration, the President shall make the appointment accordingly. The power of the President to require reconsideration was found neither in the JAC Bill nor in the Parliamentary Committee report.

The NJAC Act also contains procedures for filling vacancies in the Supreme Court and high courts. The central government shall intimate all vacancies existing in the apex and high courts to the NJAC within 30 days from the date when the Act came into force so that it could make recommendations to fill these positions. Referrals shall be made by the central government six months prior to the occurrence of any vacancy due to completion of a term and within 30 days should a vacancy arise due to death or resignation. In comparison with the JAC Bill, the procedures for filling vacancies in the NJAC Act are more efficient in addressing the problem of judicial insufficiency.

## Veto Power of the Executive and Collapse of the Collegium

Another tremendously significant provision in the NJAC Act stated that the Commission shall not recommend a person for appointment as a judge of the higher courts if two members do not agree with the recommendation. This provision would fundamentally change the power relationship between the judiciary and the executive in terms of judicial appointment because a person accepted by neither the Union Minister of Law and Justice nor one eminent member could not be recommended and appointed. Even though the three most senior Supreme Court judges, including the CJI, represent half of the NJAC membership, they must gain the support of both eminent members if they wish to recommend a person against the government's will. Furthermore, since a committee

composed of the Prime Minister, the CJI, and the Leader of Opposition of the Lok Sabha nominates the two eminent members, at least one of them would most likely be pro-government. This provision that a recommendation cannot proceed against the will of two members in effect endowed the executive with veto power and put an end to the collegium system that dated back to 1993. On the other hand, since the judiciary, with its three NJAC members, also holds veto power over recommendation, the government did not necessarily prevail over the courts. But considering how the collegium had made the Indian judiciary perhaps more independent than that of any other country, the NJAC Act was certainly epoch-making in introducing democratic control into the judicial appointment for the purpose of making the judiciary less independent.[31] The Act was welcomed on the whole, as the collegium had been long criticised as closed and opaque.

As specified by Article 368 of the Constitution concerning amendment procedures, the NJAC Bill and the Constitution (121st Amendment) Bill required ratification by the legislatures of at least half of the states between its passage by Parliament and its presentation to the President for assent, because the bills changed the Constitution's Chapter IV, Part V concerning the apex court and Chapter V, Part VI concerning the high courts. After ratification by the state legislative assemblies and assent by President Pranab Mukherjee in December 2014, the NJAC Act and the 99th Constitutional Amendment took effect in April 2015. At this point, it appeared that the collegium system was breaking up.

## Rebirth of the Collegium Through Judicial Review

But the judiciary countered with its last resort, judicial review, to salvage the collegium. The Supreme Court declared the NJAC Act and the 99th

[31] This was also, however, a reason why jurists and legal scholars raised concerns about the NJAC Act. It was pointed out early on that the NJAC Act was unconstitutional because (1) the executive could have full control of appointment to the higher courts by abusing the law; (2) the NJAC could be easy to manage arbitrarily as the term 'eminent' has no definition; (3) that the NJAC would be in danger of being abused as two eminent members together could have veto power; and (4) that less independent courts could generate harmful effects in cases involving judicial review against the government (Kumar and Gautam 2015).

Constitutional Amendment to be unconstitutional and void on 16 October 2015.[32] Four of five judges on the bench for this case joined the majority opinion, presenting the following reasons. First, judicial independence in appointment was indispensable to protect the people's liberties and fundamental rights. Second, the term 'eminent persons' was unacceptably vague and, the Court argued, the process of nominating eminent members should be modified for the purpose of appointing persons familiar with the law. Third, the Court objected to the fact that only two members together could wield veto power. Fourth, membership of the Union Minister of Law and Justice on the NJAC could cause a conflict of interest in the case of litigation against the government. Lastly, Bhimrao Ramji Ambedkar, a drafter of the Indian Constitution, argued that the judiciary should be highly independent of the executive so as to prevent the latter from becoming tyrannical. According to the Supreme Court, the NJAC Act and the 99th Constitutional Amendment were contrary to the basic structure of the Constitution at these points.

It became apparent from the appointment of a CJI soon after this judgement of unconstitutionality that the collegium system had been reborn and that the judiciary remained fairly independent. The CJI, H. L. Dattu, recommended T. S. Thakur, the most senior judge on the Court, as his successor to the President in advance of Judge Dattu's retirement on 2 December 2015. The President accordingly appointed Thakur as CJI on 18 November 2015. If the NJAC Act had been valid, the Narendra Modi government could have wielded enormous influence over the selection. But since the collegium survived, there was no room for interference by the executive.

## Conclusion

The judicial appointment reform efforts by the Modi government failed in the face of opposition from the Supreme Court. This result, however, did not imply a strong likelihood that the collegium system would

[32] *Supreme Court Advocates-On-Record Association and another* v *Union of India*, Writ Petition (Civil) No.13 of 2015. For the verdict, see Sengupta (2015), Srikrishna (2016).

continue unaffected. Its maladies still need to be solved and discontent with it is still prevalent. The Union Minister of Finance at that time (and former Union Minister of Law and Justice), Arun Jaitley, criticised the Court's verdict as 'tyranny of the unelected'. In fact, a call for judicial reform was also raised from within the collegium. Jasti Chelameswar, who authored the dissenting opinion when the Supreme Court ruled the reforms unconstitutional in October 2015, delivered a public criticism of the collegium for its opaqueness and exclusiveness and was absent from the collegium meeting in September 2016. Significantly, judicial reform was called for by a judge who was one of three collegium members with the authority to appoint high court judges from 4 January 2017, the day after CJI Thakur's retirement, to 22 June 2018, the date when Chelameswar would have to retire due to age. The verdict of October 2015 also acknowledged the need to reform judicial administration, as the Supreme Court directed the government to draft a new memorandum of procedure for judicial appointments to higher courts.[33] The Ministry of Law and Justice told the Lok Sabha in February 2018 that it would need more time to finalise the memorandum of procedure. As of May 2018, the tug of war continues between the Modi government and the apex court over this issue.

Another example of the struggle concerns the elevation of K. M. Joseph, Chief Justice of the Uttarakhand High Court, to the Supreme Court. Justice Joseph and senior advocate Indu Malhotra were recommended to become apex court judges by the collegium on 11 January 2018. Malhotra was appointed to the Court on 27 April 2018, but the government sent Joseph's file back to the collegium for reconsideration. Its stated reasons for doing so were that he was the 42nd most senior judge among India's high courts, there were 10 high court chief justices senior to him, and the Kerala High Court, where he served before his appointment as Chief Justice of the Uttarakhand High Court in July 2014, was too small a court to be represented by two Supreme Court

[33] C. Raj Kumar (2015) has proposed a new appointment process within the collegium system. It would include a detailed set of criteria for the selection of judges, so as to rigorously scrutinise candidates' competence and integrity in a fair and transparent manner, and establishing a separate, independent administrative office within the Supreme Court exclusively to deal with all matters relating to judicial appointments.

judges. The true reason, however, was alleged to be his quashing the President's rule in Uttarakhand in April 2016. The government and the Supreme Court's collegium are still competing for power to appoint high court judges. Thus, the authority to fill judicial positions is contested between democratically elected leaders and the unelected judicial elite.

Future judicial reforms are likely, to some extent, to include mechanisms to increase judicial diversity like those contained in the NJAC Act. Since reservation policies have been widely adopted in India, it would not be surprising should the Supreme Court promote democratisation of the judiciary through judicial participation by excluded groups like lower castes, religious minorities, and women, so that it can escape the frequent criticism that the courts do not listen to the voices of the people and should be subject to democratic control. When the Modi government, whose NJAC Act was ruled unconstitutional by the apex court, tries again to reform the judicial appointment system, public participation in the judicial process and judicial democratisation by means of reservation or some similar process could be a powerful source of popular appeal.

Significant changes will happen in the relationship between the executive and the judiciary if the collegium is reorganised or dissolved and the judiciary becomes less independent. Since the collegium system was established in the 1990s, the average age of appointment to the Supreme Court has been higher and the average tenure there consequently shorter than before. This is because the Court has paid special attention to the executive's concerns so as to make its institutional independence more politically palatable. The judicial activism conducted by the Supreme Court prior to 1993 was led by judges with longer tenures. Since then, the apex court has steered clear of judicial activism in exchange for maintaining the collegium and a high level of independence (Chandrachud 2014: 183). Taking this political context into consideration may help us to understand more clearly why the Court upheld several public order laws enacted as counterterrorism measures in the 1990s and 2000s.

The political turn of the Supreme Court in the 1990s suggests that the judiciary could return to activism, with the goal of countering the government with broad public support, should a stronger government threaten its judicial independence. In response to social demands, the Court in recent years has rendered epoch-making decisions, including

one in April 2014 giving transgender people the official status of a third sex and one in July 2016 that harshly criticised the immunity from prosecution granted to the armed forces under AFSPA.[34] It can be concluded that the judiciary has become more active as the executive became more hostile to the collegium, as reflected in the JAC Bill and the NJAC Act.

It is difficult to predict whether the judiciary will retain its substantial independence for years to come or if the executive will regain strong control over the courts. The political relationship between the government and the judiciary has been in flux since the largest party, the BJP, won a single majority in the 2014 general election and both houses of Parliament unanimously passed the NJAC Bill and the Constitution (121st Amendment) Bill submitted by the Modi government. Whether institutional democratisation of judicial appointment from above eventually crystallises, as the miscarried NJAC intended, will have a profound impact on how the institutionalisation of human and collective rights from below, examined in other chapters of this book, proceeds.

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[34] The AFSPA was withdrawn from Tripura in 2015 and removed from Meghalaya and parts of Arunachal Pradesh in April 2018. As of April 2018, the Act is effective in the whole of Nagaland, Assam, and Manipur (excluding seven Assembly constituencies of Imphal).

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# 4

# Citizenship In-between: A Case Study of Tibetan Refugees in India

Tatsuya Yamamoto

## Introduction

This chapter clarifies situations surrounding citizenship (*mi ser*) as a right of Tibetan refugees in India by focusing on both laws in India and the Charter of the Tibetans-in-Exile, and on institutions implementing such laws. Tibetan refugees have lived under the legal order consisting of a dual legal system: first, the Charter established by the Central Tibetan Administration (CTA), the government of Tibetan refugees; second, the Indian legal system set by the Government of India (GoI). While most Tibetan refugees have been provided with Tibetan citizenship by the CTA, some have been given Indian citizenship by the GoI since the 2010s. In this sense, Tibetan refugees have been hugely influenced by "institutionalization from above", and whether they are offered Tibetan and Indian citizenship has become a big issue. This chapter argues that situations surrounding Tibetan refugees under the Indian legal order put the refugees in-between laws, policies and institutions concerning citizenship.

T. Yamamoto (✉)
Shizuoka University, Shizuoka, Japan


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In addition, this chapter shows that Tibetan citizenship legally guaranteed to Tibetan refugees not only has linkages to matters of membership in Tibetan refugee societies and accessibility to material redistribution, but also has a religious aspect. Previous arguments about religious citizenship (e.g., Miedema 2008) focused on the importance of religions to form individual and collective identity in multicultural societies, and on institutional matters to implement policies respecting religions. This chapter shows that Tibetan citizenship as a legal status includes a religious aspect, that is, a sharing of blessing. Similarly, this chapter asserts that such a perspective with religious implications observed among Tibetan refugees forces us to reconsider the presumption of excluding the sacred from the secular in the concept of citizenship as a legal status.

In sum, this chapter explores some phases of the legal order in contemporary democratic India by focusing on citizenship splitting Tibetan refugees from 2010 onward. To achieve it, this book features the following cases: first, "institutionalization from below" by "mainstream" Tibetan refugees legally seeking Indian citizenship who have brought great impacts to Tibetan refugee societies in India since the 2010s; second, "institutionalization from below" by examining the case of an "illegal" Tibetan refugee who has been denied his Tibetan citizenship by the CTA and can only secure his status by acquiring Indian citizenship in a different way from "mainstream" Tibetan refugees.

Anthropological studies have been producing many achievements concerning citizenship since the 1990s. This chapter especially builds on arguments about citizenship linked to institutions and the discussion in the nation-state and its legal definition. For instance, Ong's perspective (1996) referring to cultural citizenship as a dual process of self-making and being-made within webs of power linked to the nation-state and civil society, and her argument paying attention to elites holding multiple passports in *flexible citizenship* (1999), still offer us important viewpoints. As mentioned later, Tibetan refugees' status is no other than the construction and negotiation by the GoI's legal decision-making and political implementations as a nation-sate, legal discourses and institutions spread by the CTA functioning as a pseudo-state, and these two big actors' power relations attempting to assign who should have citizenship. Recent claims for rights by Tibetan refugees in India aim to achieve

their legal recognition about their citizenship in the web of such power relations, and to similarly acquire redistribution of the material distributions and blessings from the Dalai Lama (cf. Jayal 2013). In this sense, this chapter partly follows a recent trend in anthropological studies concerning citizenship, such as "the move away from a theory of citizenship as purely a legal status towards a position where citizenship is analysed as a complex bundle of practices constituting political membership is now established" (Lazar 2013: 12). However, this chapter's position is different from other authors interpreting the concept of citizenship in much broader ways, such as Fumanti who criticizes Ong's arguments as "anchored in strategic, legal definitions of citizenship" (Fumanti 2017: 497). Despite recognizing such arguments' intentions as attempts to interpret citizenship as a part of membership in different ways and to set the concept free from its legal implication, this chapter finds such trends inappropriate to understand the legal order that Tibetan refugees live under. To Tibetan refugees in India, the most important thing is whether they can be legally given their citizenship under the dual legal system of the CTA and the GoI. Participation in other political spheres does not make any sense until they are legally recognized as citizens.

Following these presumptions, this chapter asserts that Tibetan refugees in India have been split in their legal and social recognition due to citizenship matters. It clarifies that situations surrounding citizenship have been hugely influencing Tibetan refugees' daily lives, voting and democratic participation in politics through social movements.

## Status of Tibetan Refugees in India

Tibetan refugees are people who have been fleeing to South Asian countries such as India, Nepal and Bhutan, and to western countries since the 14th Dalai Lama left Tibet in 1959. According to the 2009 census, there are 127,935 Tibetan refugees in the world. Among them, 94,203 live in India and 13,514 live in Nepal. Under the category of Tibetan refugees, we can find diversity especially in the sense of their backgrounds. They can be roughly classified into three clusters: Tibetans in the first wave

leaving Tibet from 1959 to the end of the 1960s; those in the second wave leaving Tibet from 1979 to the beginning of the 1990s; and those in the third wave leaving Tibet since 1996. Now that nearly 60 years have passed since 1959, it is not so rare to find Tibetan refugees in the first wave living together with the third or fourth generation of refugees. While some Tibetans were born and live in exile, others were born in Tibet and decided to come to Tibetan refugee societies as newcomers. Such newcomers' reasons for exile are multiple. Though some refugees provide instances such as meeting the 14th Dalai Lama, evacuation from political hardships in Tibet and acquirement of opportunities to be educated, their reasoning tends to be situational. To Tibetan refugees, exodus to India and Nepal does not necessarily mean the end of their journey. Some are willing to move on to western countries, while others prefer going back to Tibet because they find lives in refugee societies uncomfortable.

Tibetan refugees in India have lived in settlements leased by the GoI or in other areas such as Delhi and Dharamsala, which is the de facto capital for Tibetan refugees. The earlier Tibetan refugees have earned their living by engaging in agriculture and seasonal sweater trading, while the later refugees have worked in CTA's offices as public servants, and at other vocations such as running tourist agencies, hotels and restaurants in the tourist industry, and so on. However, young Tibetan refugees have been suffering from chronic unemployment in Tibetan refugee societies. Due to their situation, they have to compete with freshmen Indian citizens to get employed. At the same time, compared with Indian citizenship holders, the legal status of Tibetan refugees has been disadvantageous in regards to working conditions in companies and acquisitions of certifications. For instance, Tibetan refugees cannot be hired in Indian public sectors, and some companies have apparently eschewed hiring Tibetan refugees. In addition, issuing certifications such as medical licenses to Tibetan refugees has been prohibited for a long time.

Because India ratifies neither the 1951 United Nations (UN) Convention on the Status of Refugees nor the 1967 Protocol, the legal status of Tibetans in India is not that of refugee but of foreigner; the legal treatment of Tibetans has therefore been decided according to the

1946 Foreigners Act. However, "while denied the legal status of 'refugee', the political label 'Tibetan refugee' is widely used both by Indian authorities, and across the Tibetan community" (McConnell 2016: 140). The GoI issues the Indian Registration Certificate for Tibetans (RC) to Tibetan refugees, and these Tibetans are compelled to regularly renew their RCs at the Foreigners Registration Office (FRO), in order to legally stay in India. The GoI also issues Tibetan refugees with an Identity Certificate (IC), which is a substitute for a passport, according to the 1967 Passport Act. Every Tibetan refugee traveling to foreign countries is required to hold an IC if they plan to go back to India legally.[1] Despite such constraints, the GoI provides Tibetan refugees with various forms of rehabilitation assistance, including issuing ration cards. Thus, while the status of Tibetan refugees in India is not legally that of a refugee, it is said that the GoI has been supporting these Tibetan refugees substantially. However, young Tibetan refugees suffering from unemployment have gone through a lot of hardship because of their legal status as foreigners.

Needless to say, the status of Tibetan refugees—not legally but substantially recognized as refugees by the GoI—has been strongly influenced by the Indian legal system and political and economic conditions in India. In order to struggle within such uncertain situations, the CTA was established in 1959 to unite Tibetan refugees. The CTA functions as a pseudo-state to govern Tibetan refugees all over the world, and has formal and informal linkages with the heads of many countries and with supporters. This polity, which aims at returning to Tibet in the future and uniting Tibetan refugees through authenticated "Tibetan culture", was led by the Dalai Lama until he declared his retirement in December 2010. Lobsang Senge has taken over the Dalai Lama's political leadership and become the president (*sri skyong*) of the CTA since then. The CTA declares its position as the Tibetan government in exile representing not only Tibetan refugees but also Tibetans under the governance of the Chinese government. However, no country, including the GoI, has officially recognized the CTA's claim and position as the Tibetan govern-

[1] The Government of Sweden declared that it would not accept the IC as an official travel document since July 28 2016. This case is an apparent example of the unstable status of the documents concerning Tibetan refugees.

ment in exile. In this sense, the CTA is no other than a state-like institution. On the other hand, the CTA's activities have been supported by many Tibetan refugees and it has undoubtedly functioned as the exile government. In addition, as a representative of Tibetan refugees, the CTA has provided sufficient social welfare for Tibetan refugees and worked hard to achieve resettlement of Tibetan refugees in India in tandem with the GoI. In this sense, the functions of the CTA can be regarded as a pseudo-state in India.

The CTA declares itself as a democratic polity and consists of three pillars: the cabinet (*bka' shag*), the Tibetan parliament in exile (*bod mi mang spyi 'thus lhan tshogs*) and the Tibetan supreme justice commission (*ches mtho'i khrims zhib khang*). And it has the Charter of the Tibetans-in-Exile (the 1991 Charter) which is expected to unite the Tibetan refugee societies focusing on the CTA and be the Tibetan Constitution in the future. The origin of the 1991 Charter extends back to the "Future Constitution of Tibet" drafted in 1961. At that time, the Dalai Lama declared the introduction of democracy to the Tibetan refugee societies in order to reflect the voices of Tibetan refugees in the operations of the CTA, and this draft was a part of the Dalai Lama's democratic projects. In 1963, this draft was revised and formulated as "The Constitution of Tibet". After a while, the effectiveness of this constitution was confirmed by Parliament in 1991 and enacted as the 1991 Charter. Since then, the 1991 Charter consisting of 115 articles has been influencing Tibetan refugees. Among its provisions, this chapter especially focuses on Article 8 (Citizen of Tibet) and Article 13 (Obligations of Citizens: All Tibetan Citizens shall fulfill the following obligations). According to Article 8, Tibetan citizenship is prescribed by the CTA as follows:

(1) All Tibetans born within the territory of Tibet and those born in other countries shall be eligible to be citizens of Tibet. Any person whose biological mother or biological father is of Tibetan descent has the right to become a citizen of Tibet; or
(2) Any Tibetan refugee who has had to adopt citizenship of another country under compelling circumstances may retain Tibetan citizenship provided he or she fulfills the provisions prescribed in Article 13 of this Charter; or

(3) Any person, although formally a citizen of another country, who has been legally married to a Tibetan national for more than three years, who desires to become a citizen of Tibet, may do so in accordance with the laws passed by the Tibetan Assembly.
(4) The Tibetan Assembly shall formulate laws of citizenship in order to enforce the above Articles.

And according to Article 13, the duties of Tibetan citizens are to:

(a) bear true allegiance to Tibet;
(b) faithfully comply and observe the Charter and the laws enshrined therein;
(c) endeavor to achieve the common goal of Tibet;
(d) pay taxes imposed in accordance with the laws; and
(e) perform such obligations as may be imposed by laws in the event of a threat to the interest of Tibet or other public catastrophe.

Among the five items in Article 13, item (d) should be noted. In 1972, some Tibetan refugees established an organization, the "Tibetan Freedom Movement", in order to show their loyalty to the CTA through each Tibetan refugee's financial support to the CTA. In fact, the Tibetan Freedom Movement called for Tibetan refugees to pay their annual tax to the CTA and it issued the Green Book as a proof of such payment. According to the provisions in Article 13 of the 1991 Charter, holding a Green Book and paying annual tax have become duties to qualify Tibetan citizenship. If he or she fulfills the required conditions of holding a Green Book and paying tax, the CTA counts them as Tibetan refugees in the census implemented every 10 years, and officially recognizes them as Tibetan refugees. As official Tibetan refugees, the CTA gives them voting rights, permission for admission to Tibetan schools run by the CTA, various social welfare distributed by the CTA and the right to work in CTA-related jobs. McConnell recognizes that "according to TGiE officials, more than 90% of exile Tibetans hold a Green Book, and these documents are issued to all Tibetan children born in exile and to each new arrival from Tibet" (McConnell 2016: 138),[2] and then immediately says:

[2] McConnell uses the term for the Tibetan Government in Exile (the TGiE), but this is just a commonly used name of the CTA, and "CTA" should be used to refer to this Tibetan polity in India.

"Tibetan citizenship and the Green Book are therefore accessible to all exile Tibetans, including 'new comer' refugees" (McConnell 2016: 139). About 10% of non-Green Book holders are regarded as Tibetans who have been against the policies of the CTA (e.g., Frechette 2005: 155–157). These non-Green Book holders are allegedly perceived in Tibetan refugee societies as illegally acquiring citizenship of host countries and enjoying the same advantages as citizens in those host countries do. Therefore, as the remark by a CTA staff member cited by McConnell shows, they presume that the majority of Tibetan refugees have refused to accept the advantages brought by illegally getting Indian and Nepali citizenship and such majority have remained to be "refugees". It seems that such perceptions have also been shared among scholars on Tibetan refugees. For instance, Carole McGranahan says: "Following the lead of the exile government, Tibetans collectively refused these advantages in favor of a claim to being Tibetans, that is, a claim to be refugees temporarily and Tibetans permanently" (McGranahan 2016: 337) because "refusing citizenship constitutes one means of asserting a right to sovereignty, of producing a state history and a subject-body, and thus of generating desired political effects at the level of the individual and the collective. To refuse is to hope for a different Tibet, one to which you may go home, regardless of your politics—of either independence/ *rang btsan* or autonomy/ *dbu ma'i lam*" (McGranahan 2016: 338). Scholars such as McConnell and McGranahan presume that Tibetan citizenship is distributable to all Tibetan refugees according to two Articles in the 1991 Charter, and even argue that refugees have the hope and potentiality to reject both citizenship of host countries and "the modern expectation that all people have a place, an attachment, a status named and known under international law, or that they will acquiesce to political occupation or other disaster" (McGranahan 2016: 340). From their perspective, it is assumed that Tibetan refugees enjoy the advantages and social welfare benefits distributed by the CTA if they demand so, and aim at deepening democracy in Tibetan refugee societies and prompting a return to Tibet. However, problems concerning citizenship experienced by Tibetan refugees in India in the 2010s have forced researchers to face the reality that previous studies appreciating the CTA's aims and policies cannot grasp the reality surrounding citizenship that Tibetan youth and many newcomers

born in Tibet have lived. This chapter describes how Tibetan refugees in India have lived with a dual legal order consisting of the Indian legal system and the 1991 Charter implemented by the CTA.

## Tibetan Refugees Acquiring or Seeking Indian Citizenship

On March 2008, a Tibetan refugee woman from a prestigious noble family stood up against the prevailing system and filed a case in regard to Indian citizenship against the GoI and related institutions. She had been denied an opportunity to be hired as an English lecturer at a university and her right to take related exams for her job opportunities was taken away. In order to remedy this situation, she applied to get an Indian passport according to her lawyers' advice. However, the Ministry of External Affairs rejected her application because the GoI does not allow applicants to hold dual citizenship. In response to this rejection, she filed this case to prove her claim's legal validity. And on December 22 2010 she was given a ruling. The Delhi High Court ordered the Ministry of External Affairs to issue an Indian passport to the Tibetan refugee woman, Namgyal Dolkar, as she had demanded. That means Namgyal Dolkar legally won Indian citizenship. The Delhi High Court's reasoning was that everyone born in India from January 25 1950 to July 1 1987 has to be recognized as an Indian citizen, according to the Citizenship Act 1955, and this rule has to be applied to the case of the Tibetan refugee Namgyal Dolkar. After this ruling, various media have asked Namgyal Dolkar to comment on her status as the first Tibetan refugee who legally won Indian citizenship.[3]

In addition to Namgyal Dolkar's historical win, on August 25 2013, the Karnataka High Court gave out a ruling to issue an Indian passport to Tenzin Choephang Ling Rinpoche, a reincarnated monk born in India, for the same reason. Just because both these rulings were given by

[3] See the article in *Times of India* at https://timesofindia.indiatimes.com/india/25-yr-old-first-Tibetan-to-be-Indian-citizen/articleshow/7323090.cms

the High Court did not mean that these decisions were retrospectively applied to all Tibetan refugees meeting the requirements. Relatively rich and highly educated Tibetan refugees—such as Phuntsok Topden, who was a student of Delhi University and filed a case in 2013—started to file cases in order to get the same rights as Namgyal Dolkar was able to win. Consequently, these claimants could win Indian citizenship for the same reason that the Delhi High Court gave a decision in Namgyal Dolkar's case. However, both cost and time for filing cases were big obstacles, and therefore this option remained closed to the majority of Tibetan refugees.[4] After that, according to the verdict of Phuntsok Wangyal's case in September 2016 by the Delhi High Court, the Ministry of External Affairs decided to issue Indian passports to Tibetan refugees meeting the requirements prescribed in the Citizenship Act 1955 from March 2017 onward, and declared that Tibetan refugees with Indian passports should be Indian citizens. This decision may increase the number of Tibetan refugees applying for Indian citizenship, but it is still unclear whether this verdict automatically provides Indian citizenship for Tibetan refugees meeting the requirements under the Indian legal system. At any rate, it has been obvious that Tibetan refugees seeking Indian citizenship through legal procedures are those likely to have an advantageous background and a self-help mindset.

However, even if the option above has remained relatively limited to well-off Tibetan refugees, what Namgyal Dolkar won in 2010 through legal procedure had an unprecedented impact on Tibetan refugee societies, as an article on the internet reports, claiming that "it certainly will have implications among the community of 1,00,000 Tibetans".[5] What Namgyal Dolkar received was not just an Indian passport and Indian citizenship. She won the reinterpretation of understanding that the 1946 Foreigners Act should be automatically applied to Tibetan refugees in India. Through her win, Tibetan refugees, legally regarded as foreigners

[4] "Tibetans born between the designated years are still routinely denied passports and it appears that the only way to enforce the provisions of the Citizenship Act is to hire a lawyer (for roughly 100,000 rupees) to contest the denial in High Court. This is not a realistic option for the vast majority of Tibetans" (TJC 2016: 61).

[5] http://www.tibetanjournal.com/index.php/2017/12/15/will-tibetans-opting-indian-citizenship-weaken-the-freedom-struggle/

for such a long time, can qualify as Indian citizens if they meet the requirements of the Citizenship Act 1955; this became accepted as an important judicial precedent. This ruling brought a huge change in the Indian legal order surrounding the legal treatment of refugees and in Tibetan refugee societies (the fact that Namgyal Dolkar is a descendant of the first Tibetan king, Songtsen Gampo, is also an important factor causing major reactions in Tibetan refugee societies). When I stayed in Dharamsala in 2011 and 2012, some of my friends managed to raise some money to file cases in order to get Indian passports, and others lamented the fact that they could not meet the requirements of the Citizenship Act 1955. On the other hand, patriotic Tibetan activists such as Tenzin Tsundue started claiming that there were problems in getting Indian citizenship. In addition, Ling Rinpoche's win, declared by the Karnataka High Court in 2013, gave more fuel to transform the situation in Tibetan refugee societies. In 2014, the Election Commission of India decided to give voting rights in the Indian general elections for the Lok Sabha to Tibetan refugees born in India from January 25 1950 to July 1 1987 as prescribed in the Citizenship Act 1955, according to the verdict of Ling Rinpoche's case. Getting voting rights at this time did not directly mean the acquisition of Indian citizenship. However, holding Indian election cards enables Tibetan refugees to participate in parliamentary Indian democracy, and this fact seemed to change such Tibetan refugees' mindsets. According to an article, around 200 Tibetan refugees living in Dharamsala appeared at a polling station on the day of an election. These Tibetan refugees were regarded as persons potentially seeking Indian citizenship. In other words, around 200 Tibetan refugees declared their demands to get Indian citizenship in public.

Rewriting the Indian legal system concerning Indian citizenship has brought about various reactions in Tibetan refugee societies. Lobsang Wangyal, who is a journalist and organizer of the Miss Tibet pageant, is a representative of the Tibetan refugees who are seeking Indian citizenship. He filed a Public Interest Litigation case to get an Indian passport against the Union of India in 2016, and has been actively speaking about this procedure in various media. When I talked with him in 2012, he said, "Whether I get Indian citizenship or not, it won't change the fact that I am a Tibetan. I, as a Tibetan, know where I came from and [where] I

want to go, and holding Indian citizenship helps to achieve our goal, not prevent us from doing." He has been giving almost the same message as this statement in various media. As with him, I could find relatively a lot of Tibetan refugees who mentioned seeking Indian citizenship in private conversations. For instance, though he does not meet the requirements because he was born in Tibet and arrived in India in the 1990s, Thupten (pseudonym) said to me: "If I can get Indian citizenship, I think I will apply. The CTA is our government, but its status and social welfare are more limited than the GoI. I find what the CTA says understandable, but I have to survive."

And an article by the Editorial Board of the Tibetan Political Review is a very interesting instance, though the article never urges Tibetan refugees to get Indian citizenship. According to the editors' understanding,

> Legally, applying for an Indian passport does not make one any less Tibetan, because the Tibetan Charter (Tsatrim) allows for Tibetans to take other citizenship. Societally, it is common practice for a Tibetan to hold American or Canadian citizenship, or for a Tibetan in Tibet to hold Chinese citizenship. Why not a Tibetan holding Indian citizenship? There should not be a societal double standard. The true test of Tibetan citizenship should be whether one holds a Green Book issued by the TGIE, not whether one also has another passport.[6]

Thus, they say: "We urge all Tibetans, and the TGIE, to engage in a serious debate on this issue while there is still time"[7] and attempt to facilitate arguments about Indian citizenship in Tibetan refugee societies.

In contrast, Tenzin Tsundue, the activist mentioned above, clearly shows his dissent against opinions and arguments that talk positively about getting Indian citizenship. Talking about the Indian general elections, for instance, he said: "It was very kind of the Indian government to initiate this move, but for us, going back to our motherland is more important. If we become Indian voters, we have to relinquish our RCs, which is why most of us have not opted for this. If we relinquish our RCs, we are no longer Tibetans."[8] In a television program about getting Indian

[6] http://www.phayul.com/news/article.aspx?id=33379&t=1

[7] http://www.phayul.com/news/article.aspx?id=33379&t=1

[8] http://www.phayul.com/news/article.aspx?id=34860

citizenship, Tenzin Tsundue all too clearly showed his negative stance toward getting Indian citizenship because he believes it breaks the unity of Tibetan refugees who are expected to endeavor to return to Tibet.

While arguments about getting Indian citizenship have erupted in Tibetan refugee societies, the CTA's stance toward Tibetan refugees seeking Indian citizenship is that it is up to each Tibetan's freedom of choice whether he or she accepts citizenship or not. President Dr. Lobsang Sangay, the head of the CTA, said that "the decision to apply for Indian or any other country's citizenship is a personal choice. If you are eligible, you can apply. The Tibetan administration has no right nor does it intend to interfere in a person's fundamental rights",[9] and the CTA even supports the preparation of the required documents to apply for Indian citizenship. It is said that originally the CTA had discouraged Tibetan refugees in India and Nepal from getting citizenship in host countries, and had put an emphasis on remaining refugees, but it has changed its attitude on getting citizenship (cf. Frechette 2005: 130). The CTA's attitude that getting voting rights and Indian citizenship is a matter of the individual Tibetan refugee's choice might reflect this trend.

However, while the neutral stance of the CTA allows Tibetan refugees to make decisions on voting rights and citizenship for themselves, Thupten's statement "I find what the CTA says understandable, but…" and the Editorial Board of the Tibetan Political Review's attempt to facilitate arguments about getting Indian citizenship might show their suspicion that the CTA actually disagrees with getting voting rights and Indian citizenship to a certain extent.[10] And this sort of suspicion is reinforced within daily contexts. For instance, when I interviewed a CTA staff member working in Majnu-ka-tilla, Delhi, in 2014 about getting Indian citizenship, he said that "the way Namgyal Dolkar received Indian citizenship was wrong. Because the Citizenship Act 1955 clearly informs us of our rights, she didn't have to file a case." However, I have to say that there is a huge rupture between his recognition and my Tibetan friends'

[9] http://tibet.net/2017/09/cta-president-iterates-kashags-position-on-tibetans-applying-for-indian-citizenship/

[10] Such interpretations could be invited by the CTA's stance toward marriage by Tibetan refugees. While the CTA encouraged intra-marriage among Tibetan refugees, it discouraged intermarriages, according to its nationalistic agenda (Childs and Barkin 2006: 49).

understanding about the way to get Indian citizenship. If I take this staff member at his word, it seems that quite a few Tibetan refugees should have known about the Citizenship Act 1955 and its legal effectiveness for getting them Indian citizenship. But the actual situation was not like that. For instance, Lobsang Wangyal has repeatedly said through various media that "everyone born in India from January 25 1950 to July 1 1987 has to be recognized as an Indian citizen, according to the Citizenship Act 1955, and this rule has to be adapted to all Tibetan refugees meeting the requirements", and the Editorial Board of the Tibetan Political Review's article published in 2013 deliberately emphasizes this fact: "Let us repeat: Any Tibetan born in India between these dates in 1950 and 1987 is already an Indian citizen."[11] These calls reflect the fact that the basic knowledge and legal effectiveness of the Citizenship Act 1955 with regard to Tibetan refugees had not been common knowledge among Tibetan refugees. In fact, while I had never met Tibetan refugees saying "we are automatically Indian citizens according to the Citizenship Act 1955" before they knew that Namgyal Dolkar won the case in regards to Indian citizenship and was legally given it, I have an impression that the number of friends mentioning the Citizenship Act 1955 has increased after they read articles mentioning the name of Namgyal Dolkar and the Citizenship Act 1955 in newspapers and on the internet.[12] Similarly, while I have heard some CTA staff members describe their status as foreigners, according to the 1946 Foreigners Act, I have never heard them mention the Citizenship Act 1955. In this sense, it is clear that Namgyal Dolkar's suit influenced Tibetan refugees' understanding about their legal status and decisions about Ling Rinpoche and other Tibetans given by the courts. And even if that particular CTA staff member's recognition about the Citizenship Act 1955 was right, it is likely that the fact that Tibetan refugees generally did not know the information written in the Citizenship Act 1955 and its legal effectiveness regarding them had been caused by the CTA's reluctant stance.

[11] http://www.phayul.com/news/article.aspx?id=33379&t=1

[12] In a web cast that invited Namgyal Dolkar, the host said that Tibetan refugees in general do not know the detail about the Citizenship Act 1955. See https://www.voatibetanenglish.com/a/2284591.html

Additionally, the CTA's reaction to getting Indian citizenship under the Citizenship Act 1955 has caused a problem relating to returning the RC issued by the GoI. According to Article 8 (2) in the 1991 Charter, the CTA allows Tibetan refugees to hold dual citizenship—which means Tibetan citizenship and other citizenship—and the Green Book, as long as such dual citizenship holders abide by the duties specified in Article 13. That means if he or she gets Indian citizenship, that Tibetan refugee maintains his or her Tibetan citizenship in Tibetan refugee societies under the protection of the 1991 Charter by holding the Green Book and paying annual tax.

On the contrary, the CTA emphasizes that Tibetan refugees holding Indian citizenship have to return their RC to the GoI, and this comes into conflict with issues concerning Tibetan citizenship. As mentioned above, the GoI requires that Tibetan refugees hold an RC and regularly reissue it at FROs as a condition to legally stay in India. However, Tibetan refugees holding Indian citizenship have to return their RC because the GoI legally prohibits holding dual citizenship. In which case, returning the RC causes inaccessibility to social welfare benefits distributed by the CTA. For instance, CTA President Dr. Lobsang Sangay says that "the applicant should not be staying in designated Tibetan refugee settlements and [should] forfeit all privileges and benefits from the Central Tibetan Administration".[13] In fact, he states that "these Tibetans cannot be called Tibetan refugees and cannot avail the benefits provided by the Central Tibetan Administration such as scholarship, jobs, etcetera".[14] In order to get such social welfare, Tibetan refugees in India are required to show their RCs. Once having returned the RC, he or she, and his or her descendants in the future, have to be outside the social welfare system.

In addition, the situation concerning the RC and the Green Book has become more complicated since July 2007. The CTA has obliged Tibetan

[13] http://tibet.net/2017/09/cta-president-iterates-kashags-position-on-tibetans-applying-for-indian-citizenship/

[14] http://tibet.net/2017/09/cta-president-iterates-kashags-position-on-tibetans-applying-for-indian-citizenship/.

However, Namgyal Dolkar was elected a member of Parliament, despite the CTA's declaration. How strict this rule's adaptation will be is still unclear.

refugees to show their RCs in order to issue them with a Green Book. That means the descendants of Indian citizenship holders will not be issued with a Green Book because they do not have an RC. As a result, their Tibetan citizenship will be denied because they do not have a Green Book and are not regarded as Tibetan refugees according to articles in the 1991 Charter. And this decision made by the CTA is likely to be discriminative, in a sense. As mentioned above, the 1991 Charter qualifies Tibetan citizenship by holding a Green Book and paying annual tax. Based on the fulfillment of these duties, the CTA provides social welfare for Tibetan refugees. However, the CTA's stance toward providing social welfare shows its discriminative facet. While Tibetan refugees holding citizenship of western countries are not required to show their RCs in order to be issued with a Green Book and get social welfare, the CTA declares that Tibetan refugees in India have to show it, and Tibetan refugees who hold Indian citizenship and have returned their RCs are not to be issued with a Green Book and are to be deprived of social welfare. In this sense, even if the CTA claims it has a neutral position about getting Indian citizenship, some Tibetan refugees suspect that the CTA has a negative stance toward such citizenship, and those refugees feel unease about getting it (TJC 2016: 63).

As shown above, it can be said that the Citizenship Act 1955 created an unprecedented gap among Tibetan refugees. The required condition prescribed in the Citizenship Act 1955 clearly shows the Indian government's stance that it will not give Indian citizenship to Tibetan refugees born after July 2 1987. The date of birth as the requirement to be qualified as an Indian citizen legally privileged some Tibetan refugees and consequently discouraged others as unqualified.

To improve this situation, a policy providing sufficient social welfare for Tibetan refugees with an RC was implemented by the Ministry of Home Affairs in October 2014. It is the Tibetan Rehabilitation Policy and is an achievement of the CTA's negotiation with the GoI. This policy recommends that state governments provide Tibetan refugees with rights and social welfare, such as rights to lease land and freedom of employment, in a uniform standard set by the GoI. So far, each state has different standards for Tibetan refugees' treatment, but this policy sets up a uniform standard and some states have accepted to abide by it (Sarkar

2017: 60–62). However, because this policy is not a law but only an executive policy, some states such as Arunachal Pradesh are reluctant to implement it, and I have met some Tibetan refugees who were suspicious of its actual effect.

In this section, we reviewed how the India legal order has experienced huge transformations caused by the citizenship-related matter in legal discourses and the legal system, and through implementations and revisions of policies since the 2010s. However, the legal order described above is just one side of the matter about getting citizenship experienced in Tibetan refugee societies. In the next section, we will see the byproduct that Tibetan refugee societies have been unintentionally and continuously producing.

## Options to Officially Unrecognized Tibetan Refugees: The Case of Tenzin

I came to have a close relationship with a Tibetan friend called Tenzin (pseudonym) when I was doing research in Kathmandu in 2015. Tenzin is a Tibetan refugee who was born in a village in the Dingri district in Tibet. He arrived in Nepal in 1988, and often moves between India and Nepal. He actively engages in activities such as supporting victims of earthquakes in Nepal as a staff member of a non-governmental organization (NGO), liberating Tibetan refugees who did not carry IDs and were arrested by Nepali police, and explaining situations concerning Tibetan refugees in Nepal on radio programs. His activities serving Tibetan refugees and Nepali victims and his sincere character are highly appreciated by his friends. One day I was sipping a cup of tea and talking about trivial things with Tenzin as usual. He suddenly started talking about himself: how he struggled to leave Tibet under much stricter conditions at the end of the 1980s (he failed to find refuge twice); what hardships he had experienced before arriving in Kathmandu since his arrival in Nepal; how he earned his living after his arrival in Kathmandu. During his explanation, I realized he had not mentioned the name of an important institution, the Tibetan Reception Center, which every Tibetan refugee is expected to visit. To make sure, I asked him when he had gone there.

Surprisingly, his answer was "the Tibetan Reception Center didn't accept me", and he began to explain this in detail. After listening to his explanation, I eventually understood the strange situation in which Tenzin was positioned within Tibetan refugee societies.

Usually, most Tibetans seeking refuge are likely to pay a certain amount of money to brokers sending such Tibetans to Nepal, and arrive in Nepal by crossing the border between Nepal and China in a group. At that time, it is said that these Tibetans often experience hardships such as the sudden disappearances of brokers, arrests and imprisonments by border securities. If they are fortunate enough to cross the border, they are expected to register themselves at the Tibetan Reception Center in Kathmandu, which is run cooperatively by the CTA and the UN High Commissioner for Refugees (UNHCR), and be sent to the Tibetan Reception Center in Dharamsala, India. The procedure became stricter in 2003 and every Tibetan refugee must follow the rules: Tibetan refugees staying in the Tibetan Reception Center in Kathmandu have to be issued with Special Entry Permits,[15] which are valid for just three months, by the GoI, and ask the Nepal Department of Immigration to permit their departure from Nepal to India. With this Special Entry Permits, Tibetan refugees can legally stay in India and, during the validity of the permits, the CTA staff members request the GoI to issue an RC. Through this process, Tibetan refugees are finally given the legal status enabling them to stay in India.

However, Tenzin, who crossed the border in 1988, did not follow this prescribed path. At that time, he was a teenager and was seeking to be educated in India. In these circumstances, he did not have enough money to pay brokers and had to cross the border by himself without knowing the procedure mentioned above. It was in 1990 that he became aware of the existence of the Tibetan Reception Center in Kathmandu, and a year had passed since he crossed the border. At that time, he was working for a carpet factory as a resident worker in Narayantar and happened to meet a Tibetan monk coming from South India to conduct some Buddhist

[15] Originally, the Special Entry Permits had four items to describe the applicant's purpose in coming to India: (a) refugee, (b) pilgrimage, (c) education and (d) other. However, in 2005 the GoI removed (a) refugee, and the version amended in 2016 just has two items: (a) education, and (b) other.

rituals in a monastery in Narayantar. The monk advised Tenzin to go to the Tibetan Reception Center, and they went there together. However, a staff member did not trust Tenzin and said, "You are a Sherpa, not Tibetan. We don't issue any documents to Sherpas." Tenzin's request was not accepted, and Tenzin and the monk had to leave the center. As a result, Tenzin not only lost the opportunity to be officially sent to India, but also failed to get documents to apply for an RC and other certificates. Tenzin had no choice other than working for a company for about two years, at which time the monk visited Narayantar again and learned about Tenzin's predicament. Finally, he decided to take Tenzin to Sera monastery in South India and Tenzin became a Tibetan monk there. He had been trained in Sera and was assigned to deliver services to various monasteries in India until he returned to secular life in 2010 due to sickness.

Because of his non-possession of an RC, he could not stay in India legally even if he could do it secretly. His story about his status mentioned above is sad enough, but what is worse, he said that he does not have a Green Book either. This means that Tenzin is not recognized as a Tibetan refugee staying in India and Nepal legally, and the CTA also did not give Tenzin Tibetan citizenship that is supposed to be given to all Tibetans under the umbrella of the Charter. In other words, Tenzin's self-recognition as a Tibetan refugee is not an officially supported status. The situation surrounding him stems from the fact that he did not go through the officially prescribed procedure at the Tibetan Reception Center. The documents issued to Tibetans during their stay in the Tibetan Reception Center correspond with both the RC issued by the GoI and the Green Book issued by the CTA. Tibetan refugees such as Tenzin who did not follow the official route prescribed by the CTA and the UNHCR unconditionally lose accessibility to these two important documents for Tibetan refugees in India. Tibetans who do not hold the Green Book cannot be counted as Tibetan refugees in the census, and Tenzin says that "without the Green Book, we become non-Tibetans in the Tibetan societies (*green book med na Tibetan society nang la Tibetan min pa chag song*)".[16] Consequently, Tenzin has neither had the modern

[16] Conversation with Tenzin on August 20 at Boudha. The case concerning the census shows that the CTA does not have any measure to calculate the number of non-Green Book holders, and it therefore seems the CTA's stance toward such Tibetans has been indifferent.

education that he originally sought, nor the social welfare and rights supplied by the CTA for Tibetan refugees. Needless to say, his situation is not under the realm of social welfare and rights brought by the Tibetan rehabilitation Policy. Tenzin visited Delhi and Dharamsala many times to apply for a Green Book, but the CTA has not issued it to him even now.

In this terrible situation without both a Green Book and an RC, Tenzin reached a big turning point in 2008 when he was allocated to a monastery in Sikkim. He was already sick at that time and whether he could take responsibility for delivering various Buddhist services was unforeseeable. In view of this circumstance, his friends born in Sikkim who had known Tenzin's legal status as neither an Indian citizen nor official Tibetan refugee suggested that he get an Indian passport in order to ensure better living conditions. Tenzin accepted this suggestion and applied for an Indian passport as a Sikkimese with the support of his friends, and finally received it as well as Indian citizenship.[17] Therefore, Tenzin received Indian citizenship "legally" by paying a small amount, while Namgyal Dolkar dove into a legal war for Indian citizenship by paying a huge amount of money to lawyers, within almost the same timeframe. After that, Tenzin decided to return to secular life because of his condition; he could not bear the monastic life, and moved to Kathmandu for medical treatment.

Getting Indian citizenship has given Tenzin some options. Indian passport holders can legally stay in India, needless to say, are not required to have a Nepalese visa and can move between both counties without any special procedures. In other words, because of his status as an Indian citizen, Tenzin is not only free from regular renewals of the RC in India and some disadvantages that Tibetan refugees in India have been facing because of their legal status, but also free from feeling uneasy, as Tibetan refugees in Nepal have been feeling under the unstable political conditions in Nepal, and paying bribes at the border between India and Nepal as

[17] I have heard that many Tibetan refugees illegally seeking an Indian passport have failed to acquire it because the GoI started computerized screening of applicants by seeing whether applicants had been issued with documents such as an RC or an IC since around 2005. It can be said that the fact that Tenzin had been issued with neither an RC nor an IC enabled him to acquire an Indian passport, paradoxically.

Tibetan refugees do in order to cross it. Thus, while Tenzin has basically stayed in Kathmandu where Tibetan refugees can get some business opportunities even if relatively lower educated, he often moves between both countries. In his life course, he has met many Tibetan refugee friends and foreign tourists with an interest in Tibetan issues, and has come to engage in various NGO activities, including liberation activities for arrested Tibetan refugees in Nepal and giving information about Tibetan refugees' hardships in Nepal to the public media. Paradoxically, his activities in Tibetan refugee societies have been supported by Indian citizenship, which his earlier situation without an RC and a Green Book to secure his life in India forced him to get, and holding Indian citizenship has enabled Tenzin to live in much more secure situations, compared with other Tibetan refugees in India and Nepal.

However, Tenzin has been sticking to his wish to acquire the Green Book. He said to me that his wish to hold it has become stronger since the huge earthquakes in Nepal in 2015. Due to damage caused by earthquakes, the export business run by Tenzin has been temporarily interrupted and he has been putting his efforts into supporting victims of these earthquakes. One day, he said, he heard some news that the CTA pays about 300 Nepal Rupees to each Tibetan family in Nepal as contributions to earthquake relief. However, Tenzin was outside the circle of persons covered by the CTA because Tenzin does not have the Green Book and has not been counted as a Tibetan refugee. Tenzin was bitterly disappointed by this news and said to me and his friends, "It doesn't matter to me whether I can get about 300 rupees. Such an amount of money is just used up for a meal! What we non-Green Book holders demand is acquiring the blessing (*byin rlabs*) of the Dalai Lama transmitted through receiving the 300 rupees."[18] What matters to him is being officially recognized as a Tibetan refugee and being a part of the common sharing of the Dalai Lama's blessing. However, for Tenzin who got Indian citizenship, the feelings in Tibetan refugee societies about getting Indian citizenship since the 2010s have seemingly made his wish difficult to fulfill more than ever before.

[18] Conversations with Tenzin on September 3 2015, and on August 25 2017.

This section featured the case of Tenzin and described the situations that Tibetan refugees without a Green Book have been facing. Luckily, Tenzin could acquire Indian citizenship, but he has been dissatisfied with his status because he has not been recognized as a Tibetan refugee by the CTA as he does not hold a Green Book. As with Tenzin, Tibetan refugees who did not stay in the Tibetan Reception Center cannot acquire the Special Entry Permits, an RC and a Green Book. As a result, some of them have to engage in illegal business, such as smuggling between Nepal and China, in order to earn their living. In the next section, we analyze how Tibetan refugees, living a very different reality from McConnell and McGranahan's descriptions, have been similarly constructing the legal order brought by the dual legal system of the GoI and the CTA as "institutionalization from above" through their everyday practices emerging as "institutionalization from below".

## Conclusion: Legal Order Producing Contingent Citizenship in Contingency

Until the 2010s, Tibetan refugees in India had been legally regarded as foreigners in the Indian legal system. Similarly, the convention that the CTA had been accepted as an institution providing such Tibetan refugees with Tibetan citizenship according to the 1991 Charter, and that Tibetan refugees had to live under the dual legal system, had been accepted by both Tibetan refugees and researchers. As a result, Tibetan refugees had to accept their legal status as "refugees" and also the disadvantages stemming from their status, such as unemployment and disqualification from obtaining certifications. However, the lawsuits by Namgyal Dolkar and other Tibetan refugees claiming their rights to be Indian citizens caused drastic transformations of Tibetan refugees' legal status within the Indian legal system and situations surrounding Tibetan citizenship guaranteed by the 1991 Charter. With reference to the theoretical perspective in the Introduction, the everyday life of each Tibetan refugee under the Indian legal order, which is the dual legal system consisting of the Indian legal system and the legal system operated by the CTA, is a contact zone, a

space for negotiations. And two sorts of institutionalizations stem from such a contact zone: "institutionalization from below", represented as lawsuits by "mainstream" Tibetan refugees such as Namgyal Dolkar and Tenzin's everyday practices in attempting to acquire the Green Book but failing to become a Tibetan refugee legally; and "institutionalization from above", represented as reactions by the GoI and the CTA. Consequently, Tibetan refugees in India are situated within new legal frameworks as subjects who seek the act of citizenship as their right, and the concept and discourses concerning it similarly influence and evoke these refugees' practices in intermingling ways.

Namgyal Dolkar and other Tibetan refugees following her example situated themselves, with the support of Indian lawyers, within the Indian public sphere dominated by the modern legal system. The fact that Namgyal Dolkar, excluded from the Indian public sphere as a foreigner and a Tibetan refugee woman, stood up against Indian civil society—that was presupposed as a legal and democratic realm for Indian citizens—through legal procedures and finally acquired Indian citizenship, transformed the category of Tibetan refugee into an actor who potentially participates in Indian civil society as an Indian citizen. By responding to the movement initiated by Namgyal Dolkar, some Tibetan refugees stood up to the existing system and filed cases for their claims to Indian citizenship. These trends have seemingly constructed the image of Tibetan refugees as autonomous individuals in both Indian and Tibetan societies. As a result of individual interventions into Indian civil society, amending legal interpretations about the status of Tibetan refugees in India and implementing policies on them have been influencing the lives of all Tibetan refugees in India, more or less. McGranahan, who hopefully argues for rejecting Indian citizenship, might trivialize these practices seeking Indian citizenship as unimportant. However, "institutionalization from below" by Namgyal Dolkar and other Tibetan refugees has led to the criteria to offer Tibetan citizenship set by the dual legal system in a more severe direction. In addition, in arguments in Parliament in Dharamsala and on the internet, we sometimes witness Tibetan refugees with antipathy and jealousy taking Indian citizenship, even if they pretend to be neutral. Considering these situations, the influence of "institutionalization from below" should not be underestimated.

For Tibetan refugees in India, needless to say, both Indian and Tibetan citizenship are a status filled with uncertainty. As the cases discussed in this chapter show, situations surrounding citizenship in India have begun to be experienced by Tibetan refugees as matters directly relevant to them, especially since the 2010s. Since the Namgyal Dolkar's lawsuit, the legal order based on the dual legal system consisting of Indian laws and the 1991 Charter as the constitution in Tibetan refugee societies has not only brought an alternative to some but has also produced and institutionalized others as Tibetan refugees who cannot take advantage of the effectiveness of such laws. Since Namgyal Dolkar's win, Tibetan refugees born in India from January 25 1950 to July 1 1987 have been qualified as potentially Indian citizens. However, this inevitably means that the right to be Indian citizens for Tibetan refugees born after July 2 1987 in India has been legally rejected, except for marrying Indian citizens. Although all Tibetan refugees, including the upper class of Tibetan refugees getting Indian citizenship illegally, have been treated as foreigners in the Indian legal system, Tibetan refugees in India have been suddenly broken down into potentially Indian citizens and foreigners by their birth date, since December 22 2010. Tibetan refugees who may be eligible to qualify as Indian citizens have started filing cases, as this chapter described earlier. However, the situations are still unclear and chaotic. Despite the GoI's order, Namgyal Dolkar and other Tibetan refugees' legal wins do not mean that the Tibetan refugees meeting the requirements of the Citizenship Act 1955 are automatically given Indian citizenship, and some cases have been ongoing. Even the potentially qualified Tibetan refugees have been patient with their uncertain legal status.

And the fact that Namgyal Dolkar and the other Tibetan refugees claiming their right to be Indian citizens and filing cases are basically highly educated and well-off enough to pay court costs should be noted. Seen from this point, "mainstream" movements of "institutionalization from below" in regards to Indian citizenship have been brought by the Tibetan refugees belonging to the upper class in the Tibetan refugee society in India, and to some extent, even in Indian society.

In addition to enjoying a sufficient social and economic background, the direction that Tibetan refugees such as Namgyal Dolkar have been pursuing since the 2010s presupposes holding Tibetan citizenship recognized by the CTA because holding the Green Book is a

requirement to qualify as a Tibetan refugee by the CTA. On top of that, if a person does not hold an RC and is not legally defined as a foreigner by the GoI, the option Namgyal Dolkar and others could take is not available. Here, we can find an overwhelming passivity that first, Tibetan refugees in India have to be recognized and qualified as Tibetan citizens by two polities.

As a result, some sections of Tibetan refugees have suddenly realized the importance and contingency of networking and relationships concerning getting citizenship. And those Tibetan refugees are the ones who came all the way from Tibet but could not get Tibetan citizenship. They have been consequently neglected by researchers such as McConnell who presume that Tibetan citizenship is provided for all Tibetans by the 1991 Charter and who underestimate the passivity included in the process of acquiring Tibetan citizenship. As mentioned above, while Article 8 in the 1991 Charter says that "[a]ll Tibetans born within the territory of Tibet and those born in other countries shall be eligible to be citizens of Tibet", people who share roots as Tibetans but did not follow the routes set by the CTA cannot officially qualify as Tibetan refugees and to hold an RC (cf. Clifford 1997). Such people will be put in an extremely unstable condition as "neither Tibetan refugees nor foreigners". Though Tibetans without a Green Book and an RC such as Tenzin are undoubtedly the people who demand support from the CTA, they are consequently the ones who are in the first place excluded from the dual legal system and cannot legally find their refuge in the Indian legal order.

Tenzin's case is a successful one among such Tibetan refugees: he could survive under such terrible conditions and eventually acquire Indian citizenship due to his status of lacking an RC and a Green Book. Because of his legal status as an Indian citizen, he can actively engage in rescue operations for victims of earthquakes, liberation activities for unfairly arrested Tibetan refugees and giving information about Tibetan refugees in Nepal through various media. However, there are many unofficial Tibetan refugees behind his successful case who cannot acquire any support and stability through holding Tibetan and Indian citizenship.[19] The CTA does not officially count such Tibetan refugees within the population of

[19] During a two-week stay in Kathmandu in 2017, I have met at least four Tibetan males without a Green Book, an RC and, needless to say, an Indian passport.

Tibetan refugees, and they cannot easily declare that they do not hold a Green Book because not holding the Green Book is likely to be interpreted as the person's political position against the CTA. As a result, such people's social existence is denied within the public sphere in Tibetan refugee societies, especially in India. In this sense, the formation of political society based on population (Chatterjee 2004) is an unrealistic option, because they cannot be visualized as the population of non-Green Book holders and be united as sharing similar backgrounds due to their invisibility in Tibetan refugee societies. Therefore, their struggle to survive in Tibetan refugee societies is dependent on contingencies such as whether they can meet someone who unexpectedly helps them to receive legal citizenship, as Tenzin's case shows.

Compared with Tibetan refugees without a Green Book and an RC, which puts them in a terrible position, Tenzin, who holds Indian citizenship, is in the position of being regarded as an actor engaging in various activities in the public sphere of Tibetan refugee societies. However, as his practices and continued demands for a Green Book show, he feels that he remains outside the public sphere. What he really demands is Tibetan citizenship, and Indian citizenship is no other than the means of legally securing his status in India and Nepal. What he especially emphasizes by representing others with similar backgrounds is that what they demand through acquiring Tibetan citizenship is not material redistributions themselves but the religious dimension included in such redistributions. What they aspire is sharing the blessing from the Dalai Lama through acquiring Tibetan citizenship. Their aspiration clearly shows that such Tibetan refugees have vernacularized the legal concept of citizenship by adding a religious dimension to it.

However, Tenzin's legal status of holding Indian citizenship has led him to a sort of stalemate. He cannot easily situate himself within Tibetan refugee societies in India and Nepal because his legal status can be easily associated with controversies over acquiring Indian citizenship since the 2010s. By focusing on the situations concerning citizenship-related issues in Tibetan refugee societies in India and Nepal, we come to know the following scheme: while there is a realm of civil society (Chatterjee 2004) consisting of the elite such as Namgyal Dolkar, who regard Tibetan citizenship implying the religious dimension as self-evident and aspire to get

Indian citizenship, there is also an alternative realm between civil society and political society in Tibetan refugee societies. Such a realm is one in which each "unofficial" Tibetan refugee is unavoidably forced to be a subject seeking rights under perilous conditions. Under the dual legal system driving Tibetan refugee societies, such "unofficial" Tibetan refugees who were excluded from Tibetan citizenship have remained invisible, while the media and the CTA have urged Tibetan citizens to face matters brought by acquiring Indian citizenship. Through active arguments about Indian citizenship, the criteria of holding Indian and Tibetan citizenship have been clarified. As a result, some can access them, and others have been alienated from them. It is said that this bipolarization is experienced as a predicament by Tibetan refugees living under the Indian legal order. It can be said that the legal order that Tibetan refugees in India have been living under since the 2010s is far from being inclusive, and has the character that makes the condition of the excluded more invisible and severe.

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# 5

# Rethinking the Reservation System in Contemporary India: A Local Point of View

Kenta Funahashi

## Introduction

The reservation system, which is an affirmative action policy, aims to ensure the right to 'equality of opportunity' for socially disadvantaged people in India. Since the policy was introduced in the Constitution of India, many arguments have been made regarding the policy, such as the actual effects of the policy and the appropriateness of the criteria for entitlement categories.

This chapter posits that there are both positive and negative aspects and influences of the policy. Positive aspects include social and economic elevation of people in the target demographic, an increased number of 'elites' arising among them, a deeper understanding of their own rights, and activation of social movements. Conversely, the negative aspects include a widened gap between those who benefit from the policy and those who do not, increased anti-reservation policy sentiment and activities among

K. Funahashi (✉)
Ryukoku University, Kyoto, Japan
e-mail: kfunama43@ybb.ne.jp


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the non-entitled, pervading jealousy of and antagonism towards the entitled, and acts of violence triggered by the consciousness of imbalance. 'In some places reservations have become the reason for hostility leading to caste violence' (Kumar and Rai 2006: 210).

This chapter focuses on the issues surrounding the reservation system in contemporary India, investigating, in particular, situations that occurred following the enforcement of the 73rd Amendment Act in 1993, which appointed quotas for women, the Scheduled Castes (SCs), and Scheduled Tribes (STs) in the village panchayats. As Kumar and Rai state, 'the introduction of PRIs (Panchayati Raj Institutions) in post-independence India was a significant step' (Kumar and Rai 2006: 217), for Dalits in particular. The Act has provided opportunities for the disadvantaged to obtain power and influence and have a positive effect on their communities at the local level. It means the democratisation of local politics since 'minorities' may participate in the political arena in the villages, which solidifies democracy in India from below.

> Panchayats have emerged as an important level within the federal structure, play a more determining role in state politics and have the capacity to carry out development at the local level. Thus, reservation at the panchayat level is today a more important avenue of political participation for Dalits than within central and state legislatures. (Kumar and Rai 2006: 13–14)

At the same time, however, it has created other problems: recurring violence in the villages due to the assertion of these rights, a wider gap between the entitled and non-entitled, and persistent negative effects on daily life in the villages. This chapter considers and rethinks the effects of the reservation system from a local point of view, using fieldwork data from Uttar Pradesh as a case study.

In many studies, it has been pointed out that Indian society has undergone radical changes since the 1990s. The political sphere has witnessed the spread and deepening of democracy. In economic terms, remarkable changes have occurred in the development of the market economy, improvements in living conditions, and—one of the negative impacts of such growth—the widening of economic gaps. Social changes include

the appearance and rise of various social movements. Culturally and religiously, diverse communities have begun to assert their identities more forcefully.

One important element of the changes in contemporary Indian society is the rise of lower-strata people, including Dalits, formerly known as 'Untouchables', and other minorities. Historically, the people who belonged to the lower strata have been discriminated against and suppressed, and have been engaged in many struggles over the years, beginning with those led by Dr. B. R. Ambedkar (1891–1956) in the case of the Dalits (Omvedt 1994; Zelliot 2001, 2004). Consequently, the political, economic, and social conditions of Dalits have gradually improved. For example, 'untouchability' has been abolished; policies, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, have been established; and the reservation system, with which this chapter deals, has been introduced. Dalits have begun to obtain both political and economic power, achieve higher social status, and gain cultural and religious autonomy to some extent.

With regard to the results of the reservation system, one can watch the rise of lower-strata people and recognise the appearance of 'elites' among them. With respect to the effects of the reservation system on the village panchayats, one can identify two kinds of change: the first is an increase in the involvement of lower-strata people or Dalits in village politics; the second is the transformation of relationships between Dalits and non-Dalits in the villages.

The appearance and presence of 'elites' in various communities, including those of Other Backward Classes (OBCs) and Dalits, can be pointed out as one of the prominent effects of the reservation system. 'Harijan elites' have been previously studied, and I will propose the concept of 'elite Dalits' later in this chapter. These elites are often engaged in social movements or activities as local leaders.

A local leader of the Bahujan Samaj Party (BSP) stated:

> *Formerly, leaders were upper castes and Dalits had just followed. However, now, we Dalits are leaders, and upper castes are following.* (16 March 2003, at Baghpat district in Uttar Pradesh)

There are some issues associated with arguing the positive and negative effects of the reservation system. As I mentioned previously, the appearance of 'elites' among lower-strata groups is one of the most remarkable effects of the system; however, this phenomenon is mostly limited to specific family lines. Simultaneously, the pervasion of the latter effect leads to a situation in which individuals have close relatives who are elites and can contact them directly. Conversely and negatively, strong feelings of jealousy and antagonism can arise towards entitled individuals who benefit from the system, and acts of violence against them can be triggered by awareness of the resulting imbalance.

## The Reservation System in India and the Rise of the 'Elites' Among the 'Untouchables'

A remarkable feature of the reservation system in India is that it allocates rights to disadvantaged people as 'communities', in contrast to the case of affirmative action policy in the United States, which gives rights to individuals (Sharma 2005). The reservation system in India has a long history, dating to the colonial era of the British Empire. Sharma observes that 'the British did not perceive India as a nation but rather as an aggregation of communities, with the implication that the electorate did not constitute a single homogeneous constituency but rather constituted of several such constituencies' (Sharma 2005: 143–144).

> From their [the British] perspective the 'minority' communities were perceived to be in danger of being overwhelmed by a 'majority' community as democratic reforms were introduced, for a majority could always outmanoeuvre a minority. This generated a political philosophy according to which the rights of these minorities had to be safeguarded against such a steamrolling majority. Two such minorities gradually came to be identified in a major way; first a Muslim minority vis-à-vis a Hindu majority and then an Untouchable minority vis-à-vis the caste Hindus, even within this Hindu majority. The British government then assumed the role of the protector and promoter of the interests of these minorities vis-à-vis the majorities. (Sharma 2005: 144)

In the case of the Muslims, the process resulted in separation, that is, the formation of Pakistan in 1947, and in the case of the Untouchables, the process led to affirmative action policies (Sharma 2005: 144). Affirmative action policies in India, the reservation policies for the SCs and STs, were instated in the Indian Constitution of 1950; the Mandal Commission then recommended allocation of quotas to the OBCs in 1990 (Nabhi's Board of Editors 2004). With respect to the reservation for the SCs and STs, they received quotas based on population ratio; (1) in seats of the legislatures (the central and the state), (2) in government jobs, and (3) in enrolment in higher educational institutions.

A great step for reservation policies in India occurred in 1993, when the 73rd Amendment Act was enforced. The Act 'provided that one-third of the seats in all panchayat councils, as well as one-third of the pradhan positions, must be reserved for women. Seats and pradhan positions were also reserved for the two disadvantaged minorities in India, SCs and STs, in the form of mandated representation proportional to each minority's population share in each district' (Chattopadhyay and Duflo 2012: 206). This meant that democracy had been taking root at the local level, since minorities could be given the opportunity to gain access to local politics.

As Chandra states:

> Especially since 1993, when the seventy-third and seventy-fourth amendments to the Constitution introduced a uniform structure of local self-government across India, local governments have acquired greater control over such [patronage] resources. Their precise responsibilities vary across states: They might be responsible for the transfer of school teachers in their areas, for the allocation of funds to development projects, for decisions on where these projects should be located, for the selection of IRDP [Integrated Rural Development Programme] beneficiaries, or for the allocation of common land. (Chandra 2004: 131)

As mentioned in the Introduction, a prominent effect of the reservation system may have been the rise of 'elites' in disadvantaged communities. The following explains the difference between the concepts of 'Harijan elite' and 'elite Dalit'. The concept of 'Harijan elite' has been

discussed in previous studies (Sachchidananda 1976; Mallick 1997; Mendelsohn and Vicziany 2000). Harijan elites are socio-economically advantaged as a result of the reservation policy. Their forefathers were relatively advantaged people such as landholders or governmental employees. Harijan elites have access to higher education and good occupations, including public employment, entrepreneurial positions, management, and so on.

> *Only those who have money can give their children a good education such as an Inter or Bachelor and have them enrol in Reservation seats. It takes money, and a good and higher education. Because we are poor, we are not able to do that.* (A factory worker, Chamar, in his 50s, Male; in Hindi; 9 March 2016, at Muzaffarnagar in Uttar Pradesh)

More important, Harijan elites assert an identity that is distinct from their original community, tending to distance themselves from their origins. Generally speaking, the relationship between 'Harijan elites' and non-elite Dalit people is not very positive.

However, there are some 'elite' individuals who actively participate in, and in most cases lead, the Dalit movements. We can refer to these people with active roles in the movements as 'elite Dalits' as opposed to Harijan elites. Some of these individuals lead movements at the state or national level, and some have active roles at the local level, which is the focus of this chapter.

Here, we share the narrative of the daughter of a regional leader of the All India Backward (SC, ST, and OBC) and Minority Communities Employees Federation (BAMCEF), an organisation of minority employees, to illustrate the difference between Harijan elites and elite Dalits. She said:

> *Those who received higher education and have a professional career tend to go to their world and to be different kinds of people from us. It is lucky for me that my father is working at BAMCEF, as I can communicate with various people. My father devotes all of his time to the activities of BAMCEF.* (in English; 23 May 2003, at Meerut in Uttar Pradesh)

## The Political Situation in Uttar Pradesh: The Presence of the Bahujan Samaj Party

To consider the politics of Dalits in the region of Uttar Pradesh, we must observe the political situation as of the 1990s, especially, with a focus on the rise and presence of the BSP (Duncan 1999; Mendelsohn and Vicziany 2000; Pai 2000, 2002; Chandra 2000, 2004; Jaffrelot 2003; Bose 2008; Narayan 2014). Uttar Pradesh is the most populous state of the 29 Indian states and has political significance, given its proximity to the capital in the Hindi belt.

The BSP was founded in 1984 by Kanshi Ram (1934–2006). He was born in 1934 as a Raedasi (Ramdasiya or Ramdassia) Sikh, which is a community of Punjabi Chamars—the SCs and so-called Dalits—converted to Sikhism, in a rural district in Punjab. Kanshi Ram obtained a B.Sc. degree from a local college and one of the government positions reserved for SC candidates, first with the Survey of India and then with the government-owned Explosives Research and Development Laboratory in the city of Pune in Maharashtra (Chandra 2004: 144).

Kanshi Ram was involved in a struggle initiated by other SC employees to prevent the abolition of a holiday commemorating Dr. Ambedkar's birthday in 1965: 'During this conflict Kanshi Ram encountered a depth of high-caste prejudice and hostility towards Dalits that was a revelation to him' (Mendelsohn and Vicziany 2000: 220). Kanshi Ram and his Mahar Buddhist colleague and friend, D. K. Khaparde, 'began formulating ideas for an organisation to be built by educated employees from the Scheduled and Backward castes. Such an organisation would work against harassment and oppression by high-caste officers, and also enable the often inward-looking occupants of reserved positions to give something back to their own communities' (Mendelsohn and Vicziany 2000: 220).

Kanshi Ram and his colleagues established the Scheduled Castes, Scheduled Tribes, Other Backward Classes and Minorities Employees Welfare Association in 1971. Kanshi Ram then established BAMCEF in 1973, 'a local association of government employees with the explicit purpose of increasing the political influence' (Chandra 2004: 144); an office of the Federation was established in Delhi in 1976. However, by the early 1980s, 'Kanshi Ram's goal shifted from seeking influence for Scheduled

Castes to creating a channel for direct political participation' (Chandra 2004: 144). Since BAMCEF members were government employees and could not take part in electoral politics, Kanshi Ram founded the Dalit Shoshit Samaj Sangharsh Samiti (DS4) in 1981, which 'was not a full-fledged political party, but its activities were more political than BAMCEF' (Narayan 2014: 53). Then, in 1984, the BSP was formed with Kanshi Ram as its President. 'Bahujan' means 'many people' or 'majority of people' in Marathi and in Hindi, which in fact comprised the SCs, STs, OBCs, and Religious Minorities, accounting for over 85% of the country's total population.

In the political arena of Uttar Pradesh, the BSP first asserted its presence as one of the ruling parties of the State through an alliance with the Samajwadi Party (SP) of Chief Minister Mulayam Singh Yadav in 1993. After dissolution of the alliance between the BSP and the SP, the BSP joined with the Bharatiya Janata Party (BJP) to form the government of the State in 1995, 1997, and from 2002 to 2003, when Mayawati (1956–) served as the Chief Minister. 'She is the first Dalit woman to have acceded to the highest office in an Indian state' (Mendelsohn and Vicziany 2000: 203).

Mayawati was born into a Dalit family, a Chamar (Jatav) family, in 1956 in Delhi. Her father worked as a clerk in the post and telegraph department of the central government (Mendelsohn and Vicziany 2000: 203; Bose 2008: 18). When she was a child, Mayawati's father insisted that 'the road to success was to become government officers through the reserved caste quota' (Bose 2008: 22). Mayawati made it her mission in life to pass the Indian Administrative Service (IAS) exam, although her academic abilities were not as strong as the great leader of the Dalits, Dr. Ambedkar. Mayawati 'had increasingly become aware about Dalit issues and the inequalities of the caste system' (Bose 2008: 23), since she experienced 'overwhelming feelings of humiliation and vulnerability as a Dalit that she had felt from her childhood' (Bose 2008: 20). 'It was not long before Mayawati was sucked into radical Dalit politics' (Bose 2008: 23).

After having met with Kanshi Ram in 1977, Mayawati had decided to enter the political arena instead of the IAS, which her father had been eager for the daughter to join. Mayawati had been establishing a presence in Dalit politics thanks to Kanshi Ram's grace, and she finally attained the position of Chief Minister.

There was great distress in October 2006 when founder and charismatic leader Kanshi Ram passed away after a long battle with his illness. The BSP had relied on the strong leadership of Kanshi Ram from the beginning; however, Mayawati was seen as his successor, and she won the State Assembly election in Uttar Pradesh in 2007 using the 'rainbow coalition' strategy, which pursued broader support from all kinds of communities (Gupta and Kumar 2007). She served out her five-year term between 2007 and 2012 as the Chief Minister with much praise and censure.

## The Reservation System from a Local Point of View

### Some Background on the Research Field

Buddhist Dalits, the focus of this chapter, are 'ex-Untouchables' and converts from Hinduism. In western Uttar Pradesh, they mainly originated in the Jatav or Chamar communities. They have often been referred to as 'Neo-Buddhists', although this is not a name that they have given themselves. Dr. Ambedkar referred to Buddhism that was based on his own ideas as '*Navayana* (new vehicle) *Buddhism*', in contrast to other forms of Buddhism such as Theravada and Mahayana Buddhism (Omvedt 2003: 2; Tartakov 2003: 193, 207). Considering that Ambedkar himself used this designation, there is nothing strange about the prefix 'neo'; however, these days Buddhist Dalits dislike the term 'Neo-Buddhist' because they feel it is exclusionary and suggests that other Buddhists look down on them.

Chamar is a large Dalit community in North India. The Chamars have traditionally worked as tanners, leather workers, shoemakers, village servants, tenants, and so on (Briggs 1999; Cohn 2004; Khare 1984; Singh 2002). In the field that is the topic of my research, they mostly work as factory workers, agricultural labourers, and daily-waged labourers.

It is said that the Jatavs were originally a sub-caste of Chamar, but they have been asserting a distinct identity as part of the Kshatriya caste. They

are relatively socio-economically advantaged, and they mostly live in urban areas (Lynch 1969; Singh 2002). Furthermore, as concerns the focus of this chapter, the Jatavs are often leaders of the Buddhist movements in western Uttar Pradesh. Regarding the relationship of Chamars and Jatavs, the Jatavs have strongly asserted a distinct identity from the Chamars, and the Jatavs and the Chamars tend to disdain each other. While the Jatavs disdain the Chamars for their poverty and perceived backwardness, the Chamars disdain the Jatavs for their wealth, earned in leather industries.

Of the two main contributors to Buddhist movements in western Uttar Pradesh, one is the well-known figure of Dr. Ambedkar. He was, and still is, considered a prominent leader of the Dalits. Ambedkar was born into the Mahar family, which comprised one of the largest sections of the Dalit caste, in Maharashtra in 1891. He studied and finally earned PhDs at both Columbia University in the United States and the London School of Economics in the United Kingdom. After returning from abroad, Ambedkar devoted himself to movements supporting the political, social, and religious liberation of the Dalits. Ambedkar renounced Hinduism in 1935 and embraced Buddhism on 14 October 1956. As he passed away two months later, on 6 December 1956, he was unable to establish a firm basis for Buddhism in Indian society and popularise the religion among Dalits. Since then, many Dalit people have been trying to practice Ambedkar's ideas about Buddhism through a process of negotiation.

The other important contributor is the Buddhist Society of India. This organisation was founded by Dr. Ambedkar himself in 1955, and thus has a strong claim to 'legitimacy'. The purpose of the Society is to spread Buddhism and conduct Buddhist rituals, which means that it only conducts religious activities. The Society leads a Buddhist movement in western Uttar Pradesh, and some leaders of the Society have been active in spreading Buddhism in towns and villages in this region.

The first phase of fieldwork was conducted from February to May 2003 and June to October 2004 (a total of nine months) in Meerut, a city in western Uttar Pradesh. The research focused on Dalit movements, especially Buddhist movements led by the Buddhist Society of India, including the organisation and leaders of these movements. During the

second phase of the fieldwork, which lasted from April 2005 to February 2006—including brief visits in March 2009, February and September 2012, and December 2014—I lived in Village V, Muzaffarnagar district, western Uttar Pradesh, and studied the everyday practices and rituals of the Buddhist Dalits.

Figure 5.1 is a graph of the composition of the population of Village V by 'caste'. The most populous caste is the Jinwars, who belong to OBCs. It is important to note that the second-most populous caste is the Chamars, which means the Chamars have voting power in village politics.

According to the 2001 census, the population of Village V was 3982, and 847 people, almost all Chamars, belonged to SCs, accounting for about 21% of the population (Registrar General and Census Commissioner, India 2001). In March 2009, there were 237 Buddhists, consisting of 120 males, 117 females, and 37 households. All of them had Chamar-caste origins.

Most Buddhist Dalits living in Village V had a *Dīkṣā* (conversion) ceremony, which was led by the leaders of the Meerut branch of the

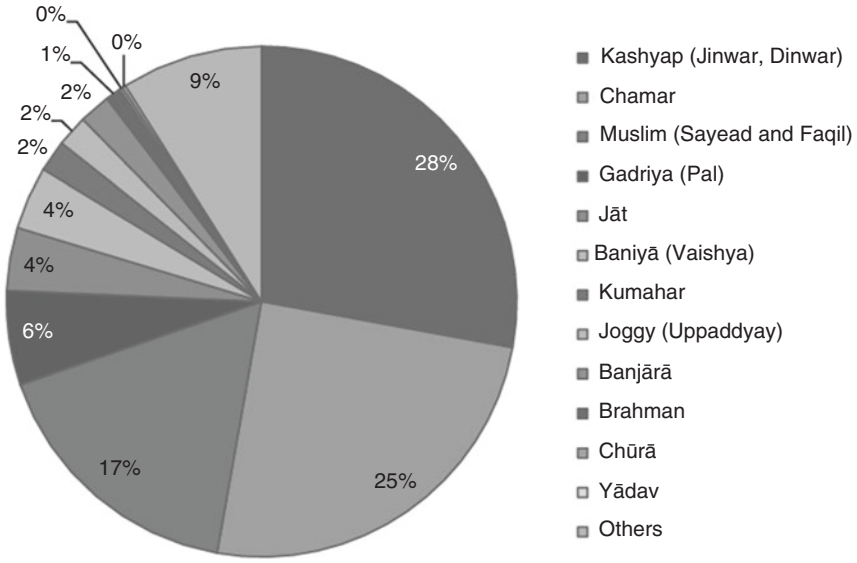


**Fig. 5.1** The population composition of village V by 'caste'. (Source: Field survey by the author)

Buddhist Society of India, in 1996. The Buddhist Dalits adhere strongly to egalitarianism and regard Buddhism as their ancestral, original religion. They also have great respect for Dr. Ambedkar.

## Cases of 'Elites' of Buddhist Dalits

The first case is about Mr. Gautam. He is from the Jatav caste community and the eminent leader of the Meerut branch of the Buddhist Society of India. He conducted the *Dīkṣā* ceremony at Village V. The outline of Mr. Gautam's life is as follows. Mr. Gautam is in his 70s and obtained a bachelor's degree before working in the Defence Accounts Department of the Central Government of India. He embraced Buddhism in 1959 and founded the Meerut branch of the Buddhist Society of India in 1962. He has led a Buddhist movement, helping to spread Buddhist concepts and the practice of Buddhist rituals in the surrounding areas.

We can consider Mr. Gautam to be one of the 'elite Dalits' that I mentioned earlier. He had a background in higher education and had a career in public employment. He is also a leader of a Buddhist movement. He has a rich knowledge of Buddhism and can conduct Buddhist rituals. He has been promoting the positive activities of Buddhism, such as regularly holding Buddhist meetings.

Generally speaking, the relationship between different castes in the Buddhist conversion movement is as follows: Jatavs are leaders, conducting Buddhism rituals positively, while Chamars are followers who have converted to Buddhism and practised Buddhist rituals. We can say that Jatavs as leaders and Chamars as followers are making a positive relationship in the development of Buddhist conversion movements, especially in practices of Buddhism. In this situation, 'non-elite' Chamars, who live in villages, get to know 'elite' Jatavs, who live in a city. When Chamars form direct relationships with a Jatav through Buddhist movements, they learn about the situation of the Jatavs and become more conscious about their own social, economic, political, and educational position. Chamars, in getting to know a successful Dalit, can think of such elites as role models. Essentially, the direct contact with Jatavs provides a powerful incentive for Chamars.

The second case study is about Mr. Prem who is living in Village V and is a Buddhist-Pradhan. Mr. Prem is a Buddhist from the Chamar community. He was elected as a Pradhan of Village V, a chief of a panchayat, as the quota seat for SCs.

The reservation system in the village panchayats was put in force in 1993 according to the 73rd Constitutional Amendment Act proposed in 1992. This Act set the quotas of one-third, for women, SCs, and STs as members of the village panchayats. There is the quota for a Pradhan as well (Kumar 2002; Raghunandan 2012).

We can consider the effects of the reservation system at the local level. One effect is the increase in the involvement of Dalit people in village politics, as mentioned in the introduction. One of the most remarkable effects is the increase of the presence of these people as Pradhans and members of village panchayats. We can say that it is important that they now have 'the right to be voted', which is eligibility for election. Another important effect is having 'the right to vote' in the election campaign. Dalit people can participate in village politics with the position of these two kinds of rights relating to elections in contemporary society.

As Kumar and Rai rightly point out: 'Representatives who belong to the disadvantaged group can change the "social meaning of membership" through their very presence and actions in the decision-making institution through what has been described as the "politics of presence"' (Kumar and Rai 2006: 37).

Looking at the case of Mr. Prem, he was a Buddhist Dalit-Pradhan, serving from 2010 to 2015. He formerly worked as a truck driver. In the election of a Pradhan in 2010, he was appointed to fulfil the quota for SCs. There were two major candidates: one was a candidate who was also a Chamar recommended by Muslims, and the other was from the Hindu community, that is, Mr. Prem. Mr. Prem got significant support from a majority of Hindus and was elected as a Pradhan.

According to analyses by Kumar and Rai, 'most of the Dalits required the support of the upper caste influential members of the village including former Pradhans to win the election' (Kumar and Rai 2006: 207). At the same time, it should be noted: 'While political parties play a role in the elections and may help Dalit candidates to win, they do not

have a presence in the running of the panchayats. Hence, the rise of the BSP has not helped Dalits in the day-to-day affairs of the panchayats' (Kumar and Rai 2006: 207).

After being elected as a Pradhan, there was a drastic change in Mr. Prem's economic condition, especially great changes in the lifestyle of his family. There were changes in his interactions as well, and he was getting to relate to 'the world', which was totally unknown to him previously.

The other effect of the reservation system at the local level is the transformation of relationships in villages. A Pradhan should have relationships with members of political parties, administrative staff, the former and next Pradhan, dominant people in the villages, and so on. A Dalit-Pradhan would have new relationships with non-Dalit people. For non-Dalit people, it is impossible to disregard Dalits, so they are compelled to connect with Dalits because Dalits have importance in election campaigns. The relationships of a Dalit-Pradhan within the Dalit people are sometimes negative. There can be a salient difference between a Pradhan and others, jealousy and envy, and severe feuds over the distribution of 'merits'.

A Buddhist Dalit-Pradhan, Mr. Prem, had finished serving as a Pradhan, but he did not return to his former work as a truck driver. He might be living as an 'ex-Pradhan' keeping the relationships created when he was a Pradhan. Notably, Mr. Prem was a representative not only of Dalits but also of Buddhists in the village. People living in the village were able to be aware of Buddhism, and Buddhists assert their presence in the village. Mr. Prem had visited and appeared at various events as a Pradhan, and he will visit and appear at various places as an ex-Pradhan as well. People, especially Dalits and Buddhists, might come to the house of an ex-Pradhan in order to express their wishes or to seek advice for their problems.

## Concluding Remarks

This chapter considered and analysed the effects of the reservation system from a local point of view, using the fieldwork data in western Uttar Pradesh as a case study. In regards to the effects of the reservation system

on the village panchayats, in particular, we pointed out two kinds of changes. One is the rise of 'elites' among the disadvantaged and the increase in the involvement of lower-strata people or Dalits in village politics. The second is the transformation of relationships between Dalits and non-Dalits in the villages.

The reservation system has resulted in the situation that some 'elite' people have appeared among lower-strata people, including Dalits. The reservation at the local panchayat level has created Dalit-Pradhans and Dalit-members of village panchayats. Now, people must regard Dalit people as important actors who have the right to vote and also have the right to be voted into village politics, based on 'politics of presence'. Of course, 'presence' is not enough for 'true' participation in politics. 'While Dalit members attend all the meetings, they are not able to participate meaningfully and effectively in the deliberations of the institution' (Kumar and Rai 2006: 117). However, it must be a significant and 'a historic step' (Kumar and Rai 2006: 213) for Dalits to have a presence in the village panchayats.

One of the most remarkable effects of the reservation system is that it has caused transformation of the relationships between Dalits and non-Dalits in the context of local politics. We can see the strong consciousness of 'equal relationships' as basic human rights among Dalits, coming from the changing situation in the village, as discussed in this chapter.

As Kumar and Rai state: '[T]his has not yet happened but there is evidence of the beginnings of a social transformation. The very symbolic importance of the introduction of reservation in panchayats must be accepted' (Kumar and Rai 2006: 215).

We can point out that there are both positive and negative aspects and influences of the reservation system. The positive aspects are emphasised in this chapter in particular, though there are undoubtedly many negative aspects concerning the system in the contemporary situation. The democratisation of the village panchayats and 'true' participation of Dalits and other disadvantaged people are now in 'a phase of transition' (Kumar and Rai 2006: 215). It should be worth looking and considering the situation of participation of Dalits under the changing circumstances of the village panchayats.

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# 6

# ‘The Right to Know Is the Right to Live’: The Right to Information Movement in India

Shinya Ishizaka

## Introduction

The purpose of this chapter is to clarify the role that the Right to Information (RTI) movement played in the institutionalisation process of the citizens’ right to know in India.[1] First, the chapter reveals that the RTI movement in India began as a part of the peasant empowerment movement and that under the latter movement, the institutionalisation process of the right to know continues till today. Second, the chapter shows that an activist organisation supporting the peasant empowerment movement has been incorporated into the institution as an indispensable agent that mediates the gap between the right to know and the right to

[1] The right to know is called *Jane ka adhikar* in Hindi, which literally means the ‘right (*adhikar*)’ to ‘know (*janna*).’ The right to information is called *Suchna ka adhikar* in Hindi, which literally means ‘the right (*adhikar*)’ to ‘ask (*suchna*).’ Both terms are used nearly synonymously.

S. Ishizaka (✉)
Ehime University, Matsuyama, Japan
e-mail: ishizaka.shinya.xj@ehime-u.ac.jp


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live in contemporary India. The author of the present study conducted a brief fieldwork survey in Rajasthan in India in August 2015.

The RTI movement in India started in 1994 in the state of Rajasthan in the north-western part of India. The key persons in the movement were Aruna Roy, Nikhil Dey, and Shankar Singh, who were all founding members of the Mazdoor Kisan Shakti Sangathan (MKSS), which literally means 'an organisation for labourers' and peasants' power.' The movement spread from the grassroots level to the state level and subsequently to the national level. Eventually, the movement achieved the enactment of the Right to Information Act (RTI Act) in 2005.

The development process of the RTI movement has been well described in the literature (Bakshi 1995, 1998; Dey et al. 1995; Jenkins and Goetz 1999; Khera 2005; Munshi 2000; Priya 1996; Roy and Dey 2002; Sengupta 2016). The formal political process leading to the legislation and the international background have also been analysed (Sharma 2015). The regulations and operations of the RTI after the enactment have been examined (Mallick 2015; Naib 2013). Today, the notion of the right to know and the system of information disclosure seem to be gradually taking root in Indian society. For example, in the Mahatma Gandhi National Rural Employment Guarantee Scheme, which requires the payment of legal minimum wages for every rural adult household member's unskilled manual labour for at least 100 days a year, anyone can verify any detail related to employment, such as employee names, over the internet. As we will see below, it was nearly impossible for an employee to acquire detailed information about public employment 30 years ago in India. Moreover, it has been noted that the RTI movement was a pioneering event in a series of movements aimed at rights-based legislation. Encouraged by the RTI movement, many other rights-based legislative efforts such as the Right to Employment, the Right to Education, and the Right to Food were initiated, thereby enhancing the empowerment of socioeconomically vulnerable people (Naib 2013).

However, few studies shed light on the background and the details of how the RTI movement in Rajasthan actually started. In fact, the MKSS was initially an organisation for a peasant empowerment movement. The RTI movement in Rajasthan was a part of the peasant empowerment movement. For the wider peasant empowerment movement, the

enactment of the Rajasthan RTI Act in 2000 and the national RTI Act in 2005 were undoubtedly extremely important outcomes, but those were not its ultimate goals. Moreover, the peasant empowerment movement in the region continues even to this day. Why and how did this peasant empowerment movement gain momentum in the mid-1990s as the RTI movement and continue as the wider peasant empowerment movement for so long? This chapter presents an analysis of the leadership and organisational characteristics and the mobilisation processes of the peasant empowerment movement.

The right to know is essential to sustaining a democratic society. Under the principle of the sovereignty of the people, the people have the right to know every public act of government. People should have the right to know when they choose their representatives or when they verify every activity of their government (Okudaira 1979). In the United States, after journalists in the 1950s started a movement to overcome the secretive behaviour of the government, the concept of the right to know spread among people mainly through the efforts of the media, after which the Freedom of Information Act came into effect in 1966 (Hayashida 2001: 37–39; Matsui 2000: 13–15). In Japan in the 1970s, a debate about whether the freedom of expression guarantees the right to know occurred when a journalist acquired a diplomatic confidential document and people also started to request the disclosure of information about a large political corruption case. Then, following the establishment of information disclosure regulations in several local governments, the national Information Disclosure Act (the Act on Access to Information Held by Administrative Organs) was enacted in 2001. In Japan, information disclosure ordinances were enacted at the local level as an indispensable premise of people's participation (participatory democracy), whereas the Information Disclosure Act at the national level was enacted as part of administrative reforms in which the importance of government accountability was emphasised (Hayashida 2001: 44–48; Matsui 2000: 18–29).

In India, the RTI Act was enacted in 2005. In many other places in the world, such as the United States or Japan, as we have just seen, the right to know has been regarded primarily as a matter of freedom of expression. In contrast, as the previous literature on the RTI in India shows, people in the RTI movement in India considered the notion of the right

to know primarily as a matter related to the right to live, which consists of fundamental human rights (Jenkins and Goetz 1999; Naib 2013).[2] However, the inner logic of how the two notions (the right to know and the right to live) are connected has not been sufficiently clear in the previous literature. This chapter clarifies that it is the activist organisation that mediates the people's actual basic livelihood and the right to information by analysing a song that was sung in the RTI movement.

## Development of the RTI Movement

The RTI movement started in Devdungri village in the Rajsamand district of the Mewar region in the state of Rajasthan in December 1994. The labourers in the village, who were employed in several developmental projects such as famine relief work, were not receiving proper wages from the budgets of those projects because of embezzlement and bribes among bureaucrats and politicians. To fight that injustice, MKSS activists planned to hold a public hearing (*jan sunwai*) that would enable people to demand accountability from officials by sharing information related to the plans and the employment circumstances of each project. To carry out those public hearings, the activists had to obtain the necessary information from official documents, but officials generally resisted disclosing the documents. Therefore, a campaign to establish information disclosure began against the Rajasthan state government (Bakshi 1998: 74).

The first public hearing was held at a school playground at Kot Kirana in the Pali district on December 4, 1994. When the muster roll of the workers on the recent development project was read, a stir swept through the hundreds of villagers at the venue. The roll included many names of the people who were not actually employed by the project or who had died many years ago. Then, the audience burst into laughter when the bills and receipts for the roofing materials, doors, and windows for the unfinished buildings were read. None of the roofs, doors, and windows were actually installed. After the public hearing, the Block Development

[2] Although a movement seeking the right to know as part of the freedom of expression guaranteed by the Constitution of India also existed, the enactment of the RTI Act was mainly the outcome of the movement in which the right to know was regarded as the right to live (Naib 2013: 32–41).

Officer (BDO) submitted the First Information Report (FIR) against the Junior Engineers (Bakshi 1995, 1998: 74–75).[3] The MKSS subsequently held four such public hearings, which approximately 500–800 local people (both lower- and middle-class people, approximately half of whom were women) were said to attend (at Bhim in the Rajsamand district on December 7, 1994, at Vijaypura in the Rajsamand district on December 17, 1994, at Jawaja in the Ajmer district on January 7, 1995, and at Thana in the Bhilwara district on April 25, 1995). All of those public hearings were video recorded, and reported by local newspapers (Bakshi 1995; Dey et al. 1995; Naib 2013: 44: Priya 1996: 83).

According to Dey et al. (1995), the MKSS activists prepared carefully prior to each public hearing. First, they had to obtain public information on each development project. Then, they needed to thoroughly examine the problems of each project. Moreover, they had to call on the villagers to attend the public hearings (Dey et al. 1995: 44–45).

Dey et al. (1995) claimed that these public hearings were different from the people's courts (*jan adalat*), which were held to uncover fraud and render a judgement on crimes. Public hearings were a place where people raised their voices and collectively audited development budgets. The public hearings also had to be open. For that purpose, the activists asked outsiders to act as moderators, and the activists invited people from other areas and journalists to attend (Dey et al. 1995: 44–45). And, '(t)he idea that the people have a right to monitor public expenditure in their area is simple but revolutionary,' and the most important outcome was that the people realised and understood, through their participation in the public hearings, that demanding 'transparency, social audit and accountability' constituted their own 'basic democratic rights' (Dey et al. 1995: 46).

According to Priya (1996), the MKSS activists were also aware that in order to prevent the organisation from being destroyed by powerful local mafias, it was imperative to have the people's visible support at the public hearings (Priya 1996: 84).

[3] There are approximately eight blocks in each district and approximately 30 panchayats in each block. In each block level, there are BDOs, and in each BDO, Junior Engineers, as Programme Officers, are responsible for conducting several programmes. There are Employment Officers in each panchayat level, and, on each worksite, there are leaders (*met*) of the labourers. (Interview with Mr. Shankar Singh on August 18, 2015, in Devdungri, Rajasthan.)

The most important prerequisite for holding a public hearing was obtaining the necessary public information. However, local officials strongly resisted releasing the documents. Therefore, the MKSS activists started to ask the Rajasthan government for legislation on information disclosure. The sit-in (*dharna*) at Beawar town in the Ajmer district began on April 5, 1996. The sit-in continued for 40 days, until May 16, with the participation of many villagers (Bakshi 1998: 77–81; Naib 2013: 43–44; Roy and Dey 2002). The RTI campaign gradually drew attention from the people in Rajasthan through such public hearings and sit-ins. The RTI campaign became an issue in the State Legislative Assembly election in 1998. After the victory of the Indian National Congress, which upheld the enactment of the state-level RTI Act in its manifest, the Rajasthan RTI Act was enforced in June 2000 under the state government of Ashok Gehlot (Naib 2013: 44).

The national-level network for RTI movements was formed in 1996. The National Campaign for People's Right to Information (NCPRI), Lok Satta, the Press Council of India, and Parivartan were the major RTI movement organisations at the national level. In 1996, a draft of the RTI bill was prepared by the Press Council of India. In response to those initiatives, the government of India established the Working Group on Right to Information and Transparency in January 1997 and then submitted a bill in May 1997. After discussions in committee meetings and plenary sessions and following the establishment of the United Progressive Alliance (UPA) government, the national RTI Act was enacted in 2005 (Naib 2013: 46–58).

Before the national RTI Act, laws on the right to information were enacted in eight states including Rajasthan, Tamil Nadu, Goa, Karnataka, Maharashtra, Assam, Madhya Pradesh, and Jammu and Kashmir (Naib 2013: 45).

## Peasant Empowerment Movement in Rajasthan

The literal meaning of the MKSS is 'organisation for labourers' and peasants' power.' According to Shankar Singh, 'labourers' are people engaged in famine relief work or out-migration work who had originally been

peasants.[4] This is why the author calls the movement 'peasant empowerment movement.' In the Mewar region, most of the peasants were farmers with small landholdings, but they became unable to sustain themselves solely by agriculture. Therefore, the wages obtained through the development projects became vitally important for the peasants' subsistence.

When Aruna Roy, Nikhil Dey, Shankar Singh, and other activists began living in Devdungri village in 1987, their initial concerns were not specifically related to issues of compliance with minimum wage laws.

In Sohangarh village, in 1989, a landlord suddenly claimed ownership of a 60-acre piece of village common land. Some villagers started to raise their voices against the landlord, and Aruna Roy, Nikhil Dey, and Shankar Singh came to help the villagers. Lal Singh, a villager, told the author that he and other villagers would not have begun their struggle if the activists had not been there.[5] Gradually, many people, even people from other areas, came to join the struggle. The landlord and his company were armed with guns, and some activists were beaten, but the people never resorted to violence. Then, the landlord was arrested. According to Shankar Singh, this land struggle was a turning point.[6] The people were surprised when the landowners were arrested, as this was something that had never happened before. It was only after that struggle that the activists felt the need to create an organisation. The MKSS was founded in the next year, 1990 (Bakshi 1998: 23–47).

Additionally, regarding the minimum wage issue, the right to information was not the focus of attention until 1994. In 1990, the activists suggested that famine relief workers—who received only eight rupees per day (male workers) and six rupees per day (female workers) instead of the eleven rupees that represented the minimum wage at that time—engage

[4] According to Shankar Singh, the peasants in the region depended on relief work even during a year of good monsoon of three months. Even among large-scale farmers, most of a farm's yield was used for the farmer's own consumption and not for sale. A famine takes place every four years. Approximately 80% of the villagers worked as migrant workers. At least one person in each household engaged in migrant work in areas such as the restaurant industry and other hospitality industries, the wrecking industry, and the construction industry. Sometimes all family members go out to work, but in many cases women, children, and elderly people remain at home. (Interview with Mr. Shankar Singh on August 17, 2015, at Devdungri, Rajasthan.)

[5] Interview with Mr. Lal Singh on August 19, 2015, in Bhim, Rajasthan.

[6] Interview with Mr. Shankar Singh on August 17, 2015, in Devdungri, Rajasthan.

in a non-cooperation movement; the workers would refuse to receive the unfair wages. The wage struggle became a large movement after some activists began a sit-in and hunger strike in Bhim town. Some city dwellers also joined the movement, and it was the shopkeepers' decision to go on strike (*bandh*) that finally convinced the Sub-Divisional Magistrate to promise to pay the workers the minimum wage (Bakshi 1998: 47–52).

Moreover, even after 1994, when the RTI campaign started, the activities of the MKSS were not limited to the right to information issue. The MKSS established a grocery shop in which all the items were sold for fair prices, and they started a business manufacturing roofing tiles. When the author visited the MKSS in 2015, one of the organisation's activities was a campaign demanding a sufficient number of teachers in schools. In a girls' school in Bhim town, there were only three teachers for 700 students.

Although the MKSS is famous for the RTI campaign, its activities and movements have not been confined to the RTI issue. Their movements have constituted a broader peasant empowerment movement that aims to secure peasants' subsistence and to promote the empowerment of peasants in the region. Therefore, one can say that the enactment of the RTI acts was an unintended outcome of the movement.

Why, then, did the peasant empowerment movement in Mewar continue for more than 20 years? The author will analyse the leadership characteristics, organisational characteristics, and the mobilisation processes of this movement.

## Leadership Characteristics

During the fieldwork the author conducted in 2015, several people pointed out that the teamwork and sharing of roles among the main three activists of the MKSS has worked well. Aruna Roy resigned from the Indian Administrative Service and became a social activist in 1974. She is a very good writer and has appeared frequently in the media. Nikhil Dey studied in the United States and returned to India to become a social activist. He is a specialist in the field of legal matters and has played an important role in lobbying. Shankar Singh was born in a village in the

Mewar region and graduated from a local college. He worked in 16 or 17 jobs before he became a social activist. He has a great talent for entertaining, and he has been a leading figure on the communication team of the MKSS. Thus, each of the three activists has exercised her or his own abilities within the organisation.

The three activists maintain close contact and make collective decisions on every matter. None of the three regards herself or himself as the top leader. In addition, all of the activists lead very simple lives. According to Shankar Singh, they receive only the legal minimum wage every month from the organisation.[7] Their humble and democratic attitudes and their simple way of living have attracted many people.

## Organisational Characteristics

The MKSS consists of full-time core members and the other various members, including part-time helpers, trainees, student interns, and supporters. The most prominent feature of the MKSS is its openness. The organisation places importance on transparency and accountability, and the members are eager to disclose information about the organisation. The MKSS website is very extensive and transparent. Even in their daily lives, the members do not want to maintain any secrecy. When the author visited the MKSS in 2015, the author slept in the same room as the MKSS activists and was given access to any information and documents in their office.

## The Mobilisation Processes

The MKSS has tactically used songs and dances for mobilisation. Shankar Singh has an excellent talent in this area. For example, the song 'I Didn't Demand (*maim nahim mamga*),' was composed during the 40-day sit-in in 1995. As we will see below, this song is in the style of a rhythmic dialogue between an organiser and participants, and the participants are led to demand the right to information at the end of the song. In addition, although the author calls the movement a peasant empowerment move-

[7] Interview with Mr. Shankar Singh on August 18, 2015, in Devdungri, Rajasthan.

ment, the MKSS does not intend to assert or protect any particular class interests but always stresses that its activities are for the most disadvantaged and vulnerable people.

## The Right to Know, the Right to Live, and the MKSS

According to the previous literature, the right to know was conceived by people as a matter related to the right to live mainly because of the social background of rampant corruption that adversely affected the everyday lives of people in India (Jenkins and Goetz 1999). The problems of corruption were not, especially for vulnerable people, a matter of disadvantage or inconvenience but rather a violation of the right to live. The right to know is related to the right to live because information disclosure contributes to the prevention or prosecution of corruption. Thus, by securing the right to know, the right to live for socioeconomically disadvantaged people might be secured.

Certainly, it would be valuable for workers to be aware of the right to know in order to reduce corruption. However, will workers be able to receive proper wages only by becoming aware of the right to know?

We now analyse the lyrics of the song, 'I Didn't Demand (*maim nahim mamga*)' that was sung in the movement and see in detail how the right to know actually connects to the right to live. The style of this song is in the form a dialogue in which Shankar asks the people questions and the people respond.

'I Didn't Demand (*maim nahim mamga*)'
(A song that was sung during the 40-day sit-in (*dharna*) in Beawar in 1995)

| | |
|---|---|
| Gold, silver (*sona, chamdi*)? | I didn't demand (*maim nahim mamga*)! |
| Palace, mansion (*mahal, makiya*)? | I didn't demand (*maim nahim mamga*)! |
| Huge bungalow (*mota bangla*)? | I didn't demand (*maim nahim mamga*)! |
| A vehicle in the bungalow (*bamgle mem gadi*)? | I didn't demand (*maim nahim mamga*)! |

Dog in a car
(*gadi mem kutta*)? I didn't demand (*maim nahim mamga*)!
Chain for a dog
(*kutte ke patta*)? I didn't demand (*maim nahim mamga*)!
Veranda in a bungalow
(*bangle mem baramda*)? I didn't demand (*maim nahim mamga*)!
Potted plant on a veranda
(*baramda mem gamlo*)? I didn't demand (*maim nahim mamga*)!
Fancy plant in the pot
(*gamle mem beldi*)? I didn't demand (*maim nahim mamga*)!
Maruti car (*maruti gadi*)? I didn't demand (*maim nahim mamga*)!
Hero Honda (*hiro honda*)? I didn't demand (*maim nahim mamga*)!
TV, cooler (*tivi kura*)? I didn't demand (*maim nahim mamga*)!
What do you want if you don't want all these (*ye sab nahim chahie, to fir kya chahie*)?
We don't want all these (*ye sab hamko nahim chahie*)!
Then what do you want (*to fir kya chahie*)?
Our problem is of food (*hamara* problem *to khane ki hai*)!
Lunch, dinner? I didn't demand (*maim nahim mamga*)!
Breakfast? I didn't demand (*maim nahim mamga*)!
Chicken curry? I didn't demand (*maim nahim mamga*)!
Malai kofta? I didn't demand (*maim nahim mamga*)!
Spinach paneer? I didn't demand (*maim nahim mamga*)!
Dal fry? I didn't demand (*maim nahim mamga*)!
Kachori? I didn't demand (*maim nahim mamga*)!
Pizza, burger? I didn't demand (*maim nahim mamga*)!
What do you want then (*phir kya chahie*)?
Water to drink (*pine ko pani hai*)!
Pepsi Cola? I didn't demand (*maim nahim mamga*)!
Coca Cola? I didn't demand (*maim nahim mamga*)!
Campa Cola? I didn't demand (*maim nahim mamga*)!
Limca? I didn't demand (*maim nahim mamga*)!
Mango Frooti? I didn't demand (*maim nahim mamga*)!
Bisleri? I didn't demand (*maim nahim mamga*)!
Beer? I didn't demand (*maim nahim mamga*)!
Wine? I didn't demand (*maim nahim mamga*)!
What do you do?
We are labourers, but we are poor!

Basic livelihood (*roji roti*)? I demand (*maim mamga*)!
Full wages (*puri majduri*)? I demand (*maim mamga*)!
School learning (*skul mem parhai*)? I demand (*maim mamga*)!
Medicines in the hospital
(*aspatal mem davai*)? I demand (*maim mamga*)!
What do you do?
We are labourers, but we are not given minimum wages! See the documents!
Panchayat expenditure
(*panchayat ka kharch*)? I demand (*maim mamga*)!
Muster roll photocopy
(*hajri ka photokopi*)? I demand (*maim mamga*)!
Electricity expenditure (*bijli ka karch*)? I demand (*maim mamga*)!
Road expenditure (*sarkon ka karch*)? I demand (*maim mamga*)!
Forest expenditure (*jangal ka karch*)? I demand (*maim mamga*)!
PDS expenditure (*rasan ka karch*)? I demand (*maim mamga*)!
Accounts on every single penny spent
(*ek-ek paise ka hisab*)? I demand (*maim mamga*)!
Right to Information
(*suchna ka adhikar*)? I demand (*maim mamga*)!

The structure of the song is simple. This is a song that, through dialogue, aims to make people realise what they should demand. Shankar first lists the luxurious items that people are unlikely to be able to obtain even if they want them and the goods that rich people enjoy as a symbol of their wealth. After confirming that the people do not want those luxurious items, Shankar reminds the audiences that the true 'problem' for people is food and water and that what they truly want is a basic livelihood (*roji roti*). What they should 'demand' is what is indispensable for their survival.

The key point of this song is Shankar's question to the people: 'What do you do?' This question is based on the premise that the minimum essential items for peoples' survival must be given in return for their work. The right to live is, originally, the notion that even those who are not working have the right to live healthy lives. However, in this song, the right to live is directly related to work.

Next is the highlight of the song: 'We are not given minimum wages!' The logic is that people's survival should be guaranteed by minimum

wages, and minimum wages are guaranteed by the 'documents.' The relevant documents should then be obtainable through the 'right to information.' In other words, a basic livelihood should be secured through work, but that is not the case because the minimum wages that should be paid are not paid. The minimum wages are not paid because the documents, which should be managed properly, are not managed properly. To ensure that the documents are managed properly, it is important for us to be aware of our right to information.

However, there is in fact a gap between the people's awareness of their right to information and the proper management of public documents. First, in order to verify rosters, expenditure certificates, and accounting records, one must be able to read and calculate. In addition, one needs to have knowledge and skills related to where and how to proceed in order to request the inspection of those documents. Moreover, one must have basic knowledge about administration and know of the existence of documents such as muster rolls and proofs of expenses for construction works or development projects. There is no one other than Shankar and the other activists to fill that gap for the time being. The right to know and the right to live can be connected only through mediation by intellectuals or activists such as Shankar, although that fact is not indicated clearly in the song. In the institutionalisation process for the right to know, the activists are also incorporated into the institution as necessary parts of it.

## Conclusion

Why has the notion of the right to know interpenetrated widely among the people of India? This chapter clarifies that, first, the enactment of the RTI Acts or the 'institutionalisation of the RTI from below' were unintended outcomes of the broader peasant empowerment movement, which has had a wide support from the people in local areas. The strengths of the movement lie in the good teamwork and role sharing of the main activists, the activists' simple lives, the openness of the MKSS organisation, the tactical use of songs and dances for mobilisation, and the movement's emphasis on the empowerment of the most disadvantaged people.

Second, this chapter reveals that, in the institutionalisation process of the right to know as the right to live, the MKSS, the organisation for the peasant empowerment movement, has been incorporated as an indispensable element of the institution.

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# 7

# Protesting the AFSPA in the Indian Periphery: The Anti-Militarization Movement in Northeast India

Makiko Kimura

## Introduction

In July 2016, the Supreme Court delivered a landmark judgment holding security forces accountable for human rights violations. It was a judgment that was welcomed by the people of Manipur, where police and security personnel have carried out countless extrajudicial killings, acts of sexual violence, and other types of human rights violations. It was also the outcome of efforts made by many human rights defenders, especially women in the state and other parts of Northeast India.

In Manipur and India's other northeastern states, civil society organizations have pointed out that human rights violations are being perpetrated by army, security personnel, and police forces during counterinsurgency operations. The Armed Forces Special Powers Act ([AFSPA]1958) was enacted and enforced in the hill areas of Manipur and Nagaland (then part of Assam state) in the 1950s. Since then, numerous cases of killings, arbitrary arrests, torture, and sexual violence are alleged to have taken place, but very few have been punished. In Northeast India, human rights

M. Kimura (✉)
Tsuda University, Tokyo, Japan



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violations perpetrated by army and security forces have been recognized as a necessary evil to eradicate armed conflict with ethnic organizations. The issue has become widely known since the 2000s, and civil society organizations in mainland India have been raising awareness about it.

In this paper, I will focus on two prominent cases of protests against human rights violations in the state of Manipur. Incidentally, in both, women played an important role in very different manners. The first case is a "naked protest" that took place in 2004, in which 12 women stripped naked in front of the headquarters of Assam Rifles, a paramilitary force notorious for human rights violations in the region. The second case is a Public Interest Litigation (PIL) that sued the Government of India (GoI) regarding extrajudicial executions in the state. The petitioners were members of Extrajudicial Execution Victims' Families Association (EEVFAM), an organization of widows and mothers who have lost their husbands or sons to arbitrary killings, and Human Rights Alert (HRA), an organization supporting it.

In conflict-affected areas of Northeast India, civilian safety has been neglected and sacrificed during the counterinsurgency operations of paramilitary forces. However, people belonging to civil society organizations in Manipur, especially women, have raised their voices against this, leading to the landmark judgment on the impunity of the security personnel in the area. In this chapter, based on fieldwork conducted with activists and survivors of the violence in Manipur, I will discuss how the anti-militarization movement in Manipur has achieved certain success in reducing human rights violations perpetrated by the army, paramilitary forces, and police in the region through both "institutionalisation from below" and "institutionalisation from above."

## Ethnic Conflict and Human Rights Violations in Manipur

### Counterinsurgency Operations and the 1958 AFSPA

The seven states in Northeast India are politically and geographically distant from New Delhi. They share 98% of the border with Bhutan,

Bangladesh, China, and Myanmar, and the Siliguri Corridor in West Bengal, with a width of 21–40 kilometres, connects the region with other parts of India. The people in the region have cultures and histories that are distinct from mainland India, and they are ethnically diverse. Since Indian independence, movements seeking autonomy or independence have emerged particularly among people in the hill areas. In the 1940s, right after the Second World War, the Nagas began their movement for independence. In the 1950s, after enduring the 1954 famine, the Mizos also began their independence movement. In Manipur, the United National Liberation Front (UNLF) was formed in 1964 with the aim of regaining state sovereignty. Many such groups question the legitimacy of governance by the Indian state and counter it through armed activities.

The GoI has seen these movements as a threat to national integration, and rather than engaging in political dialogue, has tried to suppress the movements through its police and paramilitary forces. In response, ethnic organizations have armed themselves and violent conflicts have emerged in the region. These have continued for over six decades, and many small-scale ethnic groups have been oppressed by army and security forces.

In the beginning, there was strong mass support for ethnic organizations, and the government tried to control the activities of civilians as well. In 1958, the AFSPA was enacted and enforced to counter the Naga National Council in Naga-inhabited areas of Assam and Manipur. In areas declared "disturbed," the AFSPA grants the armed forces the power to shoot to kill in law enforcement situations, arrest without a warrant, and detain people without time limit. The AFSPA was later enforced in Mizoram, Tripura, and other parts of Assam when the conflicts expanded in the region.

In Manipur, the AFSPA was implemented in hill districts inhabited by the Nagas in the late 1950s, and the area was expanded to valley districts, including Imphal (the state capital) in the 1970s. At the time, organizations[1]

[1] There are three armed organizations seeking autonomy or independence from India. The People's Liberation Army was established in 1978 to liberate the Meiteis, Kukis, and Nagas from the Indian state. The People's Revolutionary Party of Kangleipak was established in 1977 with the main goal of deporting "outsiders" from Manipur. The UNLF was established in 1964 to establish Manipur as an independent socialist country.

seeking independence and sovereignty for Manipur became active among the Meiteis, the dominant group in the state, and started to arm themselves.

In the 1980s, when the armed conflicts spread to most states in the Northeast, many counterinsurgency operations were carried out in the area. There were reports of numerous cases of human right violations perpetrated by security forces, and concerns over the impunity of the culprits have been expressed by UN human rights bodies and international human rights NGOs.[2] In fact, some UN Committees have recommended the repeal of the AFSPA in their reports,[3] but the GoI has not responded to them.

In Manipur, the most typical acts of violence against women have been perpetrated against members of armed organizations or those who support them. This violence started in the 1950s, when the Naga National Council began mobilizing people for independence. The GoI then sent army and paramilitary forces to the villages of the leaders and participants of the movement, and they burned down the houses, interrogated people with torture, and killed innocent villagers. During these interrogations, a number of rape cases were reported (Iralu 2000: 185–188).

Furthermore, as the counterinsurgency operations continued for years, many military personnel were stationed in areas affected by conflict. In many cases, women faced sexual violence, and rapes of men have also been reported. In many of these incidents, the perpetrators were not legally prosecuted.

## The Role of Women in the Anti-Militarization Movement in Manipur

In Manipur, the Meiteis are the dominant population and they reside mainly in the Imphal valley. The Nagas and the Kukis, the so-called

[2] International human rights NGOs such as Amnesty International and Human Rights Watch have also repeatedly called for the repeal of the AFSPA. See Human Rights Watch (2008) and the website below. https://www.amnesty.org.in/show/entry/indian-government-must-repeal-afspa (Accessed on November 20, 2017).

[3] For example, in 2007, the Committee on the Elimination of Racial Discrimination urged the GoI to repeal the AFSPA in its Concluding Observations on the report submitted by the state. UN Doc, CERD/C/IND/CO/19 (5 May 2007).

tribals,[4] are dominant in the hill areas surrounding the valley. The Meiteis established its kingdom around first century AD and developed a written culture. In the seventeenth century, the Meitei king adopted the Hindu religion, which then spread among his people. In the nineteenth century, the British colonized the kingdom and it became a princely state. At the time of the independence of India, the Maharaja was coerced to sign the Merger Agreement and the state was merged into the Indian Union.

Researchers have pointed out that the people of Manipur and other societies in the Northeast have achieved better gender equality than other areas of India. In particular, women in the Northeast rank highly on a number of indicators for literacy, employment, and participation in household decision-making (McDuie-La 2012: 328–330). In many of these societies, women play a significant role in agriculture and trade, and enjoy freedom in social and economic activities. In Meitei society, women play an important role in terms of agriculture—the main state industry.

In Meitei society, generally, men are responsible for political decision-making, but women also give their opinion on matters affecting their livelihood. For example, the "Women's War (*Nupi Lal*)" took place in 1939 during the British colonial period. At the time, it was women who controlled the markets and food supplies. Among these, the sale of rice—a Meitei staple food—was most important. Most of the paddy rice for export was processed in Marwari-owned Mills, so the bulk of the trade was in their hands. In 1939, the price of rice rose steeply because Marwaris bought up more rice than could reasonably be spared. Suffering from the shortage, women tried to prevent the bullock carts carrying the rice from reaching the Marwari storehouse. Some even took more violent measures. Parrat and Parrat stated, "[s]ome carts were seized and others overturned and their loads scattered, and groups of women roamed the streets after dark to try to prevent clandestine deliveries." On December 12, a large number of women gathered and resolved to appeal to the Political Agent of the British government to reintroduce a ban on export, and

[4] The term "tribe" was introduced in India by British colonial officials to refer to the autochthonous ethnic communities in the hills. It has been criticized as having discriminatory connotations. With the rise of the indigenous movement in the international arena, there is an attempt to replace it with terms such as "indigenous peoples." In India, however, those who are listed as "scheduled tribes" are entitled to reservations in university admission and government jobs, and the term is still widely used. In this paper, I have used the term with full acknowledgement that it is problematic.

proceeded to his bungalow. The British government tried to suppress the protest and deployed the Assam Rifles, the oldest paramilitary force in the region, but the women did not pull back. By this time, men and children had also joined the protest and the movement had spread widely (Parrat and Parrat 2010: 115–121). Despite a strong patriarchy, women in Meitei society enjoy relatively more freedom and autonomy compared with Hindu and Muslim societies in other parts of India.

Even today, women's movements in Manipur are quite active. In the 1970s, to tackle the issue of alcoholism among children and youth, women started patrolling their community in the evening holding torches *(meira)*. Women from the families of peasants, fishermen and vendors joined the movement. In the 1980s, when the AFSPA was applied in the area, women began to monitor human rights violations perpetrated by paramilitary forces. In April 1980, after a bomb blast was carried out by an armed group, the Central Police Reserve Force began arresting and torturing civilians, and some women were raped. To counter the atrocities, women started patrolling the community carrying torches. These women are known as "*Meira Paibi* (torch bearers)," and have played an important role in the movement against militarization and human rights violations committed by security forces (Manchanda 2011: 61; Menon 2007: 178–179).

## The Naked Protest in Front of Assam Rifles' Headquarters

### The Murder of Manorama and Protests Against Militarization

From the 1990s to the 2000s, protests against militarization, especially the AFSPA, grew in Meitei society. The murder of Thangjam Manorama and the resulting naked protest by 12 women, in particular, caught significant attention among the pan-Indian media. On July 11, 2004, Thangjam Manorama Devi, a 32-year-old woman, was arrested by personnel of Assam Rifles at her home in Imphal. A few hours later, her bullet-riddled body was found a few kilometres away from her home.

Her body bore bullet marks on the genitals, and the doctor who conducted her post-mortem examination reported that because of the injuries in the lower part of her body, no conclusive opinion could be passed on whether or not Manorama was raped. The Assam Rifles stated that she had been arrested on the suspicion of being a militant, and that she was gunned down as she attempted to escape by jumping out of the vehicle. The statement added that during the interrogation, she had disclosed that she possessed an AK-47 rifle (Talukdar 2004a).

Protesting the Assam Rifles' statement, Apunba Lup, an umbrella body of 32 organizations, called for a 48-hour bandh. On July 15, more than 40 women gathered in front of Kangla Fort, the Headquarters of the Assam Rifles. Among them, 12 women removed their clothing and staged a demonstration against the alleged rape and killing. They held banners with slogans such as "Indian Army rape us" and "Indian Army take our flesh," and shouted the same slogans in the Meitei and English languages (Talukdar 2004a, b; Rehman 2008).

The Government of Manipur imposed a curfew on the same day. The protest continued, however, and police and security forces retaliated with rubber-bullets and tear gas shells. The protests demanding the immediate withdrawal of the AFSPA turned violent. Protesters set ablaze government offices, five youth attempted immolation, and a young man cut off his fingers. A number of violent clashes resulted between the protesters and police or security forces (Talukdar 2004a, b).

Under criticism for the oppression carried out, Chief Minister Oklam Ibobi Singh agreed to set up an Inquiry Committee and promised to punish the relevant officers of the Assam Rifles. The Inquiry Committee under Upendra Singh, a retired District and Sessions Judge, submitted a report in November 2004. However, the Assam Rifles filed a petition stating that the appointment of the commission by the State government was beyond its competence. The court ruled that the State of Manipur was not the appropriate government having administrative control over the armed forces deployed in the State and entitled to protection under Section 6 of the AFSPA. Section 6 states that without the sanction of the GoI, no legal proceedings can be instituted against the security forces (Talukdar 2010).

In the meantime, the GoI constituted a committee on November 19, 2004, to review the provisions of the AFSPA, and appointed Justice B. P. Jeevan Reddy, a retired Supreme Court judge, as its chairman. Reddy submitted a report to the GoI in 2005 and recommended that the Act be repealed. However, the Manmohan Singh Government did not take any action, as the Army is strongly opposed to the repeal of the AFSPA (Talukdar 2010).

In this way, the women's naked protest and large-scale demonstrations against the killing of Manorama and the AFSPA forced the Government of Manipur and GoI to take some action on the issue of militarization in the state. There have been numerous demonstrations and appeals against the AFSPA and human rights violations committed by security forces, but the GoI had been indifferent to the matter till then. The naked protest has led to significant changes in both the governments' attitude. It has also been pointed out that the number of human right violations, especially that of extrajudicial executions by the Assam Rifles, has significantly gone down since. Moreover, Kangla Fort, the former palace of the Meitei kingdom which has been used as the Headquarters of the Assam Rifles, has been returned to the state.

## The Female Body as a Symbol of Oppression

It is certain that the women's naked protest was the most influential of the series of protests by civil society organizations and the masses. Not only did it attract the attention of the pan-Indian media, it also prompted many organizations and individuals in Manipur to stand up and unite against militarization. It was also notable that the personnel of Assam Rifles and Manipur police hesitated to touch the women and were unable to take action against them right away. In the following two sections, I would like to discuss why the women's naked protest was so powerful in the context of the anti-militarization movement in Manipur.

In Northeast India, there are massive security forces in place to carry out the counterinsurgency operation, and many women (and sometimes men) have become victims of sexual violence. In the conflict-affected areas of the Northeast, women's bodies are subjected to the insults and

lust of Indian soldiers, the aggressors. In fact, Laishram Ghyaneshwari, one of the protestors in the naked protest, stated in an interview by the *Tehelka,* a bi-weekly magazine:

> What emerged in our discussion was the feeling that we, the women of Manipur, were virtually naked – we were always insecure, forever at risk of molestation by the security forces. Why then should we not walk in the streets naked, what clearer protest could we make to teach a lesson not just to the security forces here but to the whole world? (Rehman 2008)

It is clear from her statement that the women were conscious that the female body is subjected to the insults of security forces, and by becoming naked, they attempted to show the outside world the dangers faced by women in Manipur. They regard rape and murder, which happened to Thangjam Manorama, as atrocities that could happen to anyone in Manipur, and positioned themselves as women just like Manorama. This is clear from the messages they wrote on their banners: "Indian Army Rape Us" and "Indian Army Take Our Flesh." The women represented themselves as a part of the group of women threatened by Indian security personnel.

It is worth noting that once the women became naked and protested in public, their bodies, which are subjected to the insults and lust of the Indian Army, became powerful in many ways. First, the personnel of the Assam Rifles could not even come out from Kangla Fort. All they could do was to peep out from inside.

The fact that women have always been subjected to sexual violence by police and security forces in conflict-affected areas in the Northeast was known to many people in the area and taken for granted. But when the naked women came to protest in public, the soldiers from outside were taken aback by such breaking of social norms.

It should be also noted that the Manipur police personnel, mainly young Meitei men, did not dare hold down the women, who were the age of their mothers. In Meitei society, it is said that men who are beaten by *phanek* (women's skirt) will not be able to build their careers. One protester noted that as some women tried to beat them by *phanek*, the policemen hesitated to touch them. At the same time, many policemen

respected the women for what they were doing, and this feeling may have prevented them from removing the protesting women from the site.[5]

## Women Protesting as Mothers

It is important to note that the naked protest was a voluntary action organized by several grassroots women's organizations.[6] It was not supported by any large-scale organization, and the women did not consult with male activists. The role of women in the anti-militarization movement, particularly of *Meira Paibi,* has already been discussed. It is worth noting that the women who participated in the naked protest are not feminists in the strict sense of the term. It is symbolic that women belonging to *Meira Paibi* are addressed as "*Ima* (mother/s)," and accept the role of mothers in society. They recognize themselves as the "mothers" of Meitei society, and acted to protect their (extended) family members.

Another woman who participated in the naked protest, Laurembam Ngambi, responded to my query as to why they chose to remove their clothes in the protest.

> We were desperately trying to protect our dignity. We have protested in many demonstrations, but nothing has changed. We thought that it is not enough to act like men. When we heard about Manorama, we thought of her mother. We asked ourselves, 'Our daughter has been raped: why do we need to wear clothes?' Initially, 20 to 30 of us planned to participate in the naked protest. But because some people felt embarrassed, only twelve of us exposed our bodies.[7]

At the time of the protest, she shouted loudly to the soldiers of the Assam Rifles, "Hey you, Indian Army. Rape us, kill us, rape us, kill us. We are all Manorama's mothers! We are all Manipuri ladies!" Literally, as

[5] Interview with Laurembam Ngambi (President, Apunba Nupi Lup, Bishnupur District) in Bishnupur, Manipur. August 21, 2012.

[6] Ibid.

[7] Ibid.

"mothers," the women bared their bodies in order to protect young women and girls who are subjected to sexual exploitation. They understood that it was their duty to protect their "daughters" in Meitei society.

The method that they took in this protest is not generally supported or accepted in Meitei society. Those who joined the protest were middle-aged or elder women, and some of them hesitated to expose their bodies. It was a shame and concern for their families, which prevented them from participating in the protest. Even those who participated were anxious about what their families would think of their actions. Again, I quote from the *Tehelka* interview with Laishram Gyaneswari:

> "I touched my husband's feet before I left," she says. "In my mind, I asked him to forgive me because I was going to do something very crucial and I couldn't possibly tell him about it." …
>
> Returning home that day, Gyaneswari says she was apprehensive of how her family would react. "I was scared," she smiles as she cuddles her grandchild, "I had not sought my husband's permission. But he told me that I had done the right thing as whatever I had done was for the women of Manipur." Her mother, Laishram Gambhini, and her four children all felt stirred by her courage. (Rehman 2008)

It can be noted that the naked protesters did not try to challenge the patriarchy or gender-based discrimination as a whole. They are not feminists in the sense that they did not try to challenge the patriarchal social norms in their protest. Instead, what we understand from their actions is that they were ordinary mothers and housewives exposing their bodies in an attempt to protect their family.

The protest was appreciated and welcomed in Meitei society, which is known for having strong patriarchal norms. It intensified the protests over the killing of Manorama. Sushanta Talukdar, a journalist, wrote, "Emotions ran high all over the State as people thronged curfew-bound streets, defying rubber-bullets and tear gas shells, in protest against the atrocities committed by security forces and demanding the immediate withdrawal of the AFSPA." Opposition parties also joined the protest and

hailed the protests as "courageous acts" (Talukdar 2004a). At the same time, the pan-Indian media also started reporting the incident and the protest with photographs. Many women's organizations and civil society organizations sent messages of solidarity to the women of Manipur (Butalia 2004).

The women who took part in the naked protest are subordinate both in society as a whole and in the anti-militarization movement, but they dared to take the risk of being ostracized and exposed their bodies with the courage of despair. By doing so, they won the community's support and were successful in representing its voice, which made their actions very powerful (Chakravarti 2010: 54).

However, it should be also noted that their protest did not result in their ultimate goals immediately. Although the Reddy Commission Report recommended the repeal of the AFSPA, the GoI did not respond accordingly. Human rights violations, including violence against women by police and security personnel, have also continued. In interviews carried out by Teresa Rehman, a former correspondent of *Tehelka,* many women who participated in the protest expressed disappointment that the Act had not been repealed (Rehman 2017). Manipur has only a few representatives in the Indian Parliament, and even though the protest was very successful in the state, it was not influential enough to promptly change the Act.

## PIL on Extrajudicial Executions

### The Establishment of EEVFAM and Rise in Protests Against "Fake Encounters"

After the naked protest in 2004, human rights violations in Manipur by the Assam Rifles have decreased substantially in number. Instead, the Manipur Police Commandos, the state-armed police forces, have resorted to arbitrary arrests and killings of suspected militants. From 1979 to 2012, more than 1500 cases of extrajudicial killings were recorded in a report compiled by human rights NGOs. There was a sharp increase in

the number in 2003, and the largest annual number of incidents—247—took place in 2008 (Civil Society Coalition on Human Rights in Manipur and the UN 2012: 27–104).

The reason why the extrajudicial killings, or so-called fake encounters, were so rampant in the state is explained as follows by Babloo Loitongbam, Executive Director of HRA. Babloo came across activism in the field of human rights when he stayed in Delhi for higher education and established the organization in Imphal in 1999 to systematically document and expose the human rights violations in Manipur and other northeastern states at the national and international platforms.[8]

> In this region, counterinsurgency operation has been evaluated by the number of armed personnel they have executed. For example, this year, we have executed 100 or 150 "militants," etc, and those who killed more have been praised. But in fact, it is very tough to counter the insurgents. Thus security forces resorted to kill easy targets such as civilians and ex-members of armed organisations. It was convenient for the people operating it, and you cannot call it a real counterinsurgency operation.[9]

The killing of mainly young men left many young widows and fatherless children who soon faced difficulty in sustaining their lives. Learning of the situation, the HRA called for a meeting for those who had lost their families in the fake encounter in July 2009. That day, they decided to form a group, which led to the formation of the EEVFAM. Renu Takhellambam, President of the organization and whose husband was killed in 2007, narrates her experience as follows:

> After my husband passed away in 2007, I did not know what to do. Till 2008, I couldn't do anything. It was the toughest time. My son was still very small and my father-in-law was not well. But there were a few meetings organized by the Gun Survivors' Network and slowly I started attending those. On July 11, 2009, I attended a meeting called by Human Rights

[8] "Babloo Loitongbam: Three Decades of Building Human Rights Solidarity," Website of Countercurrents. http://www/countercurrents.org/babloo220315.htm (accessed on January 29, 2018).

[9] Interview with Babloo Loitongbam, HRA at his residence-cum-office in Imphal. August, 2 2017.

> Alert. Many families of the victims came, and all gave testimonies of how their husbands and sons had been killed. We all cried, and we also raised our voices to ask who was responsible for the loss.
>
> That day, we passed a resolution and decided to form an organisation. I was elected president. I refused because I thought I would not be able to play the role. But others persuaded me and till today, I remain its president.[10]

In the beginning, EEVFAM held meetings once every two weeks to share their experiences and mourn the death of their loved ones. But in the initial stages, many of the women faced criticisms from their own families.[11] In Manipur society, widows were not supposed to go out alone.

> We started holding a meeting once every two weeks. In the beginning, my family was not happy that I was absent from home. But when I talked with others, I came to know that it [the loss of family members] was not my lone experience and felt encouraged. We could share our feelings, cry together and laugh together. I felt free.
>
> In Manipur society, certain stigma is attached to women who lost their husbands. We were not supposed to go out alone. Some even suspected that I had a relationship if I went outside with a man. But after we filed a case at the Supreme Court in 2012, my family members have slowly come to understand what I have been doing.[12]

EEVFAM has also functioned to establish self-help groups for microfinancing, as many of the women have suffered a lack of stable income due to the demise of their family breadwinner. Having income-generating projects helped them expand their membership. Many of the members took loans of Rs. 5000 from the Sharmila Foundation, and were asked to repay Rs. 500. These repayments have become a financial resource for EEVFAM's activities.

In July 2009, two weeks after EEVFAM was established, a story about fake encounters was reported by *Tehelka*, a bi-weekly magazine which is

[10] Interview with Renu Takhellambam, President of EEVFAM at HRA office, Imphal. August, 3 2017.

[11] Interview with Ranjeeta Sadokpam, a member of HRA in Delhi. August, 9 2017.

[12] Interview with Renu Takhellambam.

circulated widely in India. It reported with detailed photos the case of Chongkham Sanjit and a bystander, who were shot dead in a market in broad daylight (Rehman 2009). Sanjit had been a member of an armed organization, but had already surrendered and not been active since then. On the day of the killing, he went to the market to buy medicine for someone in his family. He was surrounded by Manipur Police Commando personnel in a shop and shot dead. From the photos, it became clear that Sanjit did not try to escape or fight back.

The report revealed that so-called encounter was actually not an encounter, but an arbitrary killing by security forces. A mass protest was organized by Apungba Lup, a conglomerate of 32 civil society organizations in Manipur, which continued for over a month. The issue of fake encounters gained social recognition in Manipur society and the media started reporting incidents. EEVFAM members were interviewed by the media as their family members had been executed in similar situations.

## A Historic Supreme Court Judgment

In 2012, Christof Heyns, the UN Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions, visited Guwahati, Assam, a neighbouring state of Manipur on the invitation of the GoI. The Special Rapporteur requested to visit Imphal during his mission, but the GoI turned this down. As he held a meeting with civil society organization in Guwahati, about 70 family members of the victims of extrajudicial killings, mostly members of EEVFAM, attended it and submitted a memorandum with detailed information of the killings.[13]

In his report submitted to the UN Human Rights Council, the Special Rapporteur described the practice of encounter killing in detail (para 12). He also reported that the AFSPA provides wide-ranging powers to the Indian armed forces, leading to numerous accounts of violations

[13] Website of Civil Society Coalition on Human Rights. https://humanrightsmanipur.wordpress.com/ (accessed on January 26, 2018).

"Downloadable Memorandum on Recommendations on extrajudicial, summary or arbitrary executions," published online on March 28, 2012 at E-Pao Net. http://e-pao.net/epSubPageExtractor.asp?src=education.Human_Rights_Legal.Downloadable_Memorandum_submitted_by_CSCHR_to_UN_Special_Rapporteur_20120328 (accessed on January 26, 2018).

committed in areas where the AFSPA is applied. He pointed out that the powers granted under the AFSPA were "in reality broader than that allowable under a state of emergency as the right to life may effectively suspended under the Act and the safeguards applicable in a state of emergency are absent (para 27)." In conclusion, he recommended that India repeal, or at least radically amend, the AFSPA (para 100).[14]

The Special Rapporteur's report recognized that the fake encounters in Manipur are gross human rights violations considering the norms and standards of the international human rights body, which the GoI is a part of. Although it gives moral encouragement to the families of the victims, the UN Human Rights Council could only make recommendations to the government, as it cannot take measures for enforcement. In many cases, the concerned governments do not take actions immediately after the report is submitted by the UN Human Rights Council. However, in the long run, such reports put pressure on the concerned governments to take measures, and often lead to improvements in the situation.

After the HRA and EEVFAM met with the Special Rapporteur, Advocate Colin Gonsalves, a leading human rights advocate based in Delhi, read the memorandum they compiled and suggested that a PIL be filed in the Supreme Court. A PIL in India can be submitted by any person of the public to approach the court seeking legal remedy in cases where the public interest is at stake to protect and deliver prompt social justice with the help of law. It has been utilized to ensure the basic human rights of weaker sections of the community in India.[15] It enables grassroots activists to access the Supreme Court, the highest judicial agency in the country, provided that they have enough technical knowledge or assistance regarding legal procedures.

Initially, many members of EEVFAM were reluctant to file the PIL because they feared further harassment, but members of HRA persuaded them. Thus in September 2012, EEVFAM and HRA filed a petition to the Supreme Court asking for (1) instituting a Special Investigation Team

[14] UN Doc, A/HRC/23/47/Add.1.

[15] "Babloo Loitongbam: Three Decades of Building Human Rights Solidarity," Website of Countercurrents. http://www/countercurrents.org/babloo220315.htm (accessed on January 29, 2018). Also, see "Introduction to Public Interest Litigation," Karmayog website. http://www.karmayog.org/pil/pil_10720.htm (accessed on April 4, 2018).

on the extrajudicial executions; (2) compensating the families to rebuild their lives; and (3) removing the existing legal barriers to prosecute the perpetrators.[16]

The Supreme Court decided to appoint a Commission headed by N. Santosh Hedge, a former Judge in the Supreme Court of India, to inquire into six cases of extrajudicial executions alleged to have taken place in 2009 and 2010. In March 2013, the cross-examination of witnesses was held in Imphal and Delhi. The following month, the Supreme Court made clear that in the report submitted by the Hedge Committee, all six cases of encounters were not genuine, and all seven persons killed in the incidents did not have prior criminal records. In addition, the report stated that the AFSPA was widely abused by security forces.[17]

After the Hedge Committee inquiry, Attorney General Mukul Rohtagi claimed in court that there is a war-like situation in Manipur, and that a different set of rules should apply to the army to make its operations possible. In 2016, however, the Supreme Court delivered a landmark judgment that made clear that security force personnel accused of human rights violations must not be allowed to get away with impunity. The Court stated, "if an offense is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court constituted under the Cr.P.C."[18]

The court also stated that the situation in Manipur is not war like, and is just an internal disturbance. The Court referred to Article 21 of the Constitution and stated, "the alleged 'enemy' in this case is a citizen of our country entitled to all fundamental rights including under Article 21

[16] "Encounter killings by security forces in Manipur: Petition to the Supreme Court of India," Network for Improved Policing in South Asia website. http://www.nipsa.in/getfile.php?filename=uploads/nl_updates_file/1002_NIPSA_Update_-__Encounter_Killings_By_Security_Forces_in_Man.pdf (accessed on January 29, 2018). Also, see "Babloo Loitongbam: Three Decades of Building Human Rights Solidarity," Website of Countercurrents. http://www/countercurrents.org/babloo220315.htm (accessed on January 29, 2018).

[17] Ibid.

[18] "Internal disturbance in Manipur, not war-like situation," published online on July 8, 2016, by Business Standard. http://www.business-standard.com/article/pti-stories/internal-disturbance-in-manipur-not-war-like-situation-sc-116070801142_1.html (accessed on January 31, 2018). Also, see "Manipur: In the waiting room of justice," Website of Amnesty International (published on May 17, 2017.) https://oldsite.amnesty.org.in/show/blog/manipur-in-the-waiting-room-of-justice-1 (accessed on January 31, 2018).

of the Constitution." It also stated: "If members of our armed forces are deployed to kill citizens of our country on the mere allegation or suspicion that they are 'enemy' not only the rule of law but our democracy would be in grave danger."[19] The judgment clearly denied the view that the human rights violations in the Northeast are "necessary evils" to combat extremists, a view so dominant in Indian public discourse. It is important to note that the court delivered this judgment based on Article 21 of the Constitution, which safeguards the right to life and personal liberty, and the judgment clearly mentions that failing to do so would endanger democracy in India.

In my interview held in August 2017, Babloo Loitongbam welcomed the judgment and stated, "on the moral level, we have won this case." But he added that now it is an issue of how to practically apply the judgment to the investigation of cases.[20] In July 2017, the Supreme Court directed a probe by the Central Bureau of Investigation into the alleged extrajudicial killings by the Army, the Assam Rifles, and the Manipur Police.

After filing the PIL, members of HRA and EEVFAM were busy collecting and verifying the information compiled in the report. Of 1528 cases, details were only available for 62. From July 2016 to January 2017, they asked the families of the victims to supply information by publishing advertisements in newspapers. Nine hundred families got in touch and offered information on the killings.

In this process, it was the task of Renu and other members of EEVFAM to get in touch with the families and compile detailed information on the killings. Being women, and as they shared their experiences of losing beloved family members, it was easier for the EEVFAM members to communicate with the families and build solidarity with them. Often, they had to travel outside Imphal town and spend hours and days ensuring that the information was correct and checking whether or not there were witnesses. In front of the bulk of documents they had collected and verified, Renu laughed and commented, "Sometimes these documents

[19] Ibid.

[20] Interview with Babloo Loitongbam, Human Rights Alert at his residence-cum-office in Imphal. August 2, 2017.

appear in my dreams." She had to resign from her job at a church to pursue the task required for the PIL.[21]

Although it seems to be a long way before the final judgment is delivered, the situation regarding extrajudicial killings in Manipur has already improved. Babloo has noted that in 2012 and 2013, the number of fake encounters declined substantially, and such practice has disappeared since 2014. He commented that police and security forces personnel were scared that they would be punished for the crime.

For the members of EEVFAM, it took a long time to reach the Supreme Court judgment after the sudden loss of their husbands and sons. In the beginning, they did not know why they had been killed. Some could not even make out if their husbands/sons were really involved in armed groups, and many could not file a case with the police or state Human Right Commission. After the 2009 *Tehelka* report, however, the issue has been recognized by the mass media and society in Manipur, and civil society organizations in other parts of India have also started to take up the issue. Moreover, the Special Rapporteur's report recognized that arbitrary killings are a case of human right violation perpetrated by the GoI. In this way, the issues being tackled by EEVFAM have slowly gained social recognition.

Renu said that it was after the women filed a PIL at the Supreme Court that their families and community in Manipur began to show an understanding of their activities. Widows who had been abandoned by society, they have struggled to make the government accountable for extrajudicial killings.

## Conclusion

The first case that I introduced in this chapter, the naked protest, is a typical example of "institutionalisation from below," which was explained in this book's introduction. The protest by the 12 women in front of Kangla Fort, the headquarters of the Assam Rifles at the time, attracted the attention of the media in other parts of India. Through their actions, the

[21] Interview with Renu Takhellambam.

human rights violations and especially the violence against women in Manipur and other areas affected by conflict in Northeast India came to be known in mainland India. Previously, they were regarded as "exceptional cases" in conflict-affected areas, but after this incident, people started to recognize that many ordinary citizens in Manipur have been affected by the human rights violations perpetrated by the army and security forces, and that something had to be done.

This was not the first time that the protest against militarization was demonstrated publicly in Manipur. As Laurembam Ngambi, a female protester, stated during my interview with her, there were many occasions where they raised their voices against militarization. The naked protest was successful in attracting media attention and forced the government of Manipur and India to take some measures to tackle the issue. This resulted in the relocation of the Assam Rifle's headquarters from Kangla Fort, and the number of human rights violations committed by the Assam Rifles has gone down phenomenally. At the same time, the Reddy Commission recommended the repeal of the AFSPA, although this has not yet been implemented by the GoI.

On the other hand, in the PIL filed by EEVFAM and HRA on the arbitrary killings, we see the interactions between "institutionalisation from below" and "institutionalisation from above." Again, the EEVFAM members were ordinary mothers and housewives whose family members were declared "insurgents" and suddenly executed by police or security personnel. It was not easy for them to even think about filing a case at the Supreme Court as it would require expertise in law. It also takes enormous amounts of time and money to pursue the cases. What made it possible for them to reach the Supreme Court was the support of HRA and other networks of civil society and human rights organizations in India. With this technical assistance, they were partly successful in holding army and security forces accountable for arbitrary arrests, torture, killings, and sexual violence.

In Northeast India, many ethnic organizations have sought autonomy or sovereignty and fought with the GoI for separate political units or independence. People in the region feel that they have been discriminated against or improperly represented. The GoI has responded to this with counterinsurgency operations and has committed numerous cases

of human rights violations. In the process, local citizens in Northeast India have been recognized as "enemies" by security personnel and their safety threatened. This has led to a decline in the legitimacy of GoI governance in conflict-affected areas in the Northeast. Civil society in the region has pointed out that it is not being properly represented by the government.

The population of the northeastern states is small (less than 5%) compared to other parts of India, and its residents tend to suffer the "tyranny of the majority" under the current representative system of parliament. In such situation, the mass protests were not influential enough to bring change in the system, which became apparent from the case of the naked protest in 2004. Although there was a mass protest and ample media attention, it was not enough to see the repeal of or changes in the AFSPA, or stop the human rights violations committed by police and security personnel.

This does not, however, mean that the protest was futile. Through the Supreme Court's judgment in 2016, the judicial agency has made appropriate interventions and is in the process of bringing change. The change in public discourse that was generated by the mass protest against militarization, particularly the naked protest, must have had a considerable influence on the judges' decision. The two cases presented in this chapter show that even though the population of Manipur is small, grassroots movements were able to bring considerable change to decrease human rights violations through non-violent and democratic measures.

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# 8

# Justice and Human Rights at the Grassroots Level: Judicial Empowerment in Dalit Activism

Maya Suzuki

## Judicial Empowerment in Dalit Activism

The critical relation and difference between theory and actuality seem to remain key questions in terms of the present and future of Dalit rights. B.R. Ambedkar has already recognized this problem in his work titled *Ranade, Gandhi and Jinnah,* published in 1943. He stated, "The prevalent view is that once rights are enacted in a law then they are safeguarded. This again is an unwarranted assumption." (Government of Maharashtra. 1979. *Dr. Babasaheb Ambedkar: Writing and Speeches*, v. 1: 222). Ambedkar clearly observed that enacting fundamental rights in a law would not be enough to ensure them in the absence of a social conscience in civil society. In a sense, only people's initiatives can guarantee their rights and transform society to address human rights violations.

I focus here mainly on the distinct features of contemporary Dalit activists seeking justice and their rights. The concept of social justice has witnessed considerable refinement in recent social science literature.

M. Suzuki (✉)
Tokyo University of Foreign Studies (National Institute for the Humanities), Tokyo, Japan


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This is not limited to scholarly concerns. In practice, the question of justice has substantially gripped the imaginations of activists who participate in social movements and everyday struggles against the deeply embedded inequality and humiliation of the caste hierarchy. With the increase in educational, economic, and political empowerment, the Dalits have risen to challenge existing policies and demand an equal share in state resources.

Especially in the context of experienced practice, the idea of justice seems to be fluid and elusive, as Upendra Baxi, a legal scholar explains, "because approaches to notions of justice vary across cultural and civilizational traditions, the question stands acutely posed: Which, what, and whose conceptions of justice may thus find salience in the enunciation of universal human rights?" (Baxi 2014: 146). There should be considerable varieties of justice depending on cultural, religious, and social causes, and the people who seek it. We must analyze not only the who, why, and what involved in the notion of justice but also how it is observed. Adopting this approach to case studies will mean a critical departure from previous research in Dalit studies and other fields, such as law and political science.[1]

The term "Dalit," used for those who were formerly considered untouchables, is synonymous with the socially disadvantaged and long-stigmatized group of people in the Brahmanical ideology. As per the 2011 national census data, they accounted for around 16.6% (201.4 million) of India's total population. Given their dispersed demographic presence, they show regional, cultural, and ethnic diversity. Moreover, it should be noted that among Dalit communities, considerable inter-caste disparities persist in socioeconomic development. While some Dalit groups are taking advantage of their numerical strength and undergoing a progressive transition by acquiring a solid education and public employment, followed by strong political representation, other Dalit groups, such as the Balmikis in the North Indian states and the Madigas in Andhra Pradesh (AP), have not benefited much from the policy of reservation. This has

[1] See Menski (2016) for further discussion on the relationship of caste-related discourse and the notion of justice as a globally diverse phenomenon.

resulted in their taking up long-standing caste-based socioeconomic relations and traditional occupations (Chalam 2009; Jodhka and Kumar 2007; Suzuki 2010).

To protest against their underrepresentation in the political arena, higher education, and employment, these disadvantaged groups among the Dalits started organizing themselves and have been raising a dissenting voice against the conventional policy of reservation since the 1990s (Gundimeda 2016; Suzuki 2010). As we will discuss later, there are some Dalit activists who seek a solution in higher courts by engaging in judicial actions. How do historically marginalized groups bring long-standing grievances to the fore?

This study explores this and related questions about the current sociopolitical dynamics of caste from the perspective of the judicial activism practiced by the Dalit community in urban North India. How and why do Dalit lawyer-activists gain access to a judicial institution like the Supreme Court? This question is examined through an ethnographic case study of the Balmikis (known as the sweeper caste) in Delhi.

The population of Balmikis in Delhi is around 0.5 million (21% of total Scheduled Castes, SC) and the second largest community after Chamars (0.9 million, 38% of total SCs). The Balmikis were not sufficiently appreciated in previous Dalit studies because of their socially and politically disadvantaged status among the Dalit castes. The rise of judicial empowerment among the Balmikis has been catalyzed by the emergence of a new generation that has acquired political awareness through higher education and public employment. Most of them proclaim themselves to be followers of Ambedkar, and his career in law encourages many of the new generation to try to enter the legal profession. The case study also attempts to analyze their conceptualization of social justice and strategies for achieving it in the course of performing their collective actions, while focusing on a distinctive feature of what they call "justice," which is conditioned by local Dalit caste relationships.

The findings of this research lead to the argument that most Balmikis need to display their caste identity to benefit from welfare schemes and assert their rights through the public interest litigations (PILs) that are increasingly being filed. The Dalit reconfiguration of justice also offers insights into the judicialization of politics in contemporary India.

## The Rise of Collective Agency and Action in the Sweeper Caste in Delhi, 1960–2010

This section attempts to briefly outline the Balmiki (sweeper) movement centered in Delhi. The Balmiki community has a comparatively low socioeconomic status, and thus their independent collective action was rarely apparent in Dalit studies (Prashad 2000; Sharma 1995; Shinoda 2005; Shyamlal 1999; Suzuki 2015).[2] However, the "lack of research = lack of movement" is not always obvious. What is becoming apparent in recent social movement research is that studies are focusing on phenomena where movements have become systematized and stable, as well as on the outcomes of movements that can be measured. Although these phenomena may not actually become movements, there are signs of change. Research is also focusing on how the potentiality and actuality of movements are understood (Melucci 1989). Discussing the "signs" of movement, rather than falling into dichotomous thinking about the success or failure of the movement, could generate various movements and bring about change in Indian society.

Observing the changes in the Balmiki movement reveals the possibility of the movement gradually spreading to the courtroom, given the movement's dependence on religious salvation and the existing political forces. It is essential to understand that once the political, cultural, and economic pathways for progression of the Balmikis were closed, the only remaining recourse was the courtroom. Why did the Balmiki people incorporate the tactics of fighting their battles in the courtroom?

This section addresses the history of the sweeper castes' organization after independence, dividing this movement into three periods based on the characteristics of its activities. The dawn of the movement was the establishment of a nationwide sweepers union (1960s), followed by the honeymoon phase, which saw the emergence of a charismatic leader and the Indian National Congress (hereinafter referred to as the "Congress") (1970s to early 1990s), and which concluded with the breakup of the

[2] While Balmiki is observed as a "passive community" that does not have its own movement (Pai and Singh 1997), the activism of other lower castes in sociopolitical arenas has been drawing scholarly attention since the early 1980s (Doron 2008; Jaffrelot 2003; Narayan 2001).

organization due to a lack of powerful leadership and the era of diversification (mid-1990s to 2010s).[3] Furthermore, I would like to reiterate that the turning point of the Dalit movement as a whole, Ambedkar's 100th birth anniversary in 1991, was a crossroads for the organization, viewed in relation to the examples examined in the latter half of this section.

## All-India Safai Mazdoor Congress, 1960s

There is little previous research on the Balmiki organization and movement, and even if documentation exists, it is predominantly owned by individuals and difficult for outsiders to gain access to. Given these constraints, the research by sociologist Shyamlal provides vital clues (Shyamlal 1999). Shyamlal published his autobiography titled *Untold Story of a Bhangi Vice-chancellor* (2001) and attended Bhangi caste meetings as a participant observer, collecting information from participants in Jodhpur city, Rajasthan. The All-India Safai Mazdoor Congress (AISMC), which was influential in Northern India from the 1960s to the early 1990s, strove to accommodate the Bhangis through welfare policies in exchange for cooperation in getting the Congress party elected. Next, we will look at the development of the AISMC, based on Shyamlal's research and interviews with the author.

At the beginning of the 1960s, several *sabhas* (caste associations) of sweeper castes were established, mainly in Maharashtra. The names of those organizations (Akhil Bhartiya Valmik Sabha, Utter Bhartiya Valmik Harijan Sangh, Valmiki Sewa Samaj, and Harijan Sewa Samiti) underscore the influence of Gandhi's Harijan movement, as well as the worship of Saint Valmiki.

In 1963, several Bhangi groups, including the aforementioned organizations, came together and held their first meeting in Bombay (now Mumbai). In the meeting, it was emphasized that organizing at an all-India level and strengthening solidarity between the castes were essential to improving the social and economic standing of castes engaged in

[3] See Prashad (2000) for Balmiki caste associations before independence, from the late nineteenth century to the 1930s. Most of them had been established under the leadership of Hindu social reform movements, such as the Arya Samaj and the Hindu Mahasabha.

scavenging jobs. These activities were limited to Maharashtra for some time, but then received the support of the Congress, which facilitated the first national meeting in 1966. The former Minister of Defense, V.K. Krishna Menon (1896–1974), conducted the opening session and Yashwant Rai, who had a personal connection to Lala Lajpat Rai (1865–1928), was the chair. At the time, the relationship between the castes and the Congress was based on the assertion by Yashwant Rai that "Balmikis will get the full benefit only under the umbrella of the Congress."

The AISMC was established as a national sweeper union in 1966. As demonstrated by the name of this organization, it attempted to mobilize the castes engaged in sweeping occupations that were dispersed throughout India. However, people from Northern India accounted for the vast majority of its members, and there were concerns about the lack of participants from other regions.

Around this time, another important factor was the influence of Gandhian social organizations. In 1969, which witnessed the commemoration of Gandhi's 100th birth anniversary, the Bhangi Mukti Andolan (Bhangi Liberation Movement) peaked, and there was greater social awareness of the squalid working conditions of manual scavenging. With the spread of the water toilet model, the methods attempted by Gandhians to liberate manual scavengers from unhygienic environments were also adopted by the public health projects at the time. Around this time, many committees were appointed, in quick succession, to enquire into the living conditions of sweepers.

## All-India Safai Mazdoor Congress with Buta Singh, 1970 to Early 1990

Buta Singh (1932–), a senior leader of the Congress, who belonged to the Mazhabi caste,[4] was the first person from the sweeper community to be appointed as a cabinet minister in the central government. He served as Union Cabinet Minister of Agriculture (1984–1986), Union Cabinet Minister of Rural Development (1984–1985), Union Cabinet Minister

[4] Mazhabis were a part of the Chuhra community before they converted to Sikhism.

of Home Affairs (1986–1989), the Governor of Bihar (2004–2006), and was, more recently, chairman of the National Commission for Scheduled Castes (2007–2010). Between the 1970s and the early 1990s, Singh had become a major leader, mediator, and bridge between the sweepers' socio-political organization, the AISMC, and the then-ruling government led by Congress.

The 1990s heralded the golden age of the AISMC, 25 years after its founding. In 1991, the celebrations of Ambedkar's 100th birthday anniversary helped it become a national-level movement, and there were demonstration marches and various events held in regions throughout India, which enabled the AISMC to strengthen the communication of its demands to the government. On September 21, 1990, with support from Congress leaders, including the late prime minister Rajiv Gandhi, Buta Singh and the AISMC organized their own rally and *dharna* in New Delhi. It passed resolutions pertaining to the socioeconomic plight of sweepers and their deplorable working conditions, which included (i) opposing the privatization of government sanitation departments; (ii) improving salaries and working conditions; (iii) enacting a law to ban the physical handling of human excreta by manual scavengers; (iv) fixing minimum wages for sweepers working in private houses; and (v) declaring the birthday of Saint Valmiki as a public holiday in the government's gazette (Shyamlal 1999: 102–103). Of those resolutions, (iii) was implemented as a central piece of legislation known as the "Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993." In addition, two national commissions were set up to monitor compliance: the National Human Rights Commission (NHRC; active from 1994 onward) and the National Commission for Safai Karamcharis (NCSK), which was active from 1994 until 2010 (Suzuki 2017). Despite various welfare interventions, they have achieved little practical success (Shyamlal 1999: 161–163; Suzuki 2010).

Under the strong leadership of Buta Singh, the AISMC successfully provided facilities to sweeper caste members under the umbrella of the Congress. Furthermore, the activities reached their zenith in 1993 through the establishment of legislation relating to manual scavengers. However, with the gradual destabilization of the central government led

by the Congress, the AISMC started to decline. First, the assassination of former prime minister Rajiv Gandhi in 1991 significantly reduced Singh's hold on the leadership. This was followed by the bribery case involving Jharkhand Mukti Morcha (JMM) members of parliament (MPs) in 1993; Singh and key ministers, including the then prime minister Narasimha Rao, were indicted on the basis of suspicion of involvement in the incident, and Singh was removed from his cabinet seat.[5]

After the downfall of Singh, the internal struggle to find a successor intensified, and the group's organizational strength and centripetal force rapidly declined. While disputes between its members continued, the group suffered from organizational problems, including the prosecution of Singh's second son on bribery charges. Thus, this group is no longer as active as it once was, but it continues to implement activities to improve the treatment of sweepers and manual scavengers.[6]

## Making Claims for Rights, Equality, and Justice in the Court: 2000s

On January 4, 2014, I met Kumar (an alias), who is in his early 50s and a general secretary of a Balmiki religious and social organization in New Delhi. He has spent the early part of post-retirement life traveling across the country and abroad to organize meetings and conferences for fostering the worship of the legendary Saint Valmiki.[7] While being interviewed by the author about caste discrimination in his childhood, he proudly took out a booklet titled *Mera Adhikar Mera Vikas* (My Right, My Development), featuring full-face photos of the Congress leaders. Kumar explained that this booklet was the latest publication by his organization and included information about measures taken by the government, such as the Scheduled Castes (SCs) and Scheduled Tribes

[5] The abovementioned politicians were acquitted of the charges in the JMM bribe case in 2002.

[6] Interview with the AISMC representative member, B.K. Mahar, on July 27, 2010.

[7] In this paper, the terms "Balmiki" and "Valmiki" are used almost interchangeably as community names. They are derived from worshipping the Sanskrit "Bhagwan Valmik," known as a legendary saint and composer of the epic *Ramayana*.

(Prevention of Atrocities) Act, 1989,[8] which were especially designed for the rights and protection of those communities.

Kumar took early retirement from a relatively high position in the state's civil service. He claimed that his was the first generation in his native village in Uttar Pradesh (UP) to obtain a university-level education, which enabled him to work in a high civil service post. His parents were uneducated. His father worked as a landless agricultural laborer and his mother was a sweeper serving families from the landlord caste. As Kumar's case shows, more than a few Balmikis have been able to improve their lives far more than those of their parents' generation, who were mostly engaged in sweeping jobs on account of their caste. Those in the "new" generation have moved away from their villages and migrated to cities for better education and job opportunities. Simultaneously, awareness about Dalit rights and entitlement has also risen.

Until the early 1990s, the collective actions of the sweeper castes were led by sweeper unions typified by the AISMC, and they implemented activities to demand improvement of the working and living environments of sweepers and manual scavengers under the umbrella of the Congress. By contrast, the organization that emerged in the 2000s was mainly characterized by an approach whereby all its efforts were poured into directly appeals to the judicial system.

Among these actions, the formation of the PIL movement attracted the most attention. PIL, often known as "social action litigation" and "judicial democracy," is a form of litigation that was first actively incorporated by the Supreme Court from the latter half of the 1970s and based on the constitutional right to remedy measures guaranteed by Articles 32 and 226 of the Indian constitution. Based on the view that a remedy shall be provided to individuals or groups whose basic rights have been violated, and that there should be aggressive judicial intervention to facilitate social justice, the Supreme Court, which has warrant jurisdiction, is to hold a trial, appoint an investigation commission, and request

[8] An NGO, Human Rights Law Network (HRLN), established in 1989, provides a national platform for lawyers and social activists with training programs and publication of human rights and judicial systems. See Agrawal and Gonsalves (2005) for the legal information relevant to the civil and human rights of Dalits.

assistance.[9] The rules and procedures were significantly relaxed. The formal requirements for the filing of a petition were simplified. According to the PIL guideline issued by the Supreme Court of India, the letter petitions under the ten categories including bonded labor, neglected children, and non-payment of minimum wages to workers that, covered under public interests, shall be received in the PIL Cell of the court and screened.

The letter petition can be filed by the injured party or third individual/organizations working to enforce fundamental rights on behalf of any person who is not able to approach the court. It was intended that the court order and remedial measures could be far-reaching, for underprivileged people who still find it difficult to approach the court because of poverty and lack of education and information. Largely due to this relaxation of traditional formal proceedings, PIL activities have attracted judicial officials and social activists tackling human rights relief. Bhuwania (2017: 5) observed that PIL had become ubiquitous in everyday discourses around Delhi city. The word of PIL can be found and heard so often in national/local newspapers and TV news reports. Lower caste communities like Balmikis also adopted this legal mechanism, beginning in the 2000s. I would like to consider two cases in Delhi. The case studies will argue that the introduction of PIL in the court has resulted in a change and capability of peoples' rights and justice. This is followed by an analysis of whether PIL enables the proposition of a "contact-zone" platform between institutionalization from above (legal orders and governance) and that from below (everyday practice of ordinary people).

## Case 1: Accusations of Human Rights Violations

Safai Karamcharis Andolan (SKA) began with a human rights NGO that was formed in AP in 1994 by three social activists to eradicate manual scavenging. Abolishing manual scavenging work, which is viewed as the cause of the contempt for the Balmiki, and seeking to recover the dignity of the Balmiki are listed as the goals of this organization.[10] The

[9] See the PIL guideline at http://supremecourtofindia.nic.in/pdf/Guidelines/pilguidelines.pdf (accessed on December 22, 2017).

[10] Information about PIL cases relies on the authors' field notes from 2006 onward. Also, see a journalist's work (Singh 2014) on SKA.

Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, which was enacted in 1993, prohibited manual scavenging and the existence of dry latrines, which necessitate this work, but it is difficult to say that enactment of this Act has completely eradicated this problem. For example, the AP government denied the existence of dry latrines in its state, but according to a rural survey conducted in 11 states between 2001 and 2002, reports indicate that dry latrines are still in use (Shah et al. 2006: 113–115).

In reality, enforcing compliance with the 1993 Prohibition law is an extremely time-consuming process, and there is very little awareness of the law itself. One of the reasons for this is thought to be the legal characteristics of this law. India is a federation state made up of 29 states and 7 union territories, and Indian law contains both federal and state laws. The 1993 Prohibition law is a federal law. Federal laws only take effect when each state legislature adopts them (provision of Article 252 (1) of the Indian Constitution). Therefore, it requires a huge amount of time for the approval procedures to be completed by all of the state legislatures within India (Suzuki 2010).

Thus, the most distinctive feature of the movement to eradicate manual scavenging is the exposure of this problem and the initiation of warrant lawsuits in the Supreme Court as a means to ensure compliance with the law and liberation of manual scavengers. The aim of this movement is to spread awareness through litigation activities about the current situation of human rights violations committed against manual scavengers and bring it to the attention of the government and society. SKA proactively used the media, and a huge stir was created when the topic was addressed in July 2012 on the television program *Satyamev Jayate*, which is hosted and produced by the Bollywood movie star Aamir Khan.

The founder and representative of the SKA movement, Bezwada Wilson (1966–), is from Karnataka. He was raised in Kolar district, which was developed as a site for gold and silver fields during the colonial era, and is a Christian convert from the Madiga caste, which is one of the SCs. During Wilson's childhood, the majority of the Madiga people worked as manual scavengers, and Wilson's father and older brother worked for the local government and Indian Railways as manual

scavengers.[11] For Madiga youth, there were few options for work other than manual scavenging, and when Wilson himself looked for work at a government employment exchange agency after graduating from high school, he was introduced to manual scavenging on account of his caste.

Wilson was harassed by his classmates in school, but he managed to progress to university with the strong support of his family. In addition to his studies, he began to participate in community service activities through his church at the age of 16. He decided to change the lives of manual scavengers working in squalid working conditions, and to change his community as a whole, by first persuading his relatives to quit working as manual scavengers. However, quite a few people strongly opposed his actions. This was because—the harsh and contemptuous nature of manual scavenging notwithstanding—the Madigas were unable to gain any other employment, and regarded it as the only means of obtaining a livelihood. Wilson continued to send letters to local government and newspapers describing the realities of manual scavenging and demanding its abolition. However, he did not receive any response at that time.

The turning point came around 1991, which marked the 100th birth anniversary of Ambedkar and was also the time when the Dalit movements throughout India were at the height of their popularity. Wilson, a follower of Ambedkar, participated in the movements and joined a bicycle rally moving from Chittoor in AP to Hyderabad. At this time, Wilson met two activists, Paul Diwakar and S.R. Sankaran,[12] who would become co-founders of SKA. Wilson and his fellow activists began organizing the movement to eradicate manual scavenging.

An interesting point at this juncture was, as mentioned earlier, that the AISMC also strengthened demands for implementation of policies for manual scavengers under the leadership of Singh, and Ambedkar's birth anniversary celebrations in 1991 were used as an opportunity to expand the network among Dalit activists and the Balmikis. Thus, it is presumed that signs of interaction and alliances were starting to emerge in the movement.

[11] Interview with Bezwada Wilson on February 6, 2006.

[12] Paul Diwakar is the general secretary of an international NGO, the National Campaign on Dalit Human Rights (NCDHR). The late S.R. Sankaran was an activist, who retired from the Indian Administrative Service (IAS) as an officer.

In 2003, the SKA moved its head office from Hyderabad to New Delhi, and activity was restarted to completely abolish dry latrines and manual scavenging in all regions of India. The focus of SKA's actions is legal intervention through PIL, and it is fighting the federal government, state governments, and other public sectors in the Supreme Court.

## Case 2: Claiming Equal Distribution and Representation in SC Reservation Policy

In addition to the work of the aforementioned SKA to prosecute issues of human rights violations committed through manual scavenging work, there are also Balmiki activists who are lodging objections to the current SC reservation policy by utilizing the same PIL procedures. A representative example is the National Cooperation Committee for Revision of Reservation Policy (hereinafter referred to as the Reservation Committee), which was formed in 2007. The distinctive feature of this committee is its demand to divide the SC reservation framework into forward and backward classes. The committee is led by lawyers, and high- and middle-ranking civil servants (retirees), and the caste composition of its members is Balmiki and other SC castes.

After retirement from the India Legal Service (ILS), the committee's representative O.P. Shukla (1947–) utilized his qualifications as a lawyer to start litigation activities as early as the 1980s, to address working issues pertinent to sweeper communities. Shukla's parents worked as sweepers in government departments, and Shukla himself helped his father with his work when he was a child. He continued his studies even while being forced to read his textbooks outdoors, using streetlights for illumination on evenings when there were power outages in his house. He obtained a scholarship and progressed to the University of Delhi. He participated in free legal consultations to support the vulnerable during his time at university, and he had a keen interest in social activities.

Shukla's first petition to the Supreme Court in the form of PIL was filed in 1986. He sent a letter to the Chief Justice of India, P.N. Bhagwati, who was known as one of the pioneers of judicial activism, by introducing a PIL claim to ameliorate the colony of municipal sweepers in New Delhi. The letter says:

> New Delhi Municipal Committee (NDMC) just after the Independence constructed a "workshop" (garbage-carrying vehicles repairing workshop) just in front of the [Valmiki saint] temple. Thus, this historical temple of Gandhiji and his most loving Harijans has been badly eclipsed by erecting a garbage vehicle factory in front of the temple. NDMC, therefore virtually wounded the sentiments and feelings of the father of the nation and his most near and dear untouchables (Valmikis). (The letter sent to Justice Bhagwati on December 12, 1986)

Shukla allegedly opposed the construction of the NDMC's workshop site on account of its violation of basic rights given under article 14, 15, 17, 21, and 25 of the Constitution of India. This plea was accepted, and the site was removed accordingly. This case is remembered as the first Balmiki PIL in the community.

Organized efforts to combat caste-based discrimination and improve labor conditions have been made and gradually turned into the subject of sub-categorization of SC reservation policy in the 2000s. The background to the establishment of the Reservation Committee can be identified as increasing dissatisfaction within the SC community with the current reservation policy. There is an extremely competitive relationship among SC groups with regard to acquisition of a place within the reservation framework, and for backward SC groups like the Balmikis, the opportunities for higher education and public employment are extremely limited. During the author's fieldwork in Delhi and other northern states, claims to exclude affluent SC groups were repeatedly heard, mostly referring to the Chamars/Ravidasis and Malas castes from the SC list. As described earlier, Balmiki activists identify themselves with the most deprived groups (*vancit varg*) and set themselves apart from other Dalit groups by their caste line. The underlying proposition here concerns the question of exclusivity in the context of lower caste activism. This exemplifies the competing demands of equal rights and share on the one hand, and the monopoly over caste-based "privilege" on the other.

As a reflection of this situation, the Punjab government in 1975 and the Haryana government in 1994 introduced a method for dividing the SC reservation system into forward/backward classes (sub-categorization); however, in July 2006, the high courts in both states

issued a stay on the government's order. Implementing the division of the reservation policy is a major problem in Karnataka and AP, and it is still being deliberated.

Representative Shukla explains the possibilities of the Reservation Committee as follows: "Firstly, our community should get educated and independent. Social activities can only succeed after that. The Balmiki have been so depressed for so long that they do not know how to fight. The cost of litigation is not affordable, but we advocate, and as legal experts know how to proceed."[13] In this statement, the feasibility of the movement is asserted by the pride evident in "we are legal experts." The concept of emphasizing legal knowledge is not limited to Shukla but is the shared characteristic of all of the participants in Balmiki activism in Delhi since the 2000s. Ambedkar, who contributed to the Dalit movement by working as a lawyer to protect the human rights of untouchables, is a role model, and his actions serve as motivation for others to become certified as lawyers.

Furthermore, when the author asked, "Why do you use PIL as a means to achieve your goals?" Shukla responded as follows: "We don't have a large population in Delhi, and we are not well financed to launch a major movement. Political activities require a huge amount of money. However, the PIL does not cost much, and national news media entities convey our message to all! Furthermore, the young generation commands social media, as well. I only have hope in the judiciary system."[14]

As can be seen in this declaration, generally the Balmikis have high expectations of the judiciary. However, I would also like to point out that their faith in politics and the government is rapidly diminishing. The background to this is that they are significantly affected by the criticism attracted by the reliance of the AISMC on the Congress and the loss of its organizational strength. The corruption that infests politics and government administration is experienced on a daily basis by the Balmiki people, and the payment of bribes in government offices or banks to obtain welfare is a routine occurrence.

[13] Interview with O.P. Shukla on August 29, 2012.

[14] Interview with O.P. Shukla on August 29, 2012.

As mentioned by Shukla, another reason to support these litigation activities is that litigation does not require large-scale mobilization, unlike demonstrations in the streets. Also, the progression of litigation and the respective judgments can be communicated to non-participants through media, and the communication costs can be curbed even further by disseminating the information via social media. These advantages are important from the perspective of movement strategies. On the other hand, there is still some doubt about how much support this kind of movement led by legal elites, which fights its battles in court, can acquire from ordinary Balmikis, who have little legal knowledge and are unfamiliar with legal proceedings. It might be too soon to say the legal elites reach other non-elite Balmiki members successfully from this case study, but this movement is attracting interest, and it remains to be seen if it will become a new model for movements. As a sign of change, I would like to underline that this case demonstrates an initial platform of "contact-zone" between institutionalization from above, such as PIL, and that of grassroots legal activism, in contrast to the previous model of sweeper labor movements and political orientation toward Congress.

The PIL filed in the Supreme Court by Shukla in 2011 was accepted, and the following August it requested investigations to ensure revision of the reservation policy of each state government for SCs. After several public hearings, this case was dismissed in 2015 with an order reading, "Learned senior counsel for the petitioner seeks leave to withdraw this writ petition with liberty to work out whatever remedy is available to the petitioner before the appropriate forum."[15] Shukla opposed this order and started to organize further legal action with the Reservation Committee members. Meanwhile, it is observed that his organization is seeking to draw political attention from Rashtriya Swayamsevak Sangh (RSS). In 2017, a senior RSS leader Krishna Gopal was invited to a function organized by Balmiki members in Delhi as one of chief guests to discuss several issues including the socioeconomic plight of sweepers and sub-classification of reservations for SCs.

[15] Writ Petition (Civil) 337 of 2011.

## Dividing Dalit Movements and the Democratization of the Judiciary Toward Better Justice?

In this article, I examined trends in the Balmiki community in Delhi, and found that it presented a different movement from the other Dalit movements that attempt to seek political or religious solutions. The period of the 1990s–2000s has witnessed increasing political awareness and aspirations among Dalits in UP, North India. There was a rise of political movements and formation of the Bahujan Samaj Party (BSP) in 1984, founded by Kanshi Ram and succeeded by Mayawati. The BSP started as a Dalit-based party with the aim of developing a revolutionary social and economic movement of change. However, the BSP has failed to unite all Dalit communities and ensure the provision of a solid political platform to them. Balmikis found themselves alienated from the center stage of BSP leadership and lost their hope for a political solution. Similarly, the Buddhist conversion movement does not seem to attract them. Therefore, to speak more precisely, Balmikis' religious orientation appears to be ambiguous among Hinduism, Saint Valmiki worship, and Buddhism, even in an individual person. The case study of this paper shows that Balmikis in Delhi try to follow a path of judicial remedy to achieve their rights and justice.

The year 1991 was the point of divergence, with the decline of the AISMC and deployment of PIL in its stead. The movements to eradicate manual scavenging and to revise the reservation system presented their demands in court, and a major characteristic of these movements was that the people in charge of organizing them were lawyers, the well-educated, or civil service officers (retirees) who had improved their socio-economic standing through the SC reservation.

Bringing the Balmikis' caste-based scavenging issues to the forefront of the movement, work that has been deeply rooted in their identity and always a source of disdain toward these people and the cause of their low socioeconomic standing, increased solidarity within the caste and shifted the objective of the movement toward improving the working and living conditions of the Balmiki.

The AISMC, SKA, and Reservation Committee cases demanded rights for the Balmiki, which would have been difficult to facilitate through the other Dalit movements. These movements should be understood as strategies that were firmly rooted in the actual situation of the Balmiki. Within these movements, there was an active formation of networks among Balmikis across different regions, and this particular movement saw the rallying of similar sub-castes of SCs from all over India.[16]

However, at the same time, I would like to point out that these movements also highlight the differences between other castes. As long as issues continue to be presented on the basis of caste, movements will remain divided and individualized, and as suggested by the breakup of the AISMC, the significance of the organization itself may be lost as the constituent members of the organization change. The movements of SKA and of the Reservation Committee are only just beginning to try to coordinate their activities with other Dalit groups, but there is almost no link with the BSP political movement and the movement for conversion to Buddhism, which are significantly influential in UP, the state adjoining Delhi, and Maharashtra. It will be interesting to see what approaches will be used to expand support beyond caste boundaries.

The notion of justice in actual practice appears elusive. The second case study of Shukla's organization is a perfect example of how other relatively deprived Dalits, who do not take much advantage of SC's reservation feel frustrated and have a sense of "injustice." Shukla is not in favor of extending the SC reservation to the private sector, saying that "We are fighting for social justice. Mayawati (the national president of the BSP) is no longer Dalit. She is not a poor person at all. We cannot say the SC reservation in the private sectors is justice. How is it possible to say it is justice that already affluent people demand more benefits? You need to consider justice by whom."[17] These comments reveal that the question of justice claimed by the Balmikis means having an equal share and having representation as to their substantive rights. There is a stronger hope among

[16] The latest petition has just been reported as being filed by the Supreme Court to exclude the affluent members (known as the "creamy layer") of the SCs and STs from the benefits of reservation. http://www.thehindu.com/news/national/plea-to-exclude-scst-creamy-layer-from-quota/article22544974.ece?homepage=true (accessed on January 31, 2018).

[17] Interview with O.P. Shukla on August 25, 2017.

Balmikis that the governmental failure to resolve caste-related problems and provide basic facilities to society is to be solved by a legal intervention like PIL, not by politics.

In terms of involvement in the historical development of PIL in India, Asano (2009: 127–128, 130) has pointed out the dispersed nature and complexity of litigation targets in recent movements. The content of PIL, which was firstly developed to protect the human rights of vulnerable members of society, now involves lawsuits where objections are lodged using PIL procedures against issues where it is difficult to clearly identify at first glance whose rights are being infringed, such as environment and corruption issues, and policies that claim to protect the rights of the vulnerable. By focusing on the people concerned, namely Balmikis, this research has clarified that there are changes among the people who are deemed to be vulnerable, and the movement of PIL has become very active and experienced in what we call "institutionalization from below" in recent years. What we sought from researching this movement was to critically analyze the unequal social structure of Indian society, where social movements are censured. Searching for the direction of new social practices will become even more important in the future.

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# 9

# The Right to Sacredness: Politics Surrounding Wind Power Development in the Thar Desert

Kodai Konishi

## Development and the Land

This essay tries to clarify the distortion of rights and laws in the context of the developmental process of sustainable wind energy in India. This is in relationship with people's senses within multiple codes, which leads to controversies among each of the actors connected to the developmental scheme. In concreteness, I will be focusing on the development of clean energy in India, especially in regard to the generation of wind power. This has been accredited as one of the most viable solutions for the chronic shortage of energy plaguing the nation of India. This movement has even been associated with the concept of "sustainability" in Narendra Modi raj. In accordance with the theme of this book, I will be observing the germination of institutionalization of rights from its organization as an underground movement, focusing on the various practices and narratives of the people involved, with emphasis on the relationship of these

K. Konishi (✉)
Tokyo Gakugei University, Tokyo, Japan
e-mail: kkodai@u-gakugei.ac.jp


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narratives to sacredness. This will be an attempt to reorganize the thoughts of high social status in society, who generate hegemonic discourse against the notions prescribed by a grassroots movement.

Grassroots activism tends to awaken when people realize a common sense of self in the sense that they have been deprived of ordinary entitlements of everyday life. At this juncture, I concentrate on the issues surrounding the prohibition of local people and their access to sacred lands and the common indignation. This leads people to reconstruct their narratives to justify accusation of the developmental scheme which has been pandering to the dominant classes of society.

This kind of logical reconstruction for sake of a justified narrative against the upper class has permeated its way into the fabric of everyday life and society among the people of India; however, there is a sense of inconsistency growing between the people living in the local cosmos and the global methodology of the sustainable development. This occurrence has been institutionalized and encouraged by the current rights and laws of the country or states. The resentment toward such movements is so momentous that diverse groups of people who are involved in the development efforts began to raise their voices in protest against the usage of the land. Through the use of local idioms, opposition to the numerous gargantuan wind turbines installed has been displayed, though they are working to promote the generation of wind power at the same time. In this instance, one cannot see simple dichotomies, such as tradition versus modernity, or locality versus globalism, but there seems to be much more complex and diverse ways for people to express their right toward the land.

In this context, I will try to reveal the cognitive discord, dissociation, as well as the entanglement against the land as it occurs in the backdrop of wind power development. There lie inconsistencies between vernacular places for living and manageable or insubstantial space that have been adapted for as equipment for the reign of the modern nation state. This is assured and upheld by constitutional law. In other words, there are legal gray-zones created through the negotiation of livable land and decontextualized vacant land, as well as between places of praxis and spaces of imaginary control.

People's attachment for the former use of the land is embedded by their many narratives. These narratives themselves have been serving as a driving force for the mobilization of their aim to express their objections against the developmental swell. These local narratives could be the logical base for dissent, which is called *matabhed*. Thus, in this essay, I will reveal the germination point of the institutionalization of rights from its origin as an underground grassroots effort. This will be done through the analysis of various cognitions of land and ways of thinking on the development of wind power as it relates to local people, after relevant information is extracted from their narratives. While those voicing these narratives have themselves been yearning to negotiate the terms of the negative impacts of the transformation of local lands, both sides of the developmental scheme (the developing and the developed) must remain in scope and be equally conveyed. The interactions between the "rights and benefits of development" and the "entitlements and privileges of life and the world" must be discussed as well.

## "Green Energy" in India

First of all, we must review recent policies on renewable energy in India.

As is well known, the rapid economic growth in India due to economic liberalization in the 1990s brought rapid urbanization and industrialization to India and chronic power shortage has been left as a major task. What is drawing attention so far is to escape from securing energy by conventional fossil fuels and to secure energy through the large-scale development of renewable energy named "green energy."

According to the International Energy Agency (IEA), the country's energy demand will increase annually by 4.5% and will be one quarter of the world's energy consumption by 2040. According to the report "Energy [R]evolution: A Sustainable India Energy Outlook" released in 2012, if the government's policies and investment work well, the share of fossil fuels in India will drop from 71% in 2009 to 23% in 2030. Wind and solar energy will dominate. It is a scenario that reduces $CO_2$ emissions and fuel costs by restraining the import of fossil fuels and produces

jobs and industries related to renewable energy (The Global Wind Energy Council 2012). Among renewable energy, wind power generation and solar power generation are already the world leaders. As of the end of March 2016, the cumulative capacity of domestic facilities in wind power generation reached approximately 27,000 MW, which has already become the world's fourth largest power generation scale.

Rajasthan, the state this essay targets, tops the list for solar and wind energy with a total installation capacity of more than 3000 MW. Indian projects like electrifying Rural India is also focused on using clean energy. In particular, the Jaisalmer district described in this chapter is the place where construction of wind park was started in 2001 by Suzlon Energy Limited, an Indian wind power company. Suzlon's "state-of-the-art" model S9X (wind turbine) was first installed in Tejwa, a small village in the desert of Jaisalmer, behind which the Union Minister of New and Renewable Energy existed. Starting with this, development has progressed to such an extent that there is no piece of land where wind turbines cannot be seen by 2014. Suzlon declared that they have been positively affecting 5000 families in 70 villages in Jaisalmer province.

## Wind Power Development and the Thar Desert

In the Thar Desert of Northwestern India, as mentioned above, the development of wind power began around two decades ago. This led to increase in the installation of wind turbines in the area (Fig. 9.1), especially in geographically hilly spaces, called *dungar* (literally translates to mountain). Such spaces are recognized as "no man's land," although, these hilly places have had multiple socio-economic advantages. Secondly, as a cultural and magico-religious domain of the people, it is regarded as important. Sometimes this space serves as a place for grazing cattle, for local relaxation, and most importantly as a place of worship for local deities and legendary gods (Konishi 2016). These lands have been recognized as common land (*vanis*) of dispersed rural settlement, called *dhani*. *Vanis* consists of lands such as *oran*, the resident area of deities, or *aan*, the place for cattle raring (Bharucha 2003: 42–44).

**Fig. 9.1** Jaisalmer wind farm, Rajasthan. (Photograph by the author)

The actors who take part in the developmental scheme consist of the state government, foreign corporations involved in wind power who operate under joint management with Indian companies, village councils such as gram panchayat, and people of local societies.

Though desert society has complicated structures, the existence of the ruling caste, namely *Rajput* and *Brahmin*, must not be underestimated. Their power against local governance and economical order still has remained even though economic indicators have spread to society and their relative cultural power has declined. This is the reason why the state officials and developers of wind power companies primarily visit the places of these ruling classes to inquire about the possibility of installing wind turbines outside and in some cases even inside villages. Agents of development try to show their respect toward the cultural rights of land use when launching the scheme of installation. Even though these lands are allegedly depicted as "no-man's lands" in state land revenue rules, they are used for the production of wind power. Additionally, the land has use for public purposes previously granted by The Land Acquisition Act of

1894, which was adopted by the British Empire. This was made possible by them having maintaining enforcement of the policy until 2013,[1] and the Rajasthan Wind Policy also substantiated these regulations in 2012.[2] Also in 2014 The Electricity (Amendment) Bill was enacted. The Bill introduces a supply licensee who will supply electricity to consumers. The distribution licensee will maintain the distribution network and enable the supply of electricity for the supply licensee. Under this law, many entities will be licensed as suppliers of renewable energy and deregulation of private sectors on land use will be promoted. In addition, it is easy to imagine that the former ruling classes who have big pipes for government officials will become the winner of further interest structure for wind power development.

If you assess the local history, it is obvious that people belonging to the lower layers should obtain a "cultural license" on land use by doing various services to the former ruling classes. Also, these "usage rights" have changed substantially as their "vernacular ownership" in a long process and this leads to the statements that the people from low castes must have their own "rights" to the land, including hilly places.

Potential jobs and roles that can be provided in this developmental scheme must have been monopolized by the ruling caste. Meanwhile, many kinds of other social groups have been excluded from the profits which could be availed from the development taking place. Since initiatives over the rights and laws concerning the land use tend to be obtained by the officials, developers, and the ruling caste, it sadly leads to the deprivation of chances from multiple actors, especially *non-Rajput* and *non-Brahman* castes or "service castes," including tribal people. These people are traditionally disposed to the service level jobs for their patrons.

[1] The replacement of the Land Acquisition Act, 1894, with the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (RFCTLARRA) occurred in 2013. This Act provides higher compensation for acquisition and makes consent of 80% and 70% of affected landowners must for acquiring land for private and public–private partnership (PPP) projects (Singh 2016: 66–67).

[2] This policy states clearly about the land use for wind power development. It goes on: "The allotment of land to the Wind Power Developers will be done as per the provisions of Rajasthan Land Revenue (Allotment of Land for setting up of Power plant based on Renewable Energy Sources) Rules, 2007 as amended from time to time" (9.3.1).

Here is a sample. Kama Ram (fictitious name) is a male in his 50s who belongs to a tribal community and is a rare person who was able to engage in developmental scheme for a little while.

According to him, wind power generation development began in 2004 in S village where he resides. In 2005 the wind turbine was completed, and the role of work was distributed between Suzlon and the dominant leading caste. He belonged to the tribe community, but luckily he was able to get the job of guarding the wind turbine (chaukidar) from thieves. Though he worked diligently for four months, he quit his job because he was abandoned while being paid only first month's salary. Also, according to him, his uncle owned the agricultural land just beside the construction site of the wind turbine and should have been able to obtain compensation of 100,000 rupees originally, but he did not receive any. The protest against Suzlon was not kept up, the company said it was sticking to give all necessary expenses, including compensation, to the controlling caste. Distribution of work and management of necessary expenses such as salaries and compensation money were held by contractors elected from members of Rajput, he says. Therefore, he doubts that salaries paid to him and the compensation money that was supposed to be paid to his uncle may have entered into the bosom of these contractors.

In addition, because there was a new water tank and a pump for groundwater in the village where he lives, I asked if this was established by a development company. The answer was "no". They are said to have been established by the state government in a completely different context. Likewise, asking about a small solar panel for power generation newly installed in the village, it is said that it was established by a wind power company. However, though the villagers were pleased with the installation of solar panels, they refused it because there was a notice that each house in the village must pay 3500 rupees at a time for the panels. He said that the removal of solar panels is close. He said that only the Rajput community was able to profit in the context of wind power eventually.

The people of these lower communities thus began to express their anger through their own idioms, raising their voices against the monopoly of the ruling caste for the unfair decision-making processes taking

**Fig. 9.2** A falling wind blade and a young man in the village. (Photograph by the author)

place. It began from the expressions of inconveniences caused by wind turbines being installed around their living quarters. They have been expressing their sentiments against mainly three aspects: the embezzlement of compensated payment that they feel should have been paid to the locals, the physical disorders that seemed to be caused by sound of wind turbine blades cutting the air 24 hours a day, and insomnia or headaches caused by the flashing red light emitted from the heads of wind turbines. The information obtained from the interview was that wind blades were falling due to strong winds and thus it was dangerous (Fig. 9.2).

## Distress of the People

One of the problems existing in relation to the livelihood of the locals is the unbeneficial relationship between the wind power scheme development and the local tourism industry. Tourism is one of the most important ways of making a living for the people in the Thar Desert, as they have been working as "camel drivers" for a long period of time. This is a job where one carries and take cares of tourists wanting to roam around

the arid desert area on a camel's back. This kind of touring has become known as "camel safaris." Through these safaris, tourists from in and out of the country aspire to taste the reality and purity of nature itself, nostalgic scenery of an arid area, barren horizons, and an overwhelming sunset or starlight view; however, the light and sound of numerous wind turbines obstruct the atmosphere and sentiments of the experience trying to be created. A few people have lost their jobs in tourism because of the decreasing number of visitors on desert routes of camel safaris. To make matters worse, this desert area has been losing the fame it once had as a site for shooting films. Filmmakers cannot get rid of the wind turbines from the frame of the camera (Fig. 9.3). This situation sometimes becomes a matter of people's lives, as these circumstances are depriving whole incomes from various jobs in the filmmaking industry as well.

The biggest concern of the people living in the development site is how they have lost their entitlement to access the areas where the wind turbines are. Given the suspicions of the locals concerning large amounts of

**Fig. 9.3** Bada Bagh, a famous tourist spot as well as film shooting spot near the wind farm. (Photograph by the author)

metal materials for constructing wind turbines, this situation is said to have started in the early half of 2010. Developers arranged the watchmen for each designated area to exclude the locals as we saw in Kama Ram's example. These watchmen were usually employed by dominant communities. As I mentioned before, the sites chosen for construction for wind farms tend to be in high places such as hilly or mountainous areas, and in fact, most of these hilly places have been thought to be sacred areas. Residents worship local deities and gods there. Thus, exclusion from these hilly areas results in the deprivation of the entitlement for the worshipping of supernatural entities for the local people of the region.

## Reappearance of "Traditional" Power Balance

About a decade has passed, and a new situation has arisen in these sacred areas. Developers of wind farms have started compensating and seeking for the approval to use sacred hills. Developers even decided to renovate traditional and smaller shrines to bigger and grand temples in authentic Hindu style. Sometimes they compensate by installing solar panels to provide electricity to the temples. In this process, the style of worship for these local deities has transformed. The higher caste such as Rajput or Brahmin monopolizes the sacred places of worship and newly made temples. On the other hand, people in lower castes are excluded from these hills and restricted to access only certain places to pray to specific deities. Lower-status people are forced to gather in one particular place of worship, to again endure newly constructed projects of the developers at the foothills of the sacred mountains, even during festivals dedicated to these local deities.

In other words, this phenomenon caused by this developmental scheme benefits only the former ruling castes in economic and cultural capacities by the monopolization of the land. Even though these people had been gradually losing strategic centrality in the social power structure (formerly destabilized during the age of globalization and neoliberalism), this situation helps to counteract that. In actuality, these ruling castes, for example a landowner caste, has been relatively losing their position in society, but for those part of other *non-Rajput* castes, they have been gain-

ing economic power in local societies in the modernization process which provides new types of monetizing means for traditionally based service castes.

In the context of the developmental scheme, however, people of lower classes once again began to lose their power, being excluded from the economic fruits of the development taking place. This did away with the entitlements people held for hopes of access to the land, where they hold economic and religious significance. This is the reason why people started to raise their voices against these harmful influences, by using the power of their various idioms and narratives.

## Nabhu Dungar: Landscape of Sacredness

One prominent example of people's criticism against the development is a case showing that people understand the development scheme taking place as a form of disrespect toward sacred beings. On top of this, it is thought that these supernatural beings can be used as one of the actors to express objections toward the dispute on the rights of how the land is in use.

Nabhu Dungar is a famous sacred hill located in the southeast region within the Jaisalmer district. Just behind the old villages of Kabha and Khabia, this hill has been thought of as the residence of several goddesses and legendary saints, Bhura Baba. Since this hill (one of the temple goddess named *kalka mata*) has been selected as a site for a wind farm, the corresponding company began making renovations to the temple for the hill. Due to this, the hill now has been shaved down to make roads for transporting materials necessary for construction.

Among the developers, two prominent ones are the Suzlon Company and Rajasthan Renewable Energy Cooperation. They jointly visited several Rajput and Brahman representative in villages and offered compensation in return for the collateral damages that will be potentially made to traditional landowners. In these compensation offers, Suzlon Company promised to provide five services to the villagers as a commitment of development; first, livestock health care, second, tree plantation, third, solar lighting, fourth, community organization, and fifth, educational

**Fig. 9.4** Themde Ray Temple during renovation. (Photograph by the author)

support.[3] These are presented as rights, *adhikar*, and they have estimated as many as 70 villages and 5000 households could potentially experience positive impact via this reparations program targeting the rehabilitation of local people. In contrast though, during field research sufficient evidence was uncovered that might suggest the reparations received by villagers were not having the intended impact in corresponding locations receiving said reparations.

Field research findings also suggest that the "compensational rights" initiative in the developmental scheme has already taken form in hilly areas, namely where sacred tiny shrines are being renovated to larger and grand ones, but this has not generated any level of social development in the area. Several cases involving huge amounts of building's stones that were transported in developmental areas, old-style small shrines that were destroyed, and large-scale "authentic" Hindu-style shrines that were being constructed one after another were observed (Fig. 9.4). In the case

[3] Suzlon's official paper "Suzlon Crosses 1000 MW in Jaisalmer; Creates India's Largest Wind Park" (11th May 2012).

of the Themde Ray Temple, the trust system in place has given an opportunity to gather funds from the wind power companies and influential enterprises run by dominant castes of the very area of construction. Similar cases around the developmental areas for wind power can be found. For example, the famous sacred mountain, Nabhu Dungar, faced a similar fate, and this case has not proceeded propitiously either.

In 2012, a truck carrying the materials for wind turbines turned over completely when it began an attempt to go up the hill of Nabhu Dungar just behind the Kabha village. One month after this accident, another truck turned over in the same place in the same fashion as the former truck accident.

In addition to this incident, in the same year of second accident, a three-layered base of a wind turbine was said to have collapsed due to heavy winds. This caused the same accident to occur again and again three more times within the span of just a few months. Eventually, the construction itself was halted and five years passed by without any operations taking place on this holy hill. This story has been shared with a rather wide range of people in the desert area.

The people living around Nabhu Dungar insisted that all of this happened because of local villager's faith. This is especially in regard to lower caste people, who gathered to pray to god, Bhura Baba, to stop all construction efforts. For them, they felt that this deity felt sympathy for their situation and expressed anger toward the agents of the wind power company. The villagers truly believe that this saint had took pity on their situation and answered their prayers by turning the trucks over.

It is notable to state that in general, the people have been aware of the apparent gap on perceived spatial recognition between the perspectives of agents of development projects and their own local interpretations. Bhura Baba, the local god, is said to live underground and make complex routes out of underpasses all around the Thar Desert. Sometimes it is said that he appears from underground to the top of hilly places in order to connect with heavenly goddesses up above. Bhura Baba is known for being the finder of groundwater, so as a natural consequence, many wells link with Bhura Baba's legend within the district. From the various myths, people believe that Bhura Baba has special powers to connect the four layers of the world, namely the underground, ground, high places (like

hills), and the heavens (referred to as *sargapur*). Horizontally his existence is believed to link the sacred places, but vertically it has the ability to connect all these four perceived layers of earth.

In this case, people living in this area believe in the existence of Bhura Baba even today, and one that this saint's residence is a narrow cave piercing through this holy mountain. It is explained that this cave's path is very deep, leading all the way to the underworld (Fig. 9.5). This underground path is called *gupha*, which plays a role in connecting three layers

**Fig. 9.5** The way to *Gupha* at Nabhu Dungar. (Photograph by the author)

of the world all the way from the underground areas to high hilly areas. Along with this vertical connection, the *gupha* links holy places where it is believed that the local deity has particular affinity for such locations. An example of such an area would be Koleriya Dungar near Tejva. This village is connected to another holy hills in Jetvai village and Baleta Mandir Temple in Nedai village, among many other examples. Each of these holy places is interspersed all around the Thar Desert, and sometimes the distance of each place might span a few hundred kilometers. It is said that there are several common traits found in these spattered sacred places. Among the traits, the most notable are that these places are surrounded by same smell of *dhoomp* (this is a kind of smoke dedicated to a sacred being), all the places have a set of shrines and cave-like underground paths (*gupha*), and lastly to mark the manifestation of a holy presence, a rat (*chuha*) is used to creep up from the *gupha* with its ear ornamented by golden earrings, and so on. Here the rat is not symbolized as vehicle (*savari*) of Lord Ganesh in Hindu pantheon, but instead as a messenger of the saint from the underworld.

These legendary narratives and awareness of the local sacredness have been elicited from the people's sense of history. This sense is connected to two layers of historical context. One layer is the bright past when the saint, Bhura Baba, was "physically alive," and the other is the era of contempt that would even go as far to deny the existence of a sacred being or supernatural environment. From this explanation given by the informants, it was also learned that the era of Bhura Baba is called the *Satya Yuga* or the "The Age of Truth." This is a time when the people were connected to the world of sacredness. In this era, social networks of human beings were guided by supernatural power. On the contrary, the modern world has lost its justice, and self-interest has become the only driving force motivating people. Human beings have gradually lost the ability to perceive sacred powers, which leads to the total denial of the presence of supernatural existences. Thus, the exclusion of lower classes from the mountains in favor of the installation of wind turbines have resulted in development receiving higher priority than the local deity's temple in the same area. This must be included as a low point in history and viewed as derogatory behavior. This period is known as *Kali Yuga* or "The Age of Darkness."

As stated before, the people of lower castes (in other words excluded classes) recognize the sacredness of these places, not only in limited domains, but in wider spaces spreading vertically and horizontally with wider perceptions of time extending into the imaginal era.

## Negotiation Toward Modernity

This kind of vertical and horizontal linkage concerned with sacredness, found in recognition of time and space, are quite important to understanding the cosmology of the people; however, actors in this developmental scheme try to grasp these spaces only from scientific or administrative points of view, and these limits to only a topographical understanding of the land being dealt with. This deep trench laying on the cognition of between two sides has been creating controversy and annoying sentiments for those involved.

To depict the gaps seen in the cosmology of the land as discordance between premodern and modern might be an unfair judgment. In other words, if we conclude the people's rich narratives as premodern occultism expressing the resistance against the logics of development, we might overlook the momentum of negotiation of the excluded classes and the appropriation of those included. The demands of redistribution for the rights of development have been included in the lower classes' logical approach to their resistance, but on the other hand, the magico-religious narratives have been found in dominant classes as well. Their demands for the renovation of shrines of many different gods attest to this claim. Even one Rajput watchman for the wind turbines said, "the sound of wind blades draws out the spirits of the dead."

Some people from tribal communities have rather positive attitudes toward wind power development. A man in his 40s is working as an English teacher in Kabhia village near the mountain of Bhura Baba said that he was harboring a negative feeling about the excavation of the sacred hill, but the improvement of roads along with the construction of the wind farm would be welcomed, because his students could attend the school more safely. After several months of field research, information regarding this man's uncle showed that he has been receiving compensation

from the wind power company as the result of legal acquisition of his farm land, which was drawn up by the Rajasthan state office.

Some young man 21 years of age from *Mali*, a vegetable-growing caste, was working in a tourist hotel in Jaisalmer city. He said, "clean energy like wind power is necessary as an infrastructural source for Indian economic growth, and such energy has an important role for the life of citizens in the city like me." He comes from the village Bada Bagh. This village is famous for numerous medieval cenotaphs installed by royal families. This is known as a prominent tourist spot. Many people, including his family, have lost their jobs as tour guides for foreigners, because of fact the ancient scenery has been broken by the bristling of local wind turbines. This resulted in the decreasing of visitors, but in a motion defying all odds, this young man may no longer have his job as a tour guide in his village, but he succeeded in pursuit of a job in city hotel. His newly founded fondness of city life and steady income may have positively influenced his feelings toward wind power development. The influence itself was event enough to the point he began to feel pride about living in an urban city.

Discourse of this nature is rare, but I found some people express partially positive attitudes in regard to sustainable energy development. The development scheme itself has the ability to make a positive economic impact on some of the people involved, so naturally their feelings toward the changes taking place in their local places of residence are not completely bad.

It is important to not forget that people who are disproportionally displaced because of this phenomenon suffered negative drawbacks as a result of the development. These people have either lost their entitlements which formerly they held, or have become alienated from the redistribution of rights and wealth from the development taking place in their localities.

These questions remain: Do the Rajput or Brahmin peoples, former ruling caste, have modernized developmental logic and appropriated approaches to the discourse concerning their topographical awareness of their own lands? The answer to this is not simple. Many of these people have demanded the renovation of shrines in sacred mountains, and sometimes they even have used the funds procured from the companies

involved to install bathing reservoirs and steps (*ghat*) for prayer on the foot of the mountain. Though we might be able to find new modes of religious reconstruction from vernacular practices of their beliefs, we must not overlook the logic of the dominating discourse which is not merely an adopted one but is as a result of complex negotiations with multiple modern entities.

## Conclusion

In the end, the deprivation of the rights to access specific land and people's multiple voices against the developmental scheme for sustainable wind energy are in a sensitive situation. Identifying the visible grassroots movement toward the objection on how land is used, the demand for equal opportunities, the redistribution of rights, and allocation of wealth presented itself must be prominent. In contrast, signs of corrective consciousness would be found to share common narratives against the logic of developers working on the construction of wind farms. In other words, the reformation of recognition has been started toward a common narrative. This narrative is characterized by the collecting and reinterpretation of vernacular idioms against hegemonic logic of development, and how the ideas of locals in the religious sphere are working together. Supernatural beings themselves also have seemingly important roles to play as actors for anti-developmental action. It might be possible to find social agency raised from exchanges of relationships between people, land, and sacred existences (Gell 1998: 106–109; Ishii 2017: 218–219).

However, this kind of characterization toward the reorganizing of common sense has not been monolithic, but rather has been a possibility of diversification. This rings true when put in context along with the forced changes of the people's lives and the environment. This instance of development has not only partially restored the erstwhile structure of society but speaks to such centrality of the ruling and land-owing classes. This also reconstructs people's cognition of space and time. The people of Thar Desert involved in the developmental scheme for wind power have been continuing the use of negotiation as a means of a kind of logic and idiom usage that they could potentially gather.

Such linguistics tend to have been configured in a vernacular way for the sake of cognizing the historical world and the status quo of contemporary world. They are vacillating between lost entitlements and the rights that would be acquired or not to receive for that matter. Thus, the people in lower statuses have been clinging to the sentiment of sacredness, trying to reconcile it with the newly soaked logic of modernity. Whether this process of negotiation results in the integration of people's will and recognition toward a collective movement or not is variable. Perhaps my research may be seeking too much consistency from the combination of individual actors and their logic. More detailed investigation will be needed as to what each actor speaks about in each situation and which idioms are used to spin out words. In that sense, it seems that "the rhizomatic or tuber approach" is the most suitable methodology as D'Souza claims.

> This approach was in part inspired by a selective and somewhat opportunistic deployment of Deleuze and Guattari's (2005) engaging and persuasive notion of the 'rhizome'…. Such an interpretation, being analytically rhizomatic, would hopefully open up the possibility for a non-linear reading that does not only resist simple chronological arrangements but, significantly as well, helps us pursue multiple pathways for exploring problems and their implications. (D'Souza 2012: 10)

Though it may potentially yield results in the confusion and decentralization of the matter entirely, one must keep this in consideration. The institutionalization of rights from below has just now begun to act like a wave swirl.

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# Conclusion

India has been economically and politically undergoing drastic changes since its independence in 1947 and has been influencing the lives of people living in India. These changes have stemmed not only from formal projects by the government of India, but also from active participations by members of the Indian public through elections and social movements. Rather, we should say that direct or indirect negotiations at contact zones between formal and official enterprises and people's claims from below have brought about diverse transformations in people's lives. Those negotiations show the Indian way of being democratic and how dynamic the democratic India has been. This book attempts to clarify some facets of the Indian legal order by focusing on lived relationships between laws and the vernacularized concepts of various rights. Under the legal order, multiple actors in India have been experiencing and producing social dynamics by democratically participating in politics in contemporary India. In order to achieve this, we developed theoretical frameworks, "institutionalization from above" at the macro level and "institutionalization from below" through people's everyday practices at the micro level.


T. Yamamoto, T. Ueda (eds.), *Law and Democracy in Contemporary India*,
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The eight chapters in this book feature the cases, including the process of making the Indian Constitution, by re-examining the Constituent Assembly debates (Chap. 2), and political relations between the Indian government and the Supreme Court of India over judicial appointments under the Manmohan Singh and Narendra Modi governments (Chap. 3). These chapters set the analytical ground for the following chapters based on ethnographic research. These chapters also featured issues with regard to holding Indian and Tibetan citizenships among Tibetan refugees in India living under the dual legal order (Chap. 4), the Right to Information (RTI) movement that started as part of the peasant empowerment movement and the role it played in the institutionalization process of the right to know in India (Chap. 5), the issues surrounding the reservation system in contemporary India and the Dalit-Pradhan created at the local panchayat level because of the reservation (Chap. 6), human rights violations and protests against locals in Manipur (Chap. 7), judicial empowerment in the Dalit community in Delhi (Chap. 8), and germinating processes of how actors come to realize the concept of rights in Rajasthan (Chap. 9). All these chapters clarified some facets of the Indian legal order and social dynamics that actors featured in each contribution experienced, by analyzing cases with these theoretical frameworks, although each contributor has a different stance about which institutionalization should be emphasized in their contributions.

Combining the achievements of these chapters, we conclude as follows. The Indian legal order has been strongly directed under the huge influence of the reservation policy guaranteed in the Indian Constitution. The reservation has been providing a certain amount of accessibility for multiple actors. Limited but supportive effects of the reservation enabled people to financially and politically improve their living standards and reputations, in combination with environmental transformations surrounding India under the multiple influences brought about by factors such as international relationships and globalization. These transformations have been supplying people under hardship with opportunities to be educated and to be supported by multiple actors including international non-governmental organizations (NGOs). While many actors remain voiceless and inaccessible to political domains, some have

succeeded in acquiring the positions to make their claims in legal and political institutions, such as village panchayats.

In addition, these actors have started raising their voices in order to show their dissent against conditions surrounding them, and to hold their entitlements and redistributions by utilizing the concept of rights such as human rights, citizenship and the right to information. Under these trends, some have taken their cases to court through Public Interest Litigation and others have organized social movements to draw the attention of politicians and administrative staff members in governments. In some cases, the governments, the administrative staff and politicians were forced to listen to them, and to amend the Constitution and laws according to people's claims. By negotiating their claims using the concept of rights, these actors participate in Indian democracy.

Through these findings, we insist that the Indian legal order is the one that negotiations and interactions between governmental actors and people's claims based on the various concepts of rights have been constructed on the basis of legal systems, including the reservation system, stimulating people's active engagement in politics in the name of democracy. In addition, we claim that the arenas where these negotiations and interactions making legal order occur are beyond the presupposed dichotomy, that is, civil society and political society. Some instances in this book show that even Dalits utilize the concept of rights and file cases to acquire what they demand, although people like Dalits tend to be viewed as belonging to political society and such practices utilizing the concepts of rights have been regarded as ones within civil society where only elites can enjoy its advantages. We show that actors living under the Indian legal order set the foundation to acquire what they demand, not only in civil and political society, but also in the third arena.

We clarified that the concept of rights in the vernacularized form has enabled actors to actively participate in the democratic process of making the Indian legal order. In this sense, the concept of rights is a strong medium for people in India to improve their living standards. In fact, they have brought drastic transformations among actors, especially regarding their accessibility to resources and other issues on a daily level. People could achieve their purposes, more or less, through performing the concept of rights. At the same time, we have to see how the concept

of rights transforms people's worldview and drives people to act in different ways. In other words, the concept of rights is an accelerator motivates people's practices. While people think and practice with concepts, concepts themselves prescribe people's cognition and force people to practise. Thus, the concept of rights has hugely influenced the way people in India live under the Indian legal order in the twenty-first century.

However, the Indian legal order is not only inclusive but also exclusive, as some contributors in this volume show. It can be said that this legal order both gives minorities a voice through a widespread understanding of the concept of rights and continuously produces voiceless subalterns. We should be careful not to romanticize and rate the Indian legal order and the functions of the concept of rights within it unnecessarily highly. Not only people given a voice by the concept of rights but also people kept in silence emerge from the Indian legal order and people's practices supporting such an order. While I believe all contributors in this book have succeeded in describing what contemporary democratic India and its legal order are like, what we have to do is to keep on carefully observing how the Indian legal order and the concept of rights under it enable people to engage in democratic politics and how they make people voiceless.

# Index[1]



[1] Note: Page numbers followed by 'n' refer to notes.


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