The Republic of Writs: Litigious Citizens, Constitutional Law and Everyday Life in India (1947-1964)

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A DISSERTATION
PRESENTED TO THE FACULTY
OF PRINCETON UNIVERSITY
IN CANDIDACY FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE
BY THE DEPARTMENT OF HISTORY

Advisers: Gyan Prakash and Hendrik Hartog

June 2013
Dissertation Abstract

This dissertation explains how the Indian Constitution that came into force in 1950, became part of the lived experience of ordinary Indians during the transition from the colonial state to the postcolonial republic. The Constitution by expanding the powers of the state to effect social and economic transformation and simultaneously granting citizens judicially enforceable rights, fundamentally transformed the relationship between citizens and the state. Methodologically, this dissertation advances beyond doctrinal analysis and judge-centred histories to understand how law operates in a culture i.e. what people believe law is and what they do with this knowledge as they work out their daily lives.

Drawing upon previously unexplored archives at the Supreme Court of India, this dissertation examines significant constitutional challenges by citizens against new transformative state initiatives to map how the constitution emerged as a field of politics that came to dominate, structure, frame and constrain everyday life. Each case examined uncovers the deepening and reach of the constitution and is representative of a distinct new legal strategies that were deployed in that period. These include challenges to the alcohol prohibition laws in Bombay, to the system of permits and licenses used to control the economy, to the cow protection laws in Bihar, UP and MP, and to the law suppression immoral traffic in women. Through the lens of litigation over police powers, the economy, religion and gender, this dissertation traces how colonial governmentality was reworked through the courts in the 1950s.
This history of early postcolonial constitutionalism from below forces a re-examination of the debates over the totalizing state, autonomous subalterns and the dichotomy between civil and political society. Through new archival discoveries it demonstrates that law and litigation were not resources that were limited to elites. Groups marginalized by law and legal regulation exhibited greater legal consciousness. The language of constitutionalism and proper procedure, enabled minorities who were not represented in the electoral consensus to confront arguments based on majoritarianism, economic efficiency, and social reform. Individual rights therefore were inextricably linked to community interests, and the ability to litigate was a networked resource.
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Acknowledgements

This dissertation became possible because of the encouragement and assistance of several people and institutions. I have been extremely fortunate in having both Gyan Prakash and Hendrik Hartog as my advisors, and to both I owe a great debt of gratitude. Gyan Prakash guided me through the tricky shores of South Asian history and constantly encouraged me to take on bigger questions and to be imaginative. His ability to make abstract theory relevant to the mundane realities of everyday continues to inspire. It was over the course of many long conversations with him that I was able to first articulate many of the ideas that undergird this project. I am immensely grateful to Gyan Prakash for his vision, his advice, his incisive comments, the long addas and taking me to task for my use of passive voice in writing

Hendrik Hartog helped me bridge the worlds of a lawyer and a historian. He taught me that law matters but not necessarily in the ways that lawyers imagine it does. As a historian he helped counterbalance many years of law school by showing me that legal history was not just about doctrine but also about "habits and dispositions revealed by law," and of "individuals caught in the web of the law". As a lawyer, he pushed for greater rigor and precision in my writing and demanded more skepticism about the motives of my protagonists. It has been a privilege to train with him and I remain grateful for the many kindnesses that he has shown me.

I owe a tremendous debt of gratitude to Bhavani Raman, without whose generosity and intellectual stimulation, my experience of graduate school would have been significantly poorer. Her seminar on Law and Society in Colonial India, and her gift for bringing together seemingly unrelated materials to make innovative connections, set
my mind ablaze with ideas. Bhavani Raman pushed me to reflect on how law and legal sources challenged our understanding of the discipline of history. I would also like to thank her for patiently engaging with multiple drafts of my work.

I have the deepest admiration and appreciation for Kim Lane Scheppel, who took an interest in my project since my first day at Princeton. Her commitment to interdisciplinary scholarship and her cosmopolitan approach to comparative constitutional law continue to inspire. I am thankful for her thoughts, advice and encouragement. I am indebted to Kim, Leslie Gerwin and the Law and Public Affairs Program (together Princeton’s invisible law school) for providing support and resources that made this project possible, and for sustaining a vibrant community life for legally engaged students at Princeton.

Since a chance meeting seven years ago, Mitra Sharafi has been a friend and guide in charting the field of South Asian legal history. Through her generosity with her time and advice, her infectious enthusiasm for her subject, her fostering a community of scholars on South Asian legal history and her courage and cheerfulness in times of adversity; Mitra sets the gold standard for the kind of academic I would aspire to be. I am particularly thankful to her for reading and commenting upon early versions of the first three chapters.

I am grateful to Carol Greenhouse and Partha Chatterjee, both for graciously agreeing to serve on my committee, and for being inspiring teachers in my early years of graduate school. Emma Rothschild commented on several presentations of my work and pushed me to think more carefully about the idea of economic life. Bruce
Ackerman introduced me to the raucous debates over American constitutionalism and taught me to think about popular constitutionalism. V.S Elizabeth nourished history and critical thinking at the National Law School in Bangalore, I am grateful for her support over the years and for giving me the first opportunity to teach history. I am greatly indebted to Chitra Srinivas for making history exciting and inculcating a historical sensibility despite the limitations of a state mandated exam oriented syllabus.

I owe huge debts to several institutions. The Graduate School, the Department of History at Princeton University and the Princeton Institute for International and Regional Studies generously supported my travels to archives and libraries in Europe and Asia. Judith Hanson, Inga Huld Markan, Kristy Novak, Lauren Kane and Reagan Maraghy made my interactions with administration and finances considerably smoother. I am grateful to John Darley and the Fellowship of Woodrow Wilson Scholars for supporting me for the last two year of graduate school, and giving me the luxury of focusing entirely on research and writing. The Dissertation Boot Camps sponsored by the Princeton Writing Program helped get significant sections of writing done. The Centre for History and Economics provided me with the space and funding to complete the dissertation and to make a final research trip to India.

This research was only possible because Justice K.G Balakrishnan, then Chief of Justice of India, graciously granted permission to consult the records at the Supreme Court of India. I am grateful to Mr Gulati, Sidharth Chauhan and the staff of the Supreme Court Record Room and Museum for making my time at the Supreme Court so rewarding. I would like to thank the staff at the National Archives of India, the Nehru Memorial Museum and Library and the Indian Law Institute in Delhi; the Punjab State
Archives in Chandigarh; the Maharashtra State Archives, the Forum for Free Enterprise and the Films Division of India in Mumbai, the Centre for South Asian Studies at Cambridge, the Asian and African Studies Collection at the British Library in London, and the Rockefeller Foundation Archive in New York. I am particularly grateful to Jaya Raman at the National Archives, Antonia Moon at the British Library and Lucas Buresch at the Rockefeller Centre Archives for their help in navigating their archives. I am also especially grateful to the staff of the Princeton Inter-Library Loan department for their extraordinary efforts to procure materials.

One of the pleasures of working on postcolonial India was the ability to talk to those who had lived through and participated in the events I study. I feel especially privileged to have met A.G Noorani, B.Sen, B.B Majumdar, Imran Khan, N.M. Hingorani, Kapila Hingorani, Rajeev Dhavan, Upendra Baxi and Mr Wadhwa. I am grateful to Raju Ramachandran for bringing some key figures to my attention and facilitating the meetings. Having been legal researchers in India in the 1950s, both Marc Galanter and George Gadbois, provided a wealth of information and generously shared documentation which was critical to the thesis.

I would like to thank David Gilmartin, Iza Hussin, Nivedita Menon and Ajay Skaria for their insightful comments on sections on the dissertation that were presented at various conferences. Portions of chapter one were presented at the Annual Conference on South Asian Studies at the University of Wisconsin-Madison in 2010, at the Colonialism and Imperialism Workshop at Princeton University in 2011, at the Democracy, Citizenship and Constitutionalism Workshop at the University of Pennsylvania in 2011, at the LEGS workshop at Princeton in 2011, at the Kings India Institute and at the
“Recovering Histories of Law in Asia” Conference in 2013. The first part of chapter two was presented at the conference on Economic Sociology of Law at the School of Oriental and African Studies in 2012. Portions of chapter three were presented at the Annual Conference of the Law and Society Association in 2011 and at the History and Economics Seminar at the University of Cambridge in 2013. An early draft of chapter four was presented at the IXth South Asian Studies Graduate Conference at the University of Chicago and at the 3rd Law and Social Sciences Research Network Conference at the University of Peradeniya in 2013.

Chapter one of my dissertation benefitted from crucial feedback from my fellow participants at the Hurst Workshop on Legal History held at the University of Wisconsin, Madison in 2011. I am grateful to Barbara Welke Young for making the Hurst Workshop one of my most exciting academic experiences so far.

This thesis has benefited from exchanges with many scholars, at conferences, over emails and coffee. I am grateful to Pratiksha Baxi, Joya Chatterji, Sitaramam Karkarala, Sunil Khilnani, Atul Kohli, Pratap Bhanu Mehta and Rahul Sagar for the wide-ranging conversations on the nature of democracy and citizenship in India. Conversations with Niraja Gopal Jayal and Karuna Mantena helped me think through the stakes of writing a history of political thought. Ritu Birla and Elizabeth Kolsky pushed me to think through the implications of colonial law in a postcolonial state. Michael McCann introduced me to the literature on law and social movements and shared his own experiences of working with the labor movement. Elizabeth Mertz drew me towards thinking about the cadences of legal speech and language. Working on a book project with Malcolm Feely and Terry Halliday offered new insights into the research on the
legal profession. William Gould provided important leads about archival sources for Uttar Pradesh in the 1950s. Stephen Legg and Prabha Kottiswaran both generously shared their unpublished work on sex trafficking with me. Rachel Berger introduced me to the methodological challenges of using advertising and visual materials as sources. Zarin Ahmad shared her experiences as an ethnographer of the Qureshi community. Lawrence Liang directed me towards the cinematic portrayal of justice in the 1950s. Dinyar Patel helped me track down biographical details of Parsi protagonists and shared in the joys and perils of working with private papers in the National Archives. Rahul De supplied critical references to Indian political economy and shared his unpublished research. Daniel Botsman and Lily Chang directed me to the new literature on constitutionalism in East Asia.

The comments and camaraderie offered by the members of my dissertation writing group, Rotem Geva, Radha Kumar and Nurfadzilah Yahaya, made the process of writing richer and more enjoyable. I am very appreciative of Catherine Evans, Julia Stephen and Alden Young’s comments on various portions of my dissertation. Durba Mitra was an important interlocutor during the critical stage of conceptualizing my prospectus. I owe a tremendous debt of gratitude to Sumati Dwivedi, who stepped in at the very last minute, to help with proofreading and disciplined many wayward footnotes. TCA Jayant helped collect a much delayed delivery of material at the Films Division. Prashant Reddy offered detailed advice on various copyright laws.

I feel privileged to be a part of a growing community of scholars who are engaging with questions of law and society in South Asia. Their friendship, camaraderie and conversations have greatly enriched the process of writing. I am grateful to Yael
Berda, Arudra Burra, Sidharth Chauhan, Sandipto Dasgupta, Arvind Elangovan, Madhav Khosla, Arvind Narrain, Eleanor Newbigin, Kalyani Ramnath, Nicholas Robinson, Julia Stephens and Arun Kumar Thiruvengadam.

Friends and colleagues at Princeton and elsewhere filled my days with happiness and sustained the project in many ways that I cannot adequately acknowledge. Rohit Lamba has been the best housemate ever. I want to particularly thank Rohit Lamba and Arijeet Pal for their deep friendship, they brought about a sense of balance during the most turbulent times, and through their 90’s Bollywood soundtrack, some much needed turbulence in periods of calm. Nurfadzilah Yahaya has been pillar of support, and a constant provider of cupcakes and good cheer. Franziska Exeler and Rotem Geva have been friends and important intellectual interlocutors since the early days of reading subaltern studies together.

I want to particularly thank Anthony Acciavati, Sare Aricanli, Nimisha Barton, Ritwik Bhattacharjo, Omar Cheta, William Deringer, Catherine Evans, Nabaparna Ghosh, Matthew Grohowski, Jitendra Kanodia, Kyril Kunakhovich, Radha Kumar, Jebro Lit Lay, Sarah Milov, Nikhil Menon, Kanta Murali, Darren Pais, Ninad Pandit, Farah Peterson, Ronny Regev, Padraic Scanlan, Margaret Schotte, Vinay Sitapati, Avani Mehta Sood and Alden Young. Their daily presence and fellowship made it a joy to live in Princeton.

Beyond Princeton, Mitra Sharafi, Kriti Kapila and Kaveri Gill, provided constant encouragement and lent a sympathetic ear to the travails of dissertation writing. Durba Mitra, Riyad Koya and Tariq Omar Ali greatly enlivened my time at the archives. Bipin
Aspatwar, Menaka Guruswamy, Arundhati Katju and Arjun Krishnan cheerfully accepted the role of native informants of the courts at Delhi that I thrust upon them, and patiently answered my questions on procedure, filing and judicial politics. Anubhuti Agrawal, Sundip Biswas, Ashwin Bishnoi, Sumona Bose, Ashvin Iyengar, Chandra Iyengar, Neha Kaul, and Vishnu Vardhan Shankar, generously threw open their houses and played host in New York, London and Mumbai.

I have been blessed with a preponderance of aunts (and a few uncles) who made the process of research and writing much easier. Suparna Sarkar, Debabrata Sarkar, Deepa and Mala welcomed me into their home with love and affection, making the transition from India to the United States much easier. I would not have been able to do this without their quiet presence and constant support. I am grateful to Arup and Swapna Roy for their encouragement and for regular cake packages that sustained me through long winters. In Delhi, Mohua Mitra and Ella Datta are a bedrock of support and affection, and have through their own work highlighted the importance of being a good writer. I am grateful to Sanjukta Datta for making me see the lighter side of being a historian.

Having begun our academic journeys at the same time, Surabhi Ranganathan has been a constant companion through the process (though she will remind me that she finished a year earlier), it is almost impossible to list the many ways that her friendship sustains me. My harshest critic and fiercest supporter, she makes me strive to be a better scholar.
My deepest gratitude goes to my family. My grandmother, Jyotsna Day, has been a beacon of unstinted love and comfort. My grandparents, Himadri Shekhar Day and Protima Mitra, both saw me leave India to begin this project and are not here to see me finish it. I hope my work will redeem their faith in me. I have often taken my brother Rahul De’s support and affirmation for granted, but living away from home made me realize how important his support has been to me and how much I miss him. His enthusiasm for new ideas, his diligence in research and his impatience with ‘fashionable trends’ have kept me grounded. My parents, Anuradha Mitra De and Ranjan De, have been my foundation, sustaining me with their love and confidence. They inculcated the love for books at an early age, without which I would have been neither a lawyer nor a historian. Without my mother’s periodic reminders to stop idling and get on with work, this dissertation would not have been completed. I would like to dedicate this dissertation, with love and gratitude, to them.
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<td>All India Women’s Conference</td>
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<td>ASMH</td>
<td>The Association for Social and Moral Hygiene</td>
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<td>BPA</td>
<td>Bombay Prohibition Act, 1949</td>
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<td>CAD</td>
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<td>CrLJ</td>
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<td>ECA</td>
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<td>ESA</td>
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<td>India Law Reports</td>
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<td>National Archives of India</td>
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<td>NMML</td>
<td>Nehru Memorial Museum and Library</td>
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<tr>
<td>MSA</td>
<td>Maharashtra State Archives</td>
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<td>SC</td>
<td>Supreme Court of India</td>
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SCR  Supreme Court Reports

SCRR  Supreme Court Record Room

SITA  Suppression of Immoral Traffic in Women and Girls Act, 1956
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<td>Jan Sangh Silenced, <em>Shankar’s Weekly</em>, 22 May 1955*</td>
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<td>Young Woman, <em>Our Constitution</em> (India, 1950)*</td>
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<td>Tug of War, <em>Shankar’s Weekly</em>, March, 1953</td>
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Introduction

Do constitutions actually matter? Many argue that they do not, pointing out that the content, success and failure of a constitution are determined by factors that are external to the text itself. Constitutional law has been portrayed as merely epiphenomenal to social and economic conditions. The problem is rendered even more acute in the non-Western world, where liberal constitutional values are seen as alien to the society they seek to govern. And yet, constitutions mark transformations of polity and codify moments of revolutionary change. How do people understand and experience a new order marked by a constitution?

Although there are some accounts of constitution making and constitutional design, the processes through which a society comes to adopt a constitution still remain underexplored. Why has the Indian Constitution, despite being the longest surviving constitution in the postcolonial world, received little attention from historians and social scientists?

This is possibly because constitutionalism in India defies easy explanations. Constitutionalism is based on the desirability of the rule of law as opposed to the arbitrary ‘rule of men’, but both seem to exist simultaneously in India. On the one hand, India has a visibly vibrant constitutional culture. The Indian Supreme Court has been frequently described as the most powerful constitutional court in the world, exercising wide powers of judicial review. A constitutional court is the final authority on interpreting the Constitution and is tasked with

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ensuring that its limits are not transgressed. Aided by a robust bar, supported by the state and enjoying tremendous public support, the courts have come to play an all-pervasive role in public life, so much so that scholars argue that “there is not a single important issue of political life in India that has not, by accident or design, been profoundly shaped by the Supreme Court’s interventions”. The state is frequently taken to task and governmental decisions that violate the constitutional limits are challenged and overturned. More significantly, self-imaginings, interests, identities, rights and injuries of citizens have become saturated with the constitutional language, and even radical social and political movements are constrained to engage with law and constitutional structures. Class struggles increasingly morph into class action cases.

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

The colonial stereotype of the litigious native fails when tested empirically. Since independence, the high visibility of constitutional litigation stands in sharp contrast to the low levels of civil

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5 It has been observed that it would take 320 years to clear the backlog of pending cases before Indian courts. "Courts will take 320 years to clear backlog cases: Justice Rao", *Hindustan Times*, March 2010, http://articles.timesofindia.indiatimes.com/2010-03-06/india/28143242_1_high-court-judges-literacy-rate-backlog (As visited on 6 August 2012).

litigiousness in India, with most citizens preferring to avoid the courts when resolving private disputes.\(^7\)

This dialectic of “law and disorder” that is visible in India, is similar to processes that John and Jean Comaroff have identified as emerging in postcolonial Africa in the 1990s. They argue that the law is ascribed a life-force of its own and the people’s faith in it sustained because “the promulgation of a New Legal Order...signals a break with the past, with its embarrassments, nightmares, torments and traumas”.\(^8\) However, this growing faith in constitutionalism is not attributed merely to regime change; the Comaroffs link it to the pervasiveness of neo-liberalism and the growth of transnational organizations and human rights networks in the 1990s.\(^9\) Both neo-liberalism and globalization lead to a greater dispersal of governance and the fragmentation of state authority, granting law a greater communicative force. Scholars studying India, following the Comaroffs’ trajectory, make a similar argument about India, emphasizing the simultaneous expansion of the role of public interest litigation over questions of rights and governance with the growth of neo-liberal economic policies.\(^10\)

However, as this dissertation demonstrates, the imbrications of the Constitution in daily life have a considerably longer history in India than in postcolonial Africa, and follow different trajectories. Within days of the adoption of the new Constitution, thousands of citizens began


invoking the Constitution when challenging state action. Conflicts with the state that had been negotiated through a variety of channels in colonial India, be they street politics or backroom negotiations, began to migrate to the courts. However, these new, legal and constitutional channels for conflict emerged at a moment of state expansion and of consolidation, not withdrawal, of authority. This ‘moment’ predates neo-liberal economic policies and instead marks the establishment of greater state control over the market.

This dissertation explores how the Indian Constitution, a document with alien antecedents that was a product of elite consensus, became part of the lived experience of ordinary Indians. It traces the process through which the Constitution emerged as the dominant field for politics. In doing so, it breaks new methodological ground by studying the Constitution through the lived experience of people, rather than the disciplines of intellectual history, constitutional law or political theory. Using previously unexplored archives at the Supreme Court, this dissertation charts how the Constitution came to dominate, structure, frame and constrain everyday life in India.

**After Midnight: Continuity and Change**

India became independent at the stroke of midnight on 15\textsuperscript{th} August, 1947. Three years later the Constituent Assembly enacted a new Constitution declaring the state to be a “sovereign democratic republic”. What changed with the coming into force of the Constitution? The Supreme Court of India would later describe this moment thus: “at one stroke territorial allegiances were wiped out and the past obliterated …., at one moment in time the new order was born with its new allegiances, springing from the same source all grounded on the same basis,
the sovereign will of the peoples of India with no class, no caste, no race, no creed, no
distinction, no reservation”. ¹¹

Members of the Constituent Assembly and commentators since then have expressed
skepticism about this official narrative of transformative change through the Constitution. The
critiques offered are both structural and cultural.

Structural critiques have usually focused on the non-representativeness of the Constituent
Assembly. Its opponents pointed out that the assembly was not popularly elected and consisted
of members nominated by provincial assemblies that were themselves elected on the basis of
very restricted franchise. The ‘people’ had little input in the largely oligarchic process of
constitution making. ¹²

Scholars have argued that despite the incorporation of universal adult suffrage and a bill
of rights, the legal framework of the Indian republic was rooted in colonial laws and institutions
that were designed to establish and maintain centralized control. ¹³ The new Constitution retained
several provisions of the colonial Government of India Act, 1935, and copied close to two-thirds
of its text, including provisions dealing with the basic structure of the polity, federalism and
emergency powers. ¹⁴ The Government of India Act, 1935 was designed to facilitate more
centralized control and as such, explicitly conferred broad emergency powers upon the central
government. Winston Churchill was driven to remark that these powers would “rouse”

¹² Upendra Baxi, “The Little Done, the Vast Undone: Reflections on Reading Granville Austin’s the Indian
¹³ Anil Kalhan, “Constitution and Extra Constitution: Emergency Powers in Postcolonial Pakistan and India,” in
*Emergency Powers in Asia: Exploring the Limits of Legality*, ed. Victor Ramraj and Arun V. Thiruvengadam
¹⁴ Subhash C. Kashyap, *Our Constitution: An Introduction to India’s Constitution and Constitutional Law* (New
Mussolini’s envy. These controversial emergency provisions of the Indian Constitution would allow the central government to proclaim a situation of emergency and suspend fundamental rights, restrict access to courts, extend the life of parliament and dissolve elected state assemblies.

The new fundamental rights were not absolute and they could be constitutionally circumscribed on the grounds of maintaining the sovereignty and integrity of India, the security of the state, good foreign relations, public order, public health, decency and morality among others. As Somnath Lahiri, the sole Communist Party member in the Constituent Assembly remarked, “many of these fundamental rights have been framed from the point of view of a police constable”. Structurally, most of the institutions of colonial government continued unchanged, including the police, the army, the judiciary and the district administration.

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

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17 Art 19 (2) to Art 19(6), Constitution of India, 1950.
18 Somnath Lahiri (Bengal: General), Constituent Assembly Debates, Tuesday, 29 April 1947.
20 In contrast, the US constitution has been amended twenty-two times in over two hundred years. The conflict between the Supreme Court and parliament of India over the question of amendments has dominated the literature.
First Amendment in the United States granted the freedom of speech, the first amendment in India placed greater restrictions upon it.\textsuperscript{21}

The second line of critique argues that, given the cultural and material foundations of the new state, it was impossible for the Constitution to bring about the massive social and economic transformations it promised.\textsuperscript{22} Unlike the West where the processes of modernity stabilized before the advent of popular democracy, in India the processes emerged simultaneously, each affecting and hindering the other.\textsuperscript{23} Drawing on a Gramscian notion of “passive revolution”, political scientists argue that the emerging bourgeoisie that dominated the new leadership lacked the social conditions to establish a complete hegemony over the new nation. Thus, the bourgeoisie allied with older dominant classes, and formed an alliance that only partially appropriated the popular masses, and therefore limited the ability of the state to emerge as a modernizing force.\textsuperscript{24} As a result, a gap arose between the elites comfortable with Weberian rationality, and the people whose everyday discourses were not structured through formal rationality at all. While some scholars focus on social and material limitations to the emergence of the state, others have pointed to the absence of a cultural vision, due to which the new postcolonial state remained an outgrowth of the colonial state, bound up in the “post-

Enlightenment, modern nation state project". In such a situation, scholars argue, the subaltern citizen blinded by the spectacle of the law eventually fails when she tries to claim her new status as a citizen.

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

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28 The essays in the Bhargava volume remain the most important work dealing with several aspects of the Constitution. The bulk of the intellectual history of modern India however remains concerned with the leading figures in the pre-independence period. More specialized monographs have dealt with aspects such as minority rights and democracy: see Rochona Bajpai, *Debating Difference: Groups Rights and Liberal Democracy in India* (New Delhi: Oxford University Press, 2011) and Pratap Bhanu Mehta, *The Burden of Democracy* (New Delhi: Penguin, 2003).
For these scholars, the institution of adult suffrage and the institutionalization of the social revolution have come to stand out as markers of radical change in the Indian Constitution. The institutionalization of universal franchise, in a deeply hierarchical society, when franchise had only recently been extended to women, people of colour and working-class men in various ‘mature’ Western democracies was a revolutionary act. Franchise without restrictions was a sharp break from the very limited franchise linked to communal identities and property qualifications that had been provided through various colonial reforms.\(^{29}\) As Sunil Khilnani evocatively describes it, the imaginative potency of democracy rests “in its promise to bring the alien and powerful machine like that of the state under the control of human will, and to enable a community of political equals before constitutional law to make their own history”.\(^{30}\)

More remarkably, the question of economic and social deprivation was made central to the Indian Constitution. The preamble to the Constitution guaranteed social, economic and (finally) political justice to all citizens. The Constitution itself laid the ground for land reforms by limiting the right to property, provided for constitutionally mandated affirmative action, abolished untouchability and human trafficking, allowed for special provisions to be made for women and children, and gave rights to religious and linguistic minority groups. Under the Directive Principles of State Policy (hereinafter “DPSP”), the Constitution laid out the ‘fundamental principles’ of governance including the equitable distribution of resources, the provision of free and compulsory education to children, equal wages to men and women,


providing just conditions of work and a living wage, the prohibition of alcohol, abolition of child labor, and improve nutrition and public health.\textsuperscript{31} Despite the implicit hierarchy in terms of implementation between the fundamental rights and DPSP, Dr. Ambedkar reassured the Constituent Assembly,

“…the intention of the Assembly is that in future both legislature and the executive should not merely pay lip-service to these principles enacted in this part but that they should be made the basis of all executive and legislative action that may be taken thereafter in the matter of governance of the country”.\textsuperscript{32}

The DPSP incorporated a wide range of constitutional aspirations, ranging from economic questions to moral precepts.\textsuperscript{33} They also linked freedom to the removal of social and economic inequality. Uday Mehta has argued that promising social and economic change through a liberal constitution was a unique experiment in India that challenges Hannah Arendt’s thesis that every attempt to resolve social questions of inequality and material destitution by political means would lead to terror and absolutism.\textsuperscript{34}

Despite their celebration of the radical departures of the constitutional text, intellectual historians remain cautious about the impact of the Constitution. They have reiterated that the Constitution was an elite project. In their narrative, the institution of democracy through the

\textsuperscript{31} See Articles 36-51, Constitution of India, 1950.
\textsuperscript{32} Dr. B.R Ambedkar, \textit{Constituent Assembly Debates}, 19 November 1948.
Constitution did not emerge from popular pressures, nor was it wrested from a state; Indian democracy, in their view, was a gift to the people of India by their political elite. Khilnani cautions us that the powerful ideas of democracy and equality persuaded few outside “intellectual and English speaking circles” and did not have the backing of any particular powerful group. It is not surprising that engagements with democracy and constitutionalism in India have turned on readings of the ‘founding fathers’.35

Intellectual histories of the Indian Constitution share an assumption with the critical political scientists when they argue that there remains a gap between the constitutional text and the society it governs. The Constitution was not authentically Indian or organic to India.36 In this, intellectual historians echo critiques by several members of the constituent assembly, who had argued that the Constitution was an alien document that would fail to work as it was made in ‘slavish imitation’ of Western constitutions.37 A disappointed member regretfully said, “we wanted the music of the veena or the sitar, but we have the music of an English band”.38 Even the authors of the Constitution remained painfully aware that its founding notions were not available as lived experience to the majority of its citizens. Dr. Ambedkar in his closing speech to the Constituent Assembly observed that with the commencement of the Constitution, India

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36 This reflects an older debate over the question of legal transplants dating back to Savigny. The debate at its crudest is between scholars who believe that a certain autonomy of law and can easily be transferred and those who argue that law is deeply embedded in society and can only survive a transfer if it matches the social and economic conditions of the new society. For a detailed review, see Assaf Likhovski and Ron Harris, eds, *Theme Issue: Histories of Legal Transplantations, Theoretical Inquiries in Law*, 10.2 (2009).
37 Damodar Swarup Seth (United Provinces: General), *Constituent Assembly Debates*, 5 November 1948. The term ‘slavish imitation’ gained some currency among critics in the Constituent Assembly and was used a few times. See also Raj Bahadur (Matsya Union), *Constituent Assembly Debates*, 9 November 1948; B. Pocker Sahib Bahadur (Madras: Muslim) *Constituent Assembly Debates*, 9 November 1948.
entered a life of contradictions, recognizing equality in political life but denying, by reason of social and economic structures, equality in other spheres.\textsuperscript{39}

**The Republic of Writs**

Despite these apprehensions, the Indian Constitution quickly came to dominate public life. The object of this dissertation is to study ‘constitutional consciousness’ as it exists in the minds of people. It charts the dialectic between the constitution as “politics of state desire” and the constitution as “articulating insurgent orders of expectations from the state”.\textsuperscript{40} The former, Baxi suggests, describes how the constitution founders and the current government imagined the constitution will operate. The latter, is generated by people who have their own expectations and demands from the constitution.

In service of this project of dialectical mapping, this dissertation turns to a set of provisions in the Constitution that have been largely ignored despite marking a clear break from the colonial past, in addition to the radical provisions of equality discussed above. These are the provisions that provide the right to constitutional remedies, which allowed any citizen of India to move the Supreme Court for the enforcement of fundamental rights granted in the Constitution.\textsuperscript{41} The powers granted to the High Courts were even wider, and they were empowered to issue remedies in forms of writs against the state for the violation of fundamental rights, legal rights and “any other matter”.\textsuperscript{42} While political scientists and historians have discussed the substance of the fundamental rights provisions, they have largely ignored the section of remedies as mere procedure. However, at one stroke these ‘procedural’ provisions of the Constitution empower

\textsuperscript{39} Dr. B.R Ambedkar, *Constituent Assembly Debates*, 25 November 1949.
\textsuperscript{41} Articles 32 of the Constitution of India, 1950.
\textsuperscript{42} Art. 226 of the Constitution of India, 1950.
citizens to challenge laws and administrative action before the courts, and greatly enhance the powers of judicial review.

The introduction of these new remedies, at a moment when the state began to expand and intervene in everyday lives in an effort to achieve social and economic transformation, led to a massive explosion of litigation before the Indian courts, one that both the state and the judiciary had been unprepared for. Almost the entirety of litigation in colonial India was civil litigation, often involving property disputes, between two or more private parties. Civil litigation rates actually declined after independence, while litigation against the state increased exponentially.43

Indian litigants had attempted to approach the colonial judiciary for redress against the colonial executive. There was a brief period in the late eighteenth century when the judiciary in Calcutta and Bombay clashed repeatedly in an attempt to impose order over an unruly legal frontier.44 However, much of this confrontation was framed in terms of a liberal imperial justice that positioned a judiciary representing the interests of the Crown and Parliament against a corrupt and unruly Company state.45

The narrative of judicial review in colonial India is one of constant erosion of authority over executive actions. The British parliament curtailed the jurisdiction of the Supreme Court of Calcutta in 1781 and made the Governor’s Executive Council the final body of appeal for all areas outside the city of Calcutta. These limitations were extended to Madras in 1800 and

43 Galanter (2009).
45 Mithi Mukherjee, India in the Shadows of the Empire: A Legal and Political History (1774-1950) (New Delhi, Oxford University Press, 2010).
Bombay in 1823.\textsuperscript{46} With the end of the Company state in 1857 and the enactment of the Indian High Courts Act, 1861, the powers of the High Courts were pruned and these confrontations became rarer. Chief Justice Ameer Ali of the Calcutta High Court was driven to wryly remark that his court had all the powers of the King’s Bench in England, provided that “England in India was confined to (a) Calcutta and (b) to British subjects i.e. servants of the Crown”.\textsuperscript{47}

Prior to the commencement of the Constitution, only the High Courts of Calcutta, Bombay and Madras (Allahabad received its writ jurisdiction in the 1920s) had the jurisdiction to issue writs, and even this was only available to and enforceable against persons and authorities within the city limits as determined in the eighteenth century. The courts outside presidency towns had no powers to issue writs. Even this limited remedy was a subject of much contestation from the executive, and the scope of writs was eroded leading to the belief that a ‘writ of liberty’ was a contradiction in a regime of conquest.\textsuperscript{48} Further legislation sought to render the government immune from prosecution. Various indemnity clauses made it mandatory to acquire the consent of the Governor-General before the institution of proceedings against government officials, and the courts were precluded from investigating the validity of government orders.\textsuperscript{49} All matters relating to revenue or its collection were excluded from the jurisdiction of the High Courts, ensuring that the chief objective of the colonial government remained unhindered. Constitutional historian Arthur Berriedale Keith described the period of Crown rule as “the golden age of bureaucracy”.\textsuperscript{50}

\textsuperscript{46} A.T. Markose, Judicial Control of Administrative Action in India (Madras, Madras Law Journal, 1956) 88-91.  
\textsuperscript{47} In Re Benoarilal Roy, (1944) 48 C.W.N. 766.  
\textsuperscript{49} For example, S.270 of the Government of India Act, 1950; S.197 of the Criminal Procedure Code, 1898, S.16 of the Defence of India Act, 1914 and 1939.  
\textsuperscript{50} Arthur Berriedale Keith, A Constitutional History of India (London: Methuen and Co, 1937).
Indian nationalists and liberal reformers repeatedly made demands, which the colonial government consistently ignored, for greater power and autonomy to the judiciary and for the establishment of a Supreme Court with broad powers.\textsuperscript{51} Judicial review was expressly included in the constitutional text not just to provide remedies for breach of fundamental rights but to open up the actions of the entire executive to scrutiny. The original draft of the Constitution had revoked the immunity of the government for writs only to the extent that they violated the fundamental rights provisions. Dr. Ambedkar moved what he described as a “small but consequential amendment” that provided that nothing in this clause revoking governmental immunity shall be construed as restricting the right of any person to bring action against the government of India.\textsuperscript{52} Sir Alladi Krishnaswami Ayyar, who served on the Committee that drafted the powers of the Supreme Court, emphasized that Ambedkar’s amendment clarified the right of aggrieved persons to move the High Court for writs, not just when fundamental rights were violated, but also whenever the government overstepped the limits of its power in exercising its quasi-judicial authority or in implementing statutory provisions.\textsuperscript{53} Article 225 of the Constitution expressly stated that the High Courts were granted jurisdiction over questions of revenue collection, destroying one of the oldest bulwarks of executive immunity.

It is curious that the Congress-dominated Constituent Assembly voluntarily granted such significant powers of judicial review, when they were rightly suspicious of the judiciary and emboldened by public support. The answer lies partially in the nationalist challenge to the British that accused them of violating the rule of law in practice. A new regime would set itself apart

\textsuperscript{51} Per the Nehru Report, there were five attempts in the 1920s to set up a new Federal Court. The Indian Reforms Commission in 1919 made no mention of the judiciary. The Simon Commission in 1930 justified their non-interference in the judiciary by the legitimacy of colonial courts in India, which were used by large number of ‘natives’.
\textsuperscript{52} Dr. BR Ambedkar (Bombay: General), CAD, 8 September 1949.
\textsuperscript{53} Alladi Krishnaswami Ayyar (Madras: General), CAD, 8 September 1949.
from the colonial regime by reclaiming and instituting the rule of law. More cynical readings suggest that the judicial review was uncontroversial in the absence of a strong tradition of judicial interference with the executive. A closer reading of the workings of the assembly makes it clear that several members, particularly practicing lawyers, saw it almost as a natural step.

The inclusion of constitutional remedies in the form of wide writ jurisdiction of the courts in newly independent India, radically transformed the practices of governance in ways the Constitution drafters did not expect. As the new state consciously sought to mould the behavior of its citizens, many found their livelihoods and ways of life challenged. The postcolonial state drew its legitimacy from its democratic mandate and development agenda, making it particularly hard for electoral minorities to challenge its agenda publically. A range of individuals disaffected with the policies of the new state, ranging from municipal sweepers to maharajahs, resorted to the courts under writ jurisdiction.

The popularity of the courts arose not only from the nature of the remedies available, but from the speedier hearing accorded to writ petitions in a system rife with endemic delays. Valued at a flat fee, the writ petition was also a much cheaper remedy than most forms of civil litigation. In 1950, the Supreme Court heard over 600 writ petitions. Its immediate predecessor, the Federal Court, had heard 169 cases over eleven years. By 1962, the Supreme Court would have heard 3,833 such cases. In the same twelve-year period, the U.S. Supreme Court, enjoying

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55 File on Ad Hoc Committee of the Supreme Court of India, Rajendra Prasad Papers, National Archives of India [hereinafter NAI].
over a century of history and influence, heard only 960 such cases. The dockets at the High Court, which was more accessible, grew even more exponentially. The wide original and appellate jurisdiction of the higher courts together with the comparatively simple procedural requirements for filing petitions brought a greater diversity of disputes before the Indian courts than before Western constitutional courts.

The writ petition therefore reveals the extent to which the state could penetrate everyday life, and the point at which this interference would compel a citizen to move the court. The adversarial nature of the litigation system forced each side to put forward its claims explicitly, making visible the new, emerging conceptual vocabulary of democracy. As Kim Lane Scheeppele has shown in her work on Hungary, the constitutional court becomes the perfect lens to see top-down and bottom-up conceptualizations of constitutional law in interaction. The constitutional courtroom thus becomes an “archive of citizenship”, as a space where the individual and the state can converse with one another.

The new Supreme Court and the newly empowered High Courts sat at the apex of a judicial system whose lower ranks continued to be staffed by executive magistrates. The district judiciary, the point of contact of most citizens with the legal system, comprised bureaucrats who performed executive functions such as revenue collection and maintenance of law and order as well as dispensing justice. The Constitution laid down the separation of the judiciary from the executive as a goal, but its achievement was a slow process, finally accomplished in the early 1960s.

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Therefore, the courts exercising constitutional jurisdiction formed a clearly demarcated space that operated at a different register.

![Hierarchy of Courts in India after 1950]

**Figure 0.1. Hierarchy of Courts in India after 1950**

Through my dissertation I examine new archives, both discursive (as in the archive of litigation) and physical (the unexplored Record Room at the Supreme Court of India). The Supreme Court is both a public and a secret archive. Its final judgments are public and are scrutinized extensively by lawyers and reported in newspapers. A recent study shows that there were more articles in leading English newspapers discussing the Supreme Court than the parliament or the prime minister. However, the materials presented to the court, the arguments made by lawyers, the affidavits and evidence produced before the court, transcripts of witnesses’

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60 Art. 50, Constitution of India, 1950.
61 I received permission from Justice K.G Balakrishnan, the Chief Justice of India, to access the Supreme Court Record Rooms and Museum, neither of which has been accessed as an archive before. I spent nine months in 2009-2010 working through the original petitions and documents of constitutional cases from the 1950s.
statements and ephemera that are kept in the Supreme Court Record Room have never before been scrutinized.

The ‘secrecy’ of the Supreme Court Record Room (and those of the lower courts) is partly physical in terms of difficulty of access and partly methodological, in their value as a source. There exists no formal procedure for researchers to consult Supreme Court records; access is granted at the discretion of the registrar. More significantly, legal scholars emphasize the final reported judgment, as it is the only document with future consequences and precedent value.

Moving beyond the judicial text, this archive provides a valuable window into both state and citizen interpretations of the Constitution, the latter being un-theorized in the constitutional discourse on India.63 Citizen interpretations of the Constitution challenge the idea of the constitutional interpretation being the monopoly of state elites, and recognize that the privilege of reading and interpreting the text belongs to every member of the ‘community’.64

My focus on litigation seeks to balance two dominant modes in histories of law in South Asia. Legal history in South Asia has predominantly meant the history of legislation. This is a result, as Mitra Sharafi points out, of the bifurcated nature of the archive, where records of the executive and legislature are housed in state archives frequently consulted by historians while judicial records remain in relatively inaccessible law courts. Thus, there is a greater emphasis on the making of law, as opposed to its everyday practice.65

64 Sanford Levinson famously describes this as the contrast between Catholic (top down) and Protestant (democratic) readings of the Constitution. Stanford Levinson, Constitutional Faith (Princeton: Princeton University Press, 1987).
65 There have been some significant studies over the last decade which are exceptional in that they focus around court cases. A majority of these draw upon cases that went up on appeal to the Judicial Committee of the Privy
Secondly, even in studies where courts are examined, the law and the legal archive are often treated as yet another body of evidence to be plotted around broader themes of Indian history (such as race, gender or the nation), leading to a lack of attention to the legal process and an overemphasis on legal texts as opposed to practice.\textsuperscript{66} Thus, legal procedure, legal doctrine and the role of lawyers are seen as incidental to the narratives produced.

Studies of democracy in independent India have predominantly focused on elections and representation, giving little attention to the judicial process. This dissertation maps these writ petitions against new government initiatives that sought to radically transform the state, as ‘critical events’. A critical event, as Veena Das describes it, is an event where new modes of action come into being which redefine traditional categories and can be acquired by a variety of political groups\textsuperscript{67}. These critical events form a new genealogy of Indian constitutionalism that emerges from the everyday acts from citizens. Thus, to paraphrase Hannah Arendt, this dissertation explores the process by which the Constitution emerges as a hybrid realm where “private interests assumed public significance”\textsuperscript{68}.

In this attempt the dissertation strives towards four goals. It traces the development of a postcolonial governmentality in India. It moves the Constitution from the realm of intellectual history and legal doctrine to that of everyday social and economic life. In the course of this

\begin{itemize}
\item Kunal M. Parker, “The Historiography of Difference,” \textit{Law and History Review} 23.3 (Fall): 685-695.
\item Hannah Arendt, \textit{The Human Condition} (Chicago; University of Chicago Press, 1958), 34-35.
\end{itemize}
repositioning, it engages with the relationship between law and society in South Asia to rethink the relationships between domination and subalternity and civil and political society. Finally, it injects markets and minorities into a global history of rights and constitutionalism.

**The Long 1950s: Towards New Histories of the Indian Republic**

What changed with the adoption of a written constitution? What did it mean to be a citizen of a sovereign republic? What did freedom mean to citizens of the Indian state? The answers to these questions remain surprisingly elusive. The Indian state in the three decades after independence has received little historical attention compared both to its colonial predecessor and its more recent past. Until recently, disciplinary divisions marked the study of India till independence as the province of historians, after which political scientists and anthropologists dominate.\(^{69}\) Research was also stymied by poor record-keeping and archival practices of the postcolonial states. State documents after independence, the mainstay of histories of colonial India, have rarely been transferred to the archives.\(^{70}\)

The absence of scholarship on the early republic is a case of unfortunate lacunae, but poses a challenge to both the historiography of the colonial state and the study of the contemporary state in India. The early Indian republic, spanning the thirty years between independence in 1947 to the Emergency in 1977 remains the canvas which is defined by the colonial state and the neo-liberal state of the 1990s.

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The colonial state has been distinguished from the modern state both in terms of its alien origins and its authoritarian underpinnings. The modern state is characterized as one that treats its subjects as strangers as opposed to an early modern state that was based on familiar relations between the ruler and the ruled. In the absence of such familiar idioms, the state evolves modern bureaucratic regimes of power based on ‘abstract’ rules of governance. Using this lens, Jon Wilson has persuasively argued that what we recognize as modern forms of governance based on an estranged relationship between ruler and ruled evolved in eighteenth century Bengal.\(^7\)

The colonial state has also been distinguished from its modern European counterpart as one that achieved only domination and not hegemony.\(^2\) In the absence of the mechanisms of representation, colonial governmentality relied more on oppressive power and less on self-disciplining by subjects. The emerging consensus is that a modern bureaucratic regime based on the rule of law was bound to fail in a colonial context, as colonial difference marked by race determined the relationship between the state and the individual. The failure of projects like the Ilbert Bill highlights for Partha Chatterjee the “inherent impossibility of completing the project of the modern state without superseding the conditions of colonial rule”.\(^3\) Attempts to rationalize the administration and make it less arbitrary would constantly run up against the question of race and the relationship between the colonizer and the colonized.\(^4\)


\(^{3}\) The Ilbert Bill was a proposed legislation which would have given Indian magistrates the right to try cases involving Europeans. The government was forced to retract it after its proposal provoked widespread opposition from Europeans in India, termed the “White Mutiny”. Partha Chatterjee, *The Nation and Its Fragments* (New Delhi: Oxford University Press, 1993), 14.

My dissertation investigates how regimes and techniques predicated on the ‘rule of colonial difference’ work when racial difference is erased and when popular representation is introduced. The postcolonial courtroom offers an interesting site to understand these new forms of governmentality. I develop a thesis offered by a small group of scholars who study colonial courts, suggesting that individual litigants find ways to approach courts to advance their own interest. However, as Nicholas Dirks notes the judiciary provided “a diffuse institutional means for the control of colonial society” because it forced indigenous litigants to adapt to a new set of discursive and institutional structures. Indigenous acceptance of the new arena for dispute management was at the same time the acceptance of a new idiom for legal processes, and this assured that the transformations of Indian society under colonialism “were accommodated with so little disruption”.

The connections between the introduction of colonial legal processes and the emergence of new practices of self-representation and perceptions of social relationships have recently been explored through analyses of court documents in the early period of colonial rule. Other work has looked at the importance of legal rulings in changing forms of familial attachment. These accounts reveal a process by which colonial law standardized public and private rights, creating new inequalities within and across communities, while the state gathered to itself a moral authority to rule. Yet there remains an important gap in our knowledge: how were colonial legal

formations and popular understandings of rights transformed in the crucial period from 1930 to the 1960s, when nationalist and more radical forms of politics sought to redefine the ethical and practical foundations of rights between citizens and the sovereign state.\textsuperscript{79}

This dissertation focuses on the two decades that have been described as the Nehruvian period, bookended by Nehru’s appointment as Prime Minister in 1947 and his death in 1964. Politically, the Congress Party headed by Jawaharlal Nehru (whose leadership was virtually unchallenged after 1952) held office continuously at the centre, and in almost all the States and local bodies. This period has been defined largely in contrast to contemporary India, dominated by neoliberal economic policies and the increased visibility of politics of identity based on caste and religion, as one dominated by the ‘Nehruvian consensus’ over socialism, secularism and non-alignment.\textsuperscript{80} Through centralized planning and modern developmental projects, the state’s primary aims were combating India’s poverty and reducing its dependence on Britain. Its politics were seen as modern and liberal and were dominated by debates over class rather than identity. Its foreign policy was based on principled non-alignment between the Eastern and Western blocs during the Cold War and an opposition to militarization.\textsuperscript{81}

The Nehruvian consensus has been viewed in contemporary times with either contempt or nostalgia, determined by the political predilections of the commentator. Those critical of the neoliberal economic policies of the 1990s have praised state control of the economy and the nascent welfare state, while market-friendly scholars have argued that the Nehruvian state’s

\textsuperscript{81} Sudipta Kaviraj, The Enchantment of Indian Democracy (New Delhi: Permanent Black, 2010).
stranglehold over the economy was responsible for India’s “Hindu rate of growth”.\textsuperscript{82} The political success of Hindu nationalism and the ensuing violence has led to celebration of Nehruvian secularism by left-liberals and to a vociferous critique of Nehru as ‘pseudo-secular’ and an ‘appeaser’ of minorities by the right.\textsuperscript{83} Despite the difference of opinion about the Nehruvian consensus, in the absence of fine-grained historical detail, scholars assume that there existed a strong centralized state that was able to impose its policy upon society and economy.

The sources most commonly used are pronouncements by public figures, macroeconomic data and some prominent central government initiatives. The role of state and local governments, let alone the quotidian functions of the state, has received little attention.

We again see a repetition of the leitmotif of the gap between state and society in this narrative, a gap which only gets bridged after 1977 with the vernacularization of democracy.\textsuperscript{84} In a recent review essay, Sudipta Kaviraj describes the early phase of politics in India as one in which the debates were carried out primarily in the language of familiar Western democratic discourse, in terms of conflicts between the political ideals of laissez faire and state intervention, between capitalist freedom and socialist redistribution. These politics visualized the movement between social classes as central to public life, while politics based on caste and religious


identity remained underground and inarticulate. Almost nostalgically Kaviraj notes that it is in
the 1970s that Indian politics begins to speak a political vernacular, when the politics of caste,
region and religion completely erased an earlier vocabulary of class interests, capitalism and
socialism.\textsuperscript{85}

This dissertation argues that becoming a postcolonial republic was a process and not an
event. It builds on recent scholarship that has sought to question the artificiality of the barrier of
1947. Scholars have shown how the physical and bureaucratic violence that accompanied the
partition of the subcontinent shaped both the structure of the state and the expectations of the
public. Challenging accounts that suggest colonial continuities among the police and
bureaucracy, they have creatively read administrative personnel records to show how notions of
loyalty, belonging and service were reworked with the Partition.\textsuperscript{86} Most significantly, they have
drawn on anthropological work on the ‘everyday state’ to move beyond divisions of high politics
and local histories and to focus on how the state functioned in everyday life.\textsuperscript{87}

However, this new literature is dominated by studies that examine the aftermath of the
partition of the subcontinent into India and Pakistan.\textsuperscript{88} While the partition was a seismic event

\textsuperscript{85} Kaviraj (2010).
\textsuperscript{86} Some of the most interesting historical scholarship on postcolonial India in recent times has emerged from a
British Academy research collaboration on “From Subjects to Citizens: The Every State in India and Pakistan” run
by William Gould (Leeds University), Sarah Ansari (Royal Holloway) and Taylor Sherman (LSE). For a research
statement see http://www.leeds.ac.uk/subjectstocitizens/index.html (as visited on 17 August 2012); and
“Introduction: From Subjects to Citizens: The Every State in India and Pakistan,” \textit{Modern Asian Studies}, 45.1
(January 2011): 1-6. One of the finest examples of this genre of scholarship is William Gould, \textit{Bureaucracy,
\textsuperscript{87} Christopher J. Fuller and Veronique Benei, eds., \textit{The Everyday State and Society in Modern India} (New Delhi:
Social Science Press, 2000); Thomas Blom Hansen and Finn Steppitat, eds., \textit{States of Imagination: Ethnographic
\textsuperscript{88} Recent works rethinking the impact of Partition on the making of the Indian state include Vazira Fazilah-
Yacoobali Zamindar, \textit{The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories}
(New York: Columbia, 2007); Yashmin Khan, \textit{The Great Partition: The Making of India and Pakistan} (New Haven:
Yale University Press, 2007); and Joya Chatterjee, \textit{The Spoils of Partition: Bengal and India, 1947-1967}
(Cambridge: Cambridge, 2007). Even within the more ambitious “From Subjects to Citizens Project”, there is only a
single paper that looks at India, and that does not assess the impact of the partition.
that caused a realignment of state and society in South Asia, viewing the entire period through the lens of partition provides a very incomplete picture of state-society relations. Furthermore, the emphasis is on questions of identity and not political economy.

This new literature also privileges certain archives and voices, particularly the work of the Ministries of Refugee and Rehabilitation whose records, unlike that of other postcolonial ministries, have been returned to the National Archives. The most visible interaction between the state and citizen has thus become that of the displaced refugee or evacuee. Therefore, the narrative of women’s citizenship in postcolonial India has been told by uncovering the histories of the abduction of women during the Partition and the state-initiated programs of recovery after independence. In contrast, there is virtually no literature on the regulation of trafficking in women and sex work, during the same period, which involved the same political actors and addressed questions of women’s citizenship.

My dissertation complements this literature by shifting focus to include understudied geographical areas (Madhya Pradesh and the Bombay Presidency) along with other significant state projects that have been neglected. The ambition of the postcolonial state was to reshape both society and economy. As Khilnani observes,

“The state was enlarged, its ambitions inflated, and it was transformed from a distant alien object into one that aspired to

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infiltrate the everyday lives of Indians, proclaiming itself responsible for everything they could desire, jobs, ration cards, educational places, security, cultural recognition. The state thus etched itself into the imagination of Indians in a way that no previous political agency had”.

New instrumentalities were created to plan, review and monitor these programs and thousands of new laws were enacted by all levels of government. Out of a total of 437 pieces of central legislation covering a century and a half found in a compilation of civil laws made in 1958, 140 were passed in the first decade of independence and 73 of the 191 Acts involving penal sanctions belonged to the same period. A majority of them dealt with social or economic regulation or administrative process, whereas only 28 of the 400-odd colonial laws could be identified as such. The Constitution created a powerful center with vast revenue-raising powers and virtually blanket powers of legislation. A Planning Commission would create overall plans within which a “protective but realistic socialism would be created”. The economy was subjected to regulatory control, perhaps more stringent than that of the agencies set up by Roosevelt as part of the New Deal. A huge public sector would ensure the manufacture and production of goods and services so vital that they could not be left to the vagaries of private enterprise, and a new import policy would ensure a measure of austerity for the national good for the Indian middle classes. In the words of Khilnani, this was a period when ‘the state stabilized, became a

91 These were made through a study of six volumes of the Civil Court Manual, Madras Law Journal Madras, and the All India Minor Criminal Acts, Law Publishing House, Allahabad, 1957.
developmental agency that aspired to penetrate all areas of life and showed that it could be subject to democratic procedure.\textsuperscript{94}

The police powers of the state expanded massively at the same time that democratic processes were being implemented. Police powers are deeply rooted in the idea of ‘public welfare’ and by tracing changes in police power this dissertation uncovers the transition from the colonial idea of ‘public’ to a postcolonial public. In doing so, it builds on recent work that looks at how police powers are transformed in a liberal regime.\textsuperscript{95}

The archive of litigation captures a broad spectrum of everyday interactions between the different levels of the state and citizens. In 1958, the Law Commission Report on the administration of justice argued that “the country stagnated for one hundred and fifty years of foreign rule, our legislatures are now trying to advance the nation in all directions. In their zeal to achieve quick results, they have not infrequently enacted legislation interfering with the vital and daily functions of the citizen. In order that their policies may go forward uninterrupted they have endeavored to entrench the executive and succumbed to the temptation of restricting the powers of the court”.\textsuperscript{96} As the new state sought to implement its policies through laws and administrative action, those affected by it would frequently appear before the courts. The docket could include an association of printers challenging the state government’s takeover of textbook production,\textsuperscript{97} a schoolgirl refusing to comply with a government order forcing her to study in her mother tongue,\textsuperscript{98} a widow protesting the requisitioning of her apartment by the rationing office,\textsuperscript{99} a

\textsuperscript{94} Sunil Khilnani (1999) 30.
\textsuperscript{96} Reform of Judicial Administration (1958: Law Commission of India), 673.
\textsuperscript{97} Ram Jawaya Kapur v. The State of Punjab, AIR 1955 SC 549.
\textsuperscript{99} Union of India v. Shirinbai Aspandier Irani, Civil Appeal No.154 of 1953.
vegetable vendor unhappy with new municipal regulations, a Hindu man unable to take a second wife due to marriage law reform or a Communist newspaper editor facing censorship by the central government. Thus, the Constitution did not descend upon the people; it was produced and reproduced in everyday encounters. It is not surprising therefore that citizens “make of the rituals, representations and laws imposed on them something quite different from what their originators had in mind”.

The archive of litigation is not just valuable for the breadth of interactions between state and citizen that it makes visible. The Record Rooms of the Supreme Court provide a new archive of postcolonial India, and its files contain a large variety of documents including affidavits, government memoranda, newspaper reports, printed material that were submitted to the court for evidence. Given the spotty coverage of records in the state archives for this period, the court’s record room becomes even more valuable.

Through these constitutional cases, this dissertation prises open the processes of state formation. Mitchell in his seminal review essay argued that the nation-state is not a “subjective belief incorporated into the thinking and action of individuals but a representation reproduced in visible and everyday forms”. The new literature on state formation therefore focuses on the cultural practices of the state, which entail the use of “symbolic languages of authority” such as the institutionalization of law and legal discourse as the authoritative language of the state, the

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100 Md. Yasin v. Town Area Committee, Jalalabad, AIR 1952 SC 115.
104 A combination of poor archiving practices and neglect has made the Supreme Court records the only records on many of these questions. Even in cases where the state was a party, corresponding files were not transferred by the Ministry of Law to the archive. The official and private papers of lawyers have rarely been preserved.
“materialization of the state in… signs and rituals” and in the practical language of governance (assertion of territorial sovereignty, development and management of the national economy).  

However, the dominant emphasis through this literature has been on how citizens encounter the state in various places. As a result, studies on state formation in postcolonial India have focused on centralized formation of cultural production from above, be it through an analysis of debates between “powerful state actors” over state-produced documentaries, organization of parades and new practices of town planning, or by tracing the intellectual history of the new consensus on an Indian model of “development” that emerges among elites.  

There is an assumption that most citizens remained outside these elite “conversations” altogether, and were increasingly puzzled by their terms. Even though figures like Nehru were aware of this and constantly sought to explain the operations of the state and democratic politics to the people, they were caught within their own conceptual language, and the limitations of intelligibility of English. Little was done to widen the circles of deliberation.  

Unlike these models which focus on the ways the state was produced from above, I am more interested in the ways it is undone and negotiated from below. As this dissertation demonstrates, constitutional litigation was an option for a citizen to insert herself into an elite conversation. The writ petition and the new Constitution compelled state authorities, including high-ranking bureaucrats and ministers to come and defend their policies before courts. It would also require them to respond specifically to claims made by the litigants. The constitutional  

courtroom is distinctly different in form and content from the records of the executive or legislature; here, instead of citizens encountering the state, the state suddenly encounters its citizens.

The courtroom was therefore the space of the unexpected. A study of the Supreme Court in the mid-sixties showed that two-thirds of the cases involved some level of government on one side and an individual or private party on the other side. The government lost fully 40% of its cases in this category of litigation. Moreover, in 487 of these 3,272 decisions, the validity of legislation was explicitly attacked by the private party to the dispute, and in 128 of these instances the legislation was held unconstitutional or otherwise invalid in its entirety (27 State laws, 4 Central laws), or in part (70 State laws, 27 Central laws). As the researcher concluded, “few, if any, other governments in the world fare as poorly in encounters with their citizens before the nation’s highest judicial tribunal”.\(^\text{110}\) It is the uncertainty of the encounter in the courtroom that makes it valuable archive, as law is the site where abstract new principles run up against the messiness of social change.\(^\text{111}\)

**A History of Constitutional Processes**

Constitutional and administrative history has long been out of fashion in India. This is in complete contrast to the United States, the other state with a long history of constitutionalism and a powerful Supreme Court, where constitutional history threatens to crowd out other bodies of legal history. The dry and voluminous tomes that exist on the subject in India date back to the


1960s and are consulted largely by those preparing for government service examinations.\textsuperscript{112} The historian’s neglect of constitutional law arises from its identification with elite histories and Whiggish linear narratives. This dissertation makes a methodological shift by focusing on the contingency of constitutional law and processes of mediation and translation.

Historians of South Asia have been rightly suspicious of the Whiggish narrative that traditional constitutional history offers where independence, universal suffrage and the republican constitution appear inevitably to succeed various imperial reforms providing for limited franchise and the representation of community interests. With the advent of subaltern studies, historians of South Asia have been increasingly critical of elite histories and have focused their attention on histories of the subordinated.\textsuperscript{113}

Constitutional law is widely understood as the arena of high politics, and the business of parliamentarians, ministers and judges. Accounts of the Supreme Court have been dominated by politically high-profile clashes between in the judiciary and the executive in cases brought by opposition politicians, Maharajahs and big industrialists.\textsuperscript{114} However, a closer empirical analysis of the Supreme Court docket in its first two decades shows a much wider range of litigants, including petty merchants and traders, low-level civil servants, students, women and even refugees and evacuees. The range of litigants at the various High Courts was even more varied in terms of class, gender and community.

\textsuperscript{113} Ranajit Guha ed., \textit{Subaltern Studies Reader} (Minneapolis: University of Minnesota Press, 1997).
\textsuperscript{114} Granville Austin’s account still remains the classic narrative history of the Constitution but ends in the 1980s. Granville Austin, \textit{Working a Democratic Constitution} (New Delhi: Oxford University Press, 1999).
Many of these assumptions are also shared by the large body of constitutional law scholarship that has been produced by the legal academy. As much of the scholarship is written for the consumption of practicing lawyers and judges, the emphasis is on determining doctrine, which has led to a focus on the Supreme Court, the final arbiter of doctrine. The High Courts, which saw a great explosion of litigation in this period, have been largely ignored. Constitutional law focuses on building a linear narrative of cases emphasizing useful precedents by highlighting victories and writing out losses. Supreme Court judgments are particularly powerful instruments for producing a certain historical truth, and can erase competing narratives and other visions of the constitutional order.

In doctrine-driven scholarship, judges emerge as central actors, and little attention is paid to the actual litigant or to the history of the dispute. It is not surprising therefore that the major debates over constitutional law in India have been framed around the question of judicial intervention or activism, asking the question: what is the appropriate role for judges in a democracy? Critical scholarship, drawing upon approaches ranging from Marxism, feminism and legal realism, has challenged doctrinal scholarship by locating judicial decisions as a product of social and political forces. However, these scholars too seek to explain constitutional law either through the predilections of individual judges or through the judiciary as a class, be they bourgeoisie property owners striking down land reforms or modernizing elites trying to reform

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Hindu law.\textsuperscript{117} Thus, the critical narrative is dominated by high-profile political cases, mostly on questions of land reform and preventive detention.\textsuperscript{118}

The literature on high constitutional law stands in stark contrast to the more anthropological approaches taken to the study of local legal institutions and the district courts.\textsuperscript{119} This in a way mirrors the historiography of the Indian state. The dissatisfaction with top-heavy administrative history mired in imperialist, nationalist or Marxist dogmas led to subaltern history, which initially defined itself by its engagement of the world of politics beyond the state.

However, both state and society exist only in interaction with one another, and it is this promising territory between constitutional history and subaltern narratives that this dissertation investigates. This dissertation makes a methodological shift away from the approaches distinguished above, and towards a social history of constitutional law, where I seek to integrate the subjects of Indian social history (subaltern actors and everyday life) with that of Indian constitutional law (high politics, judges and political theory). In doing so, I draw upon the methods of constitutional ethnography. Kim Scheppele, writing on the post-Socialist courts of Eastern Europe and Russia, describes the goal of constitutional ethnography as to “better understand how constitutional systems operate by identifying the mechanisms through which

\textsuperscript{117} For the former approach, see Granville Austin, \textit{The Indian Constitution: Cornerstone of a Nation} (Oxford: Clarendon Press, 1966), 390; and for the latter, Ronojoy Sen, \textit{Articles of Faith: Religion, Secularism and the Indian Supreme Court} (New Delhi: Oxford University Press, 2010); and Ratna Kapur and Brenda Crossman, \textit{Secularism’s Last Sigh: Hindutva and the (Mis)Rule of Law} (New Delhi: Oxford University Press, 1999).
governance is accomplished and the strategies through which governance is attempted, experienced, resisted and revised, taken in their historical depth and cultural context”.

This thesis argues that by asking ‘what did the court do?’, we fail to consider the real contestations between judges, litigants, lawyers and other actors in presenting legal claims. To understand how constitutional law works in India, then, it is necessary to understand what it is that people (whether legal officials or ordinary citizens) believe law is and what it is that people do with this knowledge as they work out what to do in their daily lives.

An equally frustrating query is: ‘who won the case?’ While the question is tempting, it is reductive and often unhelpful in explaining people’s repeated engagement with law.

This dissertation challenges the singular truth produced by a judgment-driven narrative by emphasizing the contingency and the contestation that go into the process of litigation. People who decided not to go to court are equally important subjects of study as people who did when faced with a similar dispute. Similarly, this dissertation pays equal attention to the losers in constitutional litigation, and maps what their vision of the correct constitutional order would have been. Legal losses are not always understood as such outside the legal arena. State officials in Uttar Pradesh for instance were startled to find that even before the Supreme Court had decided a case, the litigant in question had hired a town crier to announce, by beating a drum, that there was a case between “the public and the town, the public has won and the town has lost”. This dissertation also engages with the afterlife of a court case, not just its circulation as

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122 Mohammad Yasin v. Town Area Committee, Jalalabad, Writ Petition 132 of 1951, Supreme Court of India Record Room.
legal precedent, but also its percolation to lower courts, its impact on executive practices and its imprint on popular memory.

Secondly, it also takes seriously the role of lawyers as intermediaries, who often translate the problem of a litigant into a legal question and seek a legal solution. The conceit of the legal profession playing a central role in state-building goes back to Tocqueville locating the strength of American democracy in the temper of the legal profession. Complementing it is recent sociological scholarship on the legal profession which suggests that lawyers have a special affinity for political liberalism. 123 The problem with this body of scholarship is that it assumes that liberalism has a universal meaning. Other scholars have focused on ways in which lawyers by practicing in various parts of the country literally bring about uniformity of governance across state territory, 124 and how colonial lawyers functioned as cultural translators and ethnographic intermediaries. 125

Despite the dominant role lawyers played in the Indian national movement and in the state thereafter, there have been few studies of the legal profession in India. 126 Apart from the role played by lawyers in the national movement, a study of the profession is crucial to

understanding the transformation from the colonial to the postcolonial since the lawyers and several judges represent a generation of Indians who had “discursively, ideologically and institutionally prepared themselves for the transfer of power”.  

Partha Chatterjee points to the increasing indigenization of the judiciary and the bureaucracy to suggest that while politicians were challenge the dominance of the colonial state on the streets and in the legislatures, a new generation of Indian professionals was asserting itself more quietly and laying the discursive foundations of the Constitution of the independent nation state.

By the 1940s, the Indian legal profession had come to constitute a fairly well-defined professional public with common journals, associational meetings, and lobbying groups. Lawyers who represented opposite sides and the judges who heard them continued to share professional and social bonds. It is this ‘habitus’ that this thesis excavates in order to contextualize their role as mediators. In the decade after independence, lawyers, judges and legal academics were consciously engaged in examining the problems of the Indian legal system. Through Commission Reports, journal articles, biographies, newspaper editorials, they spoke as lawyers expressing their concerns and visions for the new legal regime.

By decentering the judgment-centered approach to legal history, this dissertation seeks to challenge the conventional narrative of the Supreme Court and the development of constitutionalism in India. Scholars with different methodological and ideological perspectives produce a very similar narrative of the early years of the Indian Supreme Court.

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128 Id.
130 Baxi (1985); Austin (1999); Rajeev Dhavan, The Supreme Court of India: A Socio-Legal Critique of Its Juristic Techniques (Bombay: N.M Tripathi, 1977); Marc Galanter, Competing Inequalities: Law and the Backward Classes
In brief, the Supreme Court was independent but had a complicated history of deference to the executive. It emerged as an aggressive defender of property rights, a fact marked by frequent clashes with Parliament over land reforms, leading to frequent constitutional amendments. On civil liberties, the court was assertive over the rights of free speech and association but deferred to the government on questions of national security or preventive detention. The court’s jurisprudence of formalistic legalism was seen to be best exemplified by the decision in *Champakam Dorairajan* where the court struck down reservations for backward classes on the ground that they violated constitutional provisions for equality.\(^{131}\) As Ashok Desai and Justice S. Muralidhar sum up the situation at the time of independence, “court procedure was drawn from the Anglo-Saxon system of jurisprudence, the bulk of citizens were unaware of their legal rights and much less in a position to assert them. The guarantees of fundamental rights and the assurances of directive principles… would have remained empty promises for the majority of illiterate and indigent citizens under adversarial proceedings”.\(^{132}\)

The real turning point in all these narratives comes with the end of the Emergency, when there is a virtual explosion of the use of courts to further human rights and social justice. Judges, shamed by their loss of credibility during the Emergency, aggressively endorse public interest litigation. Scholars note the enhanced movement towards legal aid, the “bold experimentation with procedure and a radical dilution of standing requirements, allowing third parties to ask for judicial action on behalf of the more oppressed and neglected persons- be it prisoners, pavement

\(^{131}\) *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

dwellers or bonded laborers”\textsuperscript{133}. As Upendra Baxi describes it, the late ‘70s mark the beginning of a phase that led the Supreme Court of India to become the Supreme Court of Indians.\textsuperscript{134} The agents of change in these narratives remain benevolent judges of the Supreme Court.

This thesis turns to the social history of constitutional law to prise open the period when the Supreme Court of India was apparently not the Supreme Court for all Indians. Empirically, the Supreme Court inserted itself as a dominant player in public life from the day of its establishment. In its first decade, supposedly a ‘period of restraint’, it struck down 128 legislations.\textsuperscript{135} The number of administrative orders and rules overruled would be much greater. Half of the first 45 amendments to the Constitution were aimed at reducing judicial power and protecting the state’s actions from judicial review. The Emergency in India was triggered by a court order that issued a writ challenging a bureaucratic decision over the conduct of Mrs. Gandhi’s election.

**The Litigious Citizen: Between Political Society and Civil Society**

The central actor in this dissertation is the litigious citizen. The litigant has received little attention as a political actor in South Asian history. For historians of colonial India, there were two political actors that emerged in colonial India: the comprador elite who collaborated in various ways with the colonial state, and the rebel. From the 1980s, critical histories turned towards the subaltern, increasingly identified in the figure of the ‘peasant rebel’.\textsuperscript{136} Subaltern studies increasingly recognized subalternity as a relationship of power (rather than an empirical category) and grew to include “subaltern elites” as well, the primary emphasis being on a form of

\textsuperscript{133} Id.
\textsuperscript{135} Granville Austin (1966) 101-104.
oppositional politics and alternate consciousness that lay outside the hegemony of the colonial state. Indian historiography strove to make the subaltern the subject of history.\textsuperscript{137} Given the conditions of colonial rule, the litigant was doubly disqualified as a subject, as someone who accepted state hegemony, and who supposedly belonged to a privileged social class.

Unsurprisingly the litigious citizen, and indeed litigation itself as a mode of political action, have been easily slotted as bourgeois in India, and as such, litigation has been regarded as an activity unavailable to the majority of the population. Partha Chatterjee has argued that the politics in the postcolonial world is divided into the domains of ‘civil society’ and ‘political society’, the latter domain representing the vast bulk of democratic politics in India. Civil society politics is marked by modern associational notions such as autonomy, deliberative decision-making, and individual rights, and operates through formal institutions like the courts and the media. Political society, in contrast, “make their claims on government, and in turn are governed not within the framework of stable constitutionally defined rights and law, but rather through temporary, contextual and unstable arrangements arrived at through direct political negotiations”.\textsuperscript{138}

In this narrative, law and legal institutions are to be regarded with suspicion by members of political society, many of whom like squatters or street vendors inhabit the margins of legality. They mobilize through both street politics and back-channel negotiations with the state in order to secure tacit acceptance of this state of illegality. The government, often recognizing the electoral power of these groups, will treat their demands as exceptions so as not to compromise the generally applicable rule and grant the license or the water supply that is

\textsuperscript{137} Chakrabarty (2002) 33.
\textsuperscript{138} Chatterjee (2008) 57.
demanded. The claims made by political society never take the form of rights and are thereby impermanent and subject to constant renegotiation. They are therefore, in Chatterjee’s terms, subaltern citizens – subalterns who are citizens, but not quite proper citizens. In contrast, the insistence on legal rights by ‘proper’ citizens, is often used as a form of ‘lawfare’ against the poor and the informal sector.

Chatterjee offers a powerful description of politics in the postcolonial world. However, this dissertation complicates the assumptions on which accounts such as Chatterjee’s rest. To begin with, it is an empirical assumption that subaltern groups do not usually resort to ‘civil society processes’ like litigation. This dissertation shows how a range of people, belonging to groups marginalized both socially and economically in independent India, turned to the court. While only a few could be considered to be absolutely poor, many participated in the informal economy, or were rendered marginal due to their religion or their gender. This diverse group of litigants included prostitutes, Muslim butchers, Hindu refugees, Muslim evacuees who had been evicted from their homes, vegetable vendors and even the occasional peasant rebel. This dissertation does not suggest that litigation is an option available to all citizens of India, but simply that access to it is not determined solely by one’s economic class.

The dissertation explores the distinctive forms of subalternity generated with the installation of electoral democracy through the tension between legislation and judicial review. The dissertation evidences that electoral minorities, i.e., members of communities that were unlikely to represent themselves through electoral democracy because of class, gender or race, were overrepresented before the courts in constitutional cases.

Secondly, there is an assumption that civil society subscribes to the norms of the liberal individual citizen, while political society is marked by the creation of new associational forms. Political society often creates new communities where none existed before or gives form to other community structures. However, as a close ethnography of litigation shows, court cases were supported by and were constitutive of new associational forms and social and political alliances.

Finally, there is an implicit assumption that the domains of civil and political society are empirically exclusive. Chatterjee’s interlocutors have suggested that while the conceptual distinction is important, it should not be interpreted to suggest a demarcation into a bourgeois civil society and a lower-class political society. Instead, they characterize civil and political society as two modes of political engagement that can be diagrammed in a continuum; the latter being more available to the urbanized elite, but not rigidly separated from the former. However, though Chatterjee recognizes that this refinement may be useful when engaging with empirical realities, he resists the suggestion of collapsing the analytical distinction between the domains.

Despite this suspicion of law, Chatterjee himself recognizes that law often emerges as the field of contest between civil and political society, due to the “extraordinary powers, unknown in any other liberal constitutional system in the world, of judicial review that Indian courts have come to assume”. This dissertation explains that these extraordinary powers developed because in many cases the courts became the mediating ground between the domains of ‘civil’

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140 Chatterjee (1998 b) 281.
and ‘political’ society. It challenges the notion that it is only the poor who live on the ‘margins of legality’, and therefore can engage politically only by demanding recognition of their illegality as an exceptional practice, thus becoming vulnerable to ‘lawfare’ i.e. the mobilization of law by the upper classes to curb the hard-won exceptions of the poor. The dissertation demonstrates that the state and civil-society actors are both likely to function illegally, and remain vulnerable to a ‘rule of law’ discourse.

This dissertation, through the social history of constitutional cases, demonstrates that litigation itself is embedded within a larger world of political practices. However, given the partial autonomy of law, litigation is more difficult for both the state and social actors to manage in integration and consistency with their other political practices.

Historians of colonial India, have rightly viewed with suspicion the imposition of an alien legal system focused on resource extraction and the maintenance of law and order. Law, in such historical accounts, was the “state’s emissary” that enabled the will of the state to penetrate, organize and control the will of the subject population.¹⁴⁴ The violence of law was embodied not merely in the coercive form of police and prisons, but also in ‘abstract legalism’ i.e. the legal frame of understanding that decontextualized and repressed the people through the imposition of formal rationality.¹⁴⁵ This dissertation offers an additional narrative by envisioning law as a resource and seeks to map, through a social history, how it can be accessed and used. It draws upon studies of legal mobilization to map how law provides both “normative principles and

strategic resources for conduct of social struggle”. Litigation is not just about victory or loss, but also creates focal points for larger mobilizations.

This dissertation has been energized by Chatterjee’s recognition that politics is not limited to “extraordinary events and spectacular acts”, but is also produced through boring, unheroic everyday life. Many of the court cases this dissertation examines do not arise from “spectacular high politics” but from quotidian encounters with the state e.g. an eviction notice, a traffic accident, a school admission, a railway journey. This dissertation demonstrates how litigational strategies evolve from multiple such everyday encounters with the state.

Secondly, Chatterjee destabilizes the dichotomy of state and society in India. As mentioned earlier, scholars and activists have argued that there existed a deep divide between the Indian state and society. Accordingly, popular politics against the state are often viewed as struggles against governmentality. Chatterjee however argues that the struggles of ‘political society’ in India, even when they contain marks of insurgency, are a product of deepening governmentality.

Similarly, the question driving the dissertation is not whether the Constitution is emancipatory or repressive (it can be both, depending on circumstances and strategies deployed), but why the Constitution became the dominant field of action in postcolonial India.

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146 Michael McCann, introduction to *Law and Social Movements*, Michael McCann ed. (Aldershot: Ashgate), xi-xxvi, xxvi.


148 The position is perhaps most explicitly stated by Nivedita Menon (2010).

Constitutional litigation, even when aimed at undoing the state, requires participation and the adoption of certain logics of governmentality. Comparing peasant agitations today to those in nineteenth century India, Chatterjee argues in a recent essay that the state is no longer an external entity to the peasantry, due to the deepening of the developmental state in an electoral democracy. Governmental welfare schemes have come to be seen less as largesse and more as a matter of legitimate claims by the poor, and they have learn to “operate the levers of the governmental system, to apply pressure in the right places”. While Chatterjee addresses conditions in contemporary India, this dissertation demonstrates how this process (of deeper integration of the state into the everyday, and greater participation in the state) began with independence, with the emergence of social welfare and economic development as state projects and the penetration of daily life by state officials, e.g. rationing agents who parceled out food, prohibition officers who searched commuters, female social workers who advised women on health and hygiene.

Global Histories of Rights and the Rule of Law: The View from India

To many scholars of Western legal systems, the narrative presented in the dissertation may seem a familiar one. A constitution is enacted by a group of liberal founders, that promises freedom and rights, and its principles are slowly expanded to encompass various groups of people. Freedom seems to flows outwards and downwards from the moment of founding. In this narrative, the life of the Indian Constitution seems to be merely a delayed version of the American constitutional narrative. The similarity is underlined by the adoption of the forms and precedents of British and American constitutional law, in terms of the American Bill of Rights, legal remedies and the common law.

Unsurprisingly, it is only the visible areas of difference from the Western norm that have attracted the attention of comparative scholars. Western monographs on comparative constitutional law which address the Indian experience have been dominated by debates over Indian secularism and its system of personal laws.\textsuperscript{151} This emphasis is most pronounced in works that seek to theorize the sociology of constitutions or provide a theoretical account of constitutional developments.\textsuperscript{152} For the rest, constitutionalism in India (and indeed the postcolonial world) is seen merely a replication of Anglo-American constitutional law. To paraphrase Partha Chatterjee, if the rest of the world has to choose their constitution from certain ‘modular’ forms already made available to them in Europe and America, what is left for them to imagine? This dissertation demonstrates that the history of constitutionalism in India opens up new fields of enquiry for scholars of constitutional law and democratic theory.

**Between Public Rights of Individuals and Private Customary Rights**

It is important to recognize that rights claims and rights consciousness in India did not emerge with the enactment of the Constitution. The challenges in this search for rights consciousness arise from the fragmented nature of the public sphere in colonial India. Indians were seen to lack the ‘liberty tree’ of British imaginings. Christopher Bayly has emphasized, in his history of liberal thought in India, how everyday encounters in colonial India informed


\textsuperscript{152} For instance, Asia is entirely ignored in Christopher Thornhill’s sociological account of the reasons modern societies seek constitutions and constitutional norms. A suggestive chapter titled ‘post-war transformations’ is found to deal with socialist constitutions in Eastern Europe rather than the postcolonial constitutions. Or take for example a leading edited volume that examines the dialogic role of legislatures with constitutions and its implication for democratic theory, yet leaves out the world’s largest democracy which has a history of strong contestation between the legislature and the judiciary. See, Christopher Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in a Historico-Sociological Perspective* (Cambridge: Cambridge University Press, 2011); *The Least Examined Branch: The Role of the Legislature in a Constitutional State*, Tvi Kahana and Richard Bauman, eds., (Cambridge: Cambridge University Press, 2006).
debates between both British and Indian intellectuals over the rights of Indians. For instance, cases of *lascars* (Indian seamen) in Britain damaging ships in response to mistreatment opened up debates over the rights of Indians and their relationship to British property.\textsuperscript{153} Sukanya Banerjee has persuasively demonstrated that British Indians formulated and laid claim to various universalist ideas of citizenship even when it was being denied to them.\textsuperscript{154} However, these forms of rights and claim-making were limited in significant ways.

First, even the most persuasive advocate of these British Indian claims had little ability to enforce them. The powers of the courts were trimmed and the limited representative government that existed had minimal powers. Thus, a majority of these claims were expressed through the petitioning of various authorities, a practice that later nationalists would pejoratively describe as ‘mendicant liberalism’. Early Indian liberals adopted a juridical model of justice, but saw the British Crown and parliament as their court, where they could appeal against the despotic local colonial government.\textsuperscript{155}

Secondly, in the absence of guaranteed liberties, many of these claims had to be made with great subtlety, through “parody, innuendo and indirect criticism” and the claimants had to search for new forums in the absence of representative institutions and in view of the elusiveness of law.\textsuperscript{156} Finally, Bayly makes an important distinction between claims made as rights-bearing individuals (which formed the basis of Indian liberalism) and those made by holders of ‘ancient customary liberties’.\textsuperscript{157} However, as Bayly and Banerjee both note, it is only increased mobility

\textsuperscript{155} For an elaboration of the argument see Mukherjee (2010).
\textsuperscript{157} Bayly (2012) 32.
that brought up claims of individual rights, be they by Indian seamen in Britain or for the right of an Indian barrister to practice in South Africa. Also, the theorists and claimants of individual rights in these narratives were almost universally members of an English-educated upper class elite.

The demands for protection of ‘ancient customary liberties’ by subjects ranging from Hindu widows demanding their inheritance rights to temple authorities resisting taxation, formed the more broad-based secondary order of rights claims in colonial India. This order drew upon promises made by the colonial government in 1772 and in 1858, to apply Hindu and Muslim religious laws to matters concerning marriage and inheritance. These promises became sites of furious contestation between the state and various groups of citizens. The colonial state’s interference in the private domain was resisted by many nationalists, who viewed the incipient nation as enjoying sovereignty and superiority in the ‘inner’ domain of family, culture and community, while conceding the colonial state’s dominance in the outer.\(^{158}\) As recent scholarship has argued, the administration of Hindu and Muslim law did not merely resurrect scriptural authority but transformed it through liberal ideas of equality, women’s rights and difference.\(^{159}\) As Tanika Sarkar argues, rights were conjugated from messy encounters between scriptural law and the Anglo-American legal system rather than through some form of systematic political thinking.\(^{160}\)

The Constitution transformed both these orders of rights. It brought forward a written code that explicitly granted rights to all citizens. Citizens belonging to a broad range of classes

\(^{158}\) Chatterjee (1993) 1-14.


presented themselves before the state as rights-bearing individuals, as opposed to petitioners seeking to have some rights recognized or propagandists working through innuendo or shadows. The difference is not merely semantic. Rights claims in colonial India were first a question of recognition i.e. of whether the subject had a right, whereas with the Constitution they became a question of enforcement, on the assumption that the existence of rights was already guaranteed. A legally enforceable right is distinct from the same right framed as a moral claim or as a privilege granted by the benevolent colonial state.

Further, the distinction between claims made as rights-bearing individuals and those made as holders of customary liberties became difficult to sustain after independence. The argument for non-interference with custom/tradition had been based on the fragmented authority between the alien state and communities. However, with independence, the state moved from the outer sphere to encompass all areas of life. The Constitution explicitly recognized religion and family as arenas for transformation. The right to practice and profess one’s religion was limited on several grounds including public order, morality and health.  

The most drastic change from the precolonial system was the displacement of a normative inequality as the ground for conceptions of rights in India. Rights under colonial government were determined by caste, class and gender and drew upon ‘custom’. The Constitution however heralded a formal equality between all citizens, and created a common source of rights for all. However, as the Constitutional founders recognized, this did not herald immediate social transformation. Given the limited history of individual rights claims in colonial and precolonial India, where did the new postcolonial rights claims emerge from? Political

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161 Article 25, Constitution of India.
theorists working on rights in India have often focused on the tensions created by granting both individual rights (such as equality and liberty) and group rights (right to religion, language) in the Indian Constitution.  

Through an ethnography of cases, this dissertation cautions against reading the dramatic growth of individual rights claims as a growth in individual rights consciousness. Several grievances arose due to interventions by the state in long-existing practices, be they prostitution or social drinking. However, the framework of the Constitution forced the articulation of the customary right through a new discursive register i.e. social drinking would have to be defended through claims of liberty and privacy of the individual. This process of translation changed both the nature of the right and how it was received by wider publics. Community identities in India are not just a challenge to individual rights, but have fostered and sustained individual rights claims.

This dissertation also underscores the necessity of recognizing that, while rights claims before the courts were brought by individuals, the process of legal mobilization and litigation was a communal one. Litigation was a networked resource that could only be accessed by individuals who were supported by communities and associations in a variety of ways. A community, if all its members were similarly affected by the state, might fund the lawsuit of an individual from amongst them by generating funds and/or through demonstrations of support in legislature, media and the street. Alternatively, the fact of a community being collectively affected by state intervention meant the development of a shared community consciousness about rights and tactics for negotiations with the state. It is relevant that certain minority communities were overrepresented in rights claims against the state, given that they found it

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163 Rajeev Bhargava (2008), Rochana Bajpai (2011)
difficult to assert their influence through electoral politics. Thus, to paraphrase Homi Bhabha, the Constitution was shaped through acts on the margins.

**Liberty in the Absence of Property**

At the heart of classical liberal theory is the protection of individual property rights. The protection of property in early colonial India was justified by the notions that a man who labored on land created property, and that the creation of a market society required ‘trust’ between its actors, which trust would in turn be based upon the protected status of an individual’s property. Both colonial administrators and Indian liberals through the nineteenth century emphasized public good that emerged from the stability of property.\(^\text{164}\) Property law was thus the cornerstone of a colonial legal system, and became the framework within which status based community identities could be incorporated into state recognized individual rights.\(^\text{165}\) So it was the language of property rights that was called upon even when other rights were at stake, for instance disputes over religious ritual and authority were settled by appealing to property titles.\(^\text{166}\)

Gilmartin and Ocko argue that it was property law that provided the model notions of rights in colonial India and that linked the individual and indigenous conceptions of identity together. Thus, religious and customary privileges came to be conceptualized as forms of individual property. It was not surprising that the only right guaranteed in the colonial Government of India Act, 1935 was the right to property.\(^\text{167}\)

However, the right to property itself became a ground for contestation in the Constituent Assembly. Several members argued in favor of weaker property rights to allow the state to bring

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\(^{164}\) Bayly (2012) 17.  
\(^{167}\) Article 299, Government of India Act, 1935. It guaranteed the right to property and contained safeguards against expropriation without compensation and against acquisition for a non-public purpose.
about land reforms and redistribute property. While the Constitution guaranteed the right to ‘hold, acquire and dispose’ property, it was subject to several limitations. Confronted with early court decisions striking down land reform law as violating the right to property, parliament sought to successively amend the Constitution and read down the right. The very first amendment to the Constitution in 1951 granted the state powers to acquire property for ‘public purposes’ or to ‘secure property management’. Laws implementing such acquisitions were declared immune from judicial review and fundamental rights challenges. The right to property continued to be eroded until the 42nd amendment in 1978 deleted it entirely from the fundamental rights section.\textsuperscript{168}

How did a rights order that was predicated on the right to property transition to a system where property was the least secure right? This dissertation uncovers a process of translation where claims to property were increasingly coded as rights to freedom of expression, privacy or equality. This move reversed the logic of the colonial order of rights where various claims had to be translated through the right to property.

So how did the colonial rule of property change with independence? Based on archival findings, the dissertation argues that the market replaced ‘property’ as the basis for the new rights order. This challenges political economy narratives about the Constitution that have almost exclusively considered real property i.e. urban and agricultural land. The market had emerged as an object of governance in colonial India in the late nineteenth century but became central to the postcolonial state’s imagination as it sought to simultaneously industrialize and redistribute

property. Building on Ritu Birla’s work on imbrications of culture in economy, this thesis shows how the new order of rights grew out of questions of consumption, production and retail.¹⁶⁹

**Dissertation Schema**

This dissertation seeks to map how constitutionalism became the governing frame in postcolonial India through a social history of constitutional and administrative processes. It does so through the minutiae of individual constitutional encounters between citizens and the postcolonial state, rather than through the construction of a grand narrative. The dissertation is therefore not organized along chronological or thematic lines.

Each chapter is framed around a particular constitutional case and performs three tasks. First, it uncovers the deepening and reach of the Constitution in everyday life. At the heart of each case is an attempt to transform the daily life of the citizen, be it through changing food practices, drinking habits, access to clothing or sexual behavior. Through an engagement with quotidian practices, each chapter also highlights the changes or lack thereof during the transition from the colonial to the postcolonial. Secondly, in recognition of the plurality of citizen interpretations of the Constitution i.e. the facts that men read constitutions differently from women, and petty traders from big businessmen; the analysis in this dissertation focuses on a different citizen political subject in each case. Finally, each chapter is also representative of a new form of legal strategy or technique that emerged within the period.

To identify critical cases, I sought early challenges to the new regulatory authorities and legislation that were set up as part of the state project to transform society and economy. These cases became important as legal precedents and also generated resonances outside the legal

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sphere, in the form of discussion within the government or in the public sphere. While such a study cannot be exhaustive, this dissertation attempts to capture the broadest range of regulatory measures and geographical distribution possible, ranging from Bombay to Bengal, and covering large cities, small towns and rural settings. Given the domination of the literature on the Constitution by cases dealing with land reforms and preventive detention, this dissertation has consciously chosen to focus on underexplored but equally significant aspects of the new regulatory state. Nevertheless, the questions over the right to property and detention without trial at the heart of land reform and detention cases have also been explored in the new analytical frames of this dissertation.

Chapter One is built around litigation over the imposition of a draconian prohibition regime in Bombay, and focuses on the emerging practice of the ‘test case’. It also highlights how constitutional cases came to impact everyday legality. The prohibition laws in Bombay and other provinces, brought in to enforce Article 47 of the Constitution of India, were amongst the earliest attempts by the postcolonial state to regulate everyday life of its citizens. The prohibition policy was a critical aspect of the state’s attempt to fashion a postcolonial identity for itself by freeing its citizens from the ‘foreign practice of drinking’. However, it relied on the mechanisms of the colonial state for its implementation, opening up questions about state involvement in private life and the role of the police in a democracy. Given that the majority of litigants were Parsis, a community that had strong links to the liquor trade, this chapter explores the emerging idea of public interest and the relationship between liberty, property and community identity. The chapter also demonstrates how even minimal legal victories were able to erode the state’s own confidence in its abilities.
Chapter Two examines a series of administrative law challenges to the Essential Commodities Act. Independent India retained commodity controls that had been established to meet wartime shortages and had become a permanent instrument to address the needs of the developmentalist state. The system of commodity controls exemplified the ‘permit-license-quota Raj’ and sought to discipline the market economy by criminalizing economic offenses. Economic offenders, often petty traders from the Marwari community, who were denied political legitimacy sought to challenge this new criminal law through the language of constitutionalism. Complicating notions that suggest that this system of controls contributed to a culture of corruption, this chapter argues that judicial review of administrative action, the hallmark of a rule of law state, emerges in India from this illegality and culture of corruption.

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

Chapter Three examines the transformation of the political agitation over cow protection by the enactment of the Constitution. While the debate over cow protection had always been framed in terms of the religious rights of Hindus and Muslims, the Constitution met the demands for cow protection on ostensibly neutral economic grounds, and laid it down in Article 48 as a directive principle of state policy. Following Partition and democratic elections, the new elected state governments of North India enacted strict laws prohibiting cow-slaughter and criminalizing the consumption of beef. This chapter engages with a writ petition brought by three thousand Muslim butchers, possibly India’s first class action suit, which challenged these bans through a language of economic rights rather than religious freedom. It examines how religious freedom,
minority rights and political mobilization were transformed through the emergence of the Constitution as a site for politics.

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

“The Republic Without a Pub is a Relic”: Policing Prohibition in Bombay

The summer of 1951 was an exceptionally hot one in Bombay. On 29 May, Behram Khurshed Pesikaka, a middle aged government servant, left home after dinner for a drive around south Bombay in order to escape the oppressive heat. As he returned home to Wodehouse Road at 9:30, some persons “emerged from behind a stationary vehicle and suddenly stepped out on the path of his jeep”. Though he braked and swerved, he was unable to avoid them, and his jeep knocked down three member of a Sindhi family. The two women were hit by the front wheel, while the man was dragged some distance by the bumper. The police constable who arrived soon after reported that Pesikaka’s breath smelt of alcohol. Pesikaka was accordingly charged under the Indian Penal Code for rash and negligent driving and under the newly enacted Bombay Prohibition Act which had made the consumption of alcohol without license an offence.

At the trial, the neighborhood watchman, an independent witness, testified that Pesikaka was driving at ordinary speed and exercising adequate care. Further, the medical evidence confirmed that though Pesikaka had smelt of alcohol, his pupils reacted to light, his speech was coherent, he was well behaved and could walk in a straight line. The police doctor testified that he was not acting under the influence of alcohol. Despite the serious injuries the victims had suffered, Pesikaka was acquitted of the charges of rash and negligent driving.171 However, the

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170 Judgment of the High Court in Criminal Appeal No. 1149-1952, Supreme Court Record Room [Hereinafter SCRR].
171 Pesikaka had voluntarily and without prejudice to the trial compensated the Motwanis (the three victims) with a sum of Rs 5,000.
The High Court decided to convict him under the Bombay Prohibition Act (hereinafter the ‘BPA’). The Court held that the gist of the offence under the BPA lay in the mere consumption of liquor without permit. It was entirely irrelevant whether the person who consumed liquor was rendered incapable of taking care of himself or not. Once the prosecution established that liquor was consumed, the burden of proof was on the accused to show that such consumption was not prohibited by the BPA. Pesikaka was sentenced to a year’s imprisonment in Arthur Road Jail. Pesikaka was one of the hundreds of thousands of people convicted under the BPA. By the time the prohibition regime was liberalized in 1964, over 400,000 people had been convicted under the prohibition laws. Pesikaka’s lawyers moved the Supreme Court of India, drawing upon the new Constitution to challenge the prohibition laws.

The prohibition laws in Bombay and other provinces were amongst the earliest attempts by the postcolonial state to regulate the everyday life of its citizens. Prohibition had been written into the Constitution as a goal for the new state. The prohibition policy was a critical aspect of the state’s attempt to fashion a postcolonial identity for itself, while relying for the implementation of this policy on mechanisms of the colonial state. Central to the problem of regulating drinking was the question of individual freedom, the exercise of will. The decision to drink can be characterized as an exercise of will; however, the act of drinking itself can lead to a loss of self control. Further, the regulation of alcohol requires the restriction of its movement, and the creation of geographies where drink can and cannot be consumed, thus limiting the freedom of movement of people and property. The imposition of prohibition had therefore to be reconciled with the new rights to property, life and liberty.

172 Judgment of the High Court in Criminal Appeal, No. 1149-1952 [SCRR].
As Mariana Valverde points out, liberal states faced greater difficulties than authoritarian regimes in enacting systems to control their citizens’ habits of consumption.\textsuperscript{175} The state machinery and the mechanisms of government that had been developed in the colonial period were not required to represent the will of the subject. But these were the physical and ideological apparatus available to the postcolonial government, which did seek to represent the popular will.

The regulation of alcohol is an extremely productive site for observation of the major modes of governance interacting with each other. As an American study of the experience of national prohibition suggested, there were “few major problems of public administration which do not emerge in striking fashion with the governmental effort to control the consumption of alcohol”.\textsuperscript{176} The act of drinking is governed by social and moral codes, religious rituals, individual desires that differ widely across the population. It is simultaneously managed by through medicalization, criminal law, licensing and zoning regulations, taxation regimes and health and safety regulations.

Given the long history of alcohol regulation in India, and the prominence of prohibition on the list of nationalist demands, the literature on the subject is surprisingly sparse.\textsuperscript{177} The extant scholarship focuses on bourgeois state projects to transform the culture and practice of


drinking, and also on the strategies of resistance and cooption adopted in response to these projects by the lower classes. Both Hardiman and Saldanha have studied how the regulation of alcohol affected the tribal groups of Bombay Presidency (South Gujarat and Thane). Both conclude that tribal practices of drinking remained unchanged despite the existence of a short-lived temperance movement among these groups, which sought to target moneylenders and Parsi landowners who monopolized the sale of liquor. These drinking practices resisted coercive efforts by the state as well as cooption by the nationalists. Social histories of prohibition emphasize the resistance and resilience of the “masses” to the bourgeoisie politics of prohibition. Thus, the failure of prohibition and temperance is predicated on the gap between the state and society.

Pesikaka’s case and the dozens of legal challenges that preceded and followed it illustrate another model of citizen engagement with the state, one that does not turn on the notion of the state – society gap. The Constitution in these legal cases was not an external force, but a structure within which prohibition could be resisted and negotiated. Pesikaka’s case is significant for two reasons. First, it offers an extremely well documented example of how citizens could find themselves in the grip of the prohibition laws when going about their everyday life. Secondly, Pesikaka’s constitutional strategy was an important shift in ways of using the legal system to subvert the regime of prohibition. It marks a turning point when the debate over prohibition moved from the question of regulating individuals or populations, to the question of regulating the state itself.

This chapter argues that the enactment of the Constitution transformed the debate over prohibition in ways that the Constitution drafters had not anticipated. Central to the
constitutionalization of the question was the reformulated idea of ‘public interest’, and its relationship to private interests. The chapter opens with examining the history of alcohol regulation in India and seeks to locate Bombay’s prohibition policy among the larger apparatus of the postcolonial welfare state. It then moves to discuss the three distinctive forms of prohibition litigation that emerged: the substantive constitutional challenge to the imposition of prohibition, the procedural challenge to the implementation of prohibition and finally the impact of this “self conscious” constitutional litigation on everyday criminal cases. Finally, it examines the impact of such litigation on the state’s confidence in its own ability to transform society through law.

Towards the Moral Nation: Prohibition and Nationalism

The BPA, under which Pesikaka was arrested, was a draconian law, enacted as part of the total prohibition policy adopted by the Congress government in Bombay in 1946. The government decided to introduce total prohibition throughout the State over a period of four years, through a gradual reduction in consumption of 25% a year. To this end, the BPA was enacted in 1949 prohibiting “the import, export, transport, manufacture, sale, purchase, possession, use or consumption of any intoxicant, hemp or the tapping of any toddy producing tree, except… in accordance with the terms and conditions of a license, permit, pass or authorization granted under the [BPA]”.

That it criminalized both the consumption and possession of alcohol marks the BPA as a radical departure from prohibition regimes in the USA, Europe and Canada.


Why did the BPA look so different from contemporary experiments with prohibition?\textsuperscript{180} The answer lies in the history of alcohol regulation in colonial India. The production and sale of alcohol in India had been a state project in colonial India. In Bombay, it had been regulated by the Bombay Abkari Act of 1878 (‘Abkari’ literally means ‘hard water’). The Abkari Act was essentially a revenue act that sought to generate maximum revenue with minimum compensation. Motivated by a need to increase profits, the government held a monopoly over the sale of liquor and auctioned licenses for the privilege of making and selling liquor in demarcated areas. Successful bidders could then delegate their rights to selected liquor dealers at the village level, who actually manufactured and sold liquor. This created a class of middlemen, often outsiders to the village economy, who had an incentive to raise liquor revenues. The Parsee community, who had access to other sources of capital, came to dominate the liquor trade in province of Bombay – a development which will be examined in more detail further on in this chapter.\textsuperscript{181}

The Bombay Abkari Act had brought in a centralized system of distilleries, to discourage the village-based alcohol production which provided more opportunities for revenue evasion. As David Hardiman elaborates, considerable effort was directed towards changing the population’s drinking practices. For instance, toddy (made from palm trees), the most popular form of liquor, was subjected to prohibitive taxes because it had a short shelf life and so could not be produced

\textsuperscript{180} The closest contemporary experience of prohibition was in the United States. The National Prohibition Act, 1919 (also known as the Volstead Act) had been enacted to enforce the 18\textsuperscript{th} Amendment, which brought about nationwide prohibition in the United States. The Volstead Act provided that “no person shall manufacture, sell, barter, transport, import, export, deliver, or furnish any intoxicating liquor except as authorized”, and significantly did not criminalize possession or consumption. For more, see Ann-Mary Syzmanski, \textit{Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes} (Durham: Duke University Press, 2003); Daniel Okrent, \textit{Last Call: The Rise and Fall of Prohibition} (New York: Scribner, 2010).

through centralized distilleries.\textsuperscript{182} Despite protests, there was a steady change in consumption habits in favor of factory made liquor. The Bombay government also enacted the Mhowra Act in 1892, which banned the collection and sale of Mhowra flowers.\textsuperscript{183} Mhowra flowers were used by Bombay’s large tribal population as food, cattle feed and – more significantly – to brew a popular alcoholic drink.

Criminal law was used to regulate alcohol only to the extent that it protected or enhanced revenues. The largest number of prosecutions dealt with cases of manufacture and sale of illicit liquor. A prototypical case would be the one of Pestonji Barjorji. Barjorji was a distiller of sprits whose license had expired and he was arrested under the Abkari Act after the police found the copper utensils used for distillation in his possession.\textsuperscript{184} Similarly, dealers or purchasers of mhowra flowers were also prosecuted.\textsuperscript{185} The emphasis in such prosecutions was on protecting a major source of British government revenue.

In contrast with the colonial policy, postcolonial India’s alcohol policy was determined by demands for social reform and not by revenue needs. Middle class temperance movements the world over had viewed drink as the root of social evil, particularly in reference to the working classes. The Indian temperance movement shared this sentiment, but additionally, stressed that drinking itself was alien to Indian culture.\textsuperscript{186}

\textsuperscript{182} David Hardiman, \textit{The Coming of the Devi: Adivasi Assertion in Western India} (Delhi: Oxford University Press, 1987), 110-112.
\textsuperscript{184} \textit{Queen Empress v. Pestonji Barjorji}, (1885) ILR 9 Bom 456.
\textsuperscript{185} \textit{In Re Limba Koya}, (1885) ILR 9 Bom 556.
Unlike Britain, where liberal thought had criticized temperance projects as violations of individual liberty, temperance was almost a constitutive feature of Indian liberalism. This arose both from the belief that alcohol consumption was against Indian custom, which placed a premium on individual self control, and from the fact that the colonial government profited tremendously on alcohol. The foreignness of alcohol is difficult to establish empirically, but it is clear that drinking practices, from the preferred kind of alcohol to the quantities consumed and the sites of consumption, were transformed by the colonial state. Revenue policies encouraged the consumption of industrially produced, low quality alcohol over home brewed liquors like *toddy* and *mahua*. Licensing rules shifted the site of drinking to the new liquor shops and bars, away from fields and village spaces.

The characterization of drink as a poisoned gift brought by the colonizers can be found in several colonial contexts, ranging from Native American accusations that they had been introduced to alcohol to make them give up their land to Ho Chi Minh’s incisive analysis of how the Vietnamese disposition was being ruined because of the shift from mild, delicate rice wine to fiery mass produced liquor. However, the Indian experience stands out because of the central position the question of prohibition held in the nationalist movement.

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Prohibition, popularized by Gandhi, became a part of the Congress’ “constructive program” in the mid-1920s. This was due to a combination of strategic advantages, namely the opportunity to hurt imperial revenues and the ability to forge a common platform between Hindus and Muslims, as well as the influence of the global temperance movement. The differences between the nationalists and the colonial state were laid bare in the evidence submitted before the Bombay Prohibition Enquiry Commission, with the British members and liquor dealers supporting the status quo and the Indian representatives arguing for stricter regulation and prohibition.

During civil disobedience movements in 1921 and 1930, Congress volunteers picketed liquor shops and sought to persuade drinkers. Temperance volunteers would take note of the people who frequented liquor shops and report them to their families and caste organizations. In Bombay Presidency, social pressure and threats of boycott were extremely successful in curbing drinking. Noting with alarm the success of picketing in Bombay, W. Dillion, the Collector, warned the administration that this would lead to large losses in excise revenue and upset civic budget estimates. Not only were liquor sales affected, there were fewer participants and paltrier bids in the auction of liquor licenses. The colonial officials saw the demand for prohibition as a ploy to destabilize the colonial state, and not a principled movement tied to values of temperance.

190 Letter from Collector, Island of Bombay to Excise Commission, Bombay Presidency, 21 June 1930”, File 750 (3) PL, Home-Internal, [MSA].
Central to Gandhi’s imagination was his view of drinking as a ‘foreign custom’ debilitating the body of the Indian worker and peasant, and by extension the Indian body politic. Swaraj would imply not just a freedom from foreign rule, but also from foreign customs. Advocating total prohibition, he wrote that there were two reasons there was no country “better fitted for immediate prohibition than India”. First, drink was sapping the vitality of the working classes “who had to be helped against themselves”; and secondly, since the intellectual classes of India did not drink like those of Europe, there would be no ‘referendum’ required. In this brief essay titled “Total Prohibition”, Gandhi spells out what emerged as the nationalist consensus on prohibition. Drink was a practice and a problem for the poor, drinking was not a part of elite culture in India as in Europe or America. The poor had therefore to be saved from themselves through the intervention of the enlightened classes. A drunkard was a diseased man, he wrote, “quite unable to help himself.”

Gandhi also recognized that temperance could not be achieved merely by giving speeches and through propaganda. “Why do people drink”, he asked. “They drink because they are suffocated living in pestilential dens”. Gandhi was empathetic towards poor drinkers, recognizing that for some it was the only way they can escape their wretched daily conditions. He urged volunteers to visit the homes of drinkers to educate them on the ills of liquor, to persuade liquor vendors to stop selling alcohol and to picket liquor shops.

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191 M.K. Gandhi, “Total Prohibition,” Young India, 4 February 1926, Collected Works, 33:49. It is difficult to estimate whether Indians drank less than other peoples, but some figures are suggestive. Hardiman’s study shows that the tribal populations of South Gujarat, who had few taboos about drink, drank 2.98 gallons of toddy and 0.5 gallons of daru per head as opposed to Britain where the consumption per head was 31.40 gallons of beer, .40 gallons of wine and 1.03 gallons of spirit. Hardiman, Coming of the Devi, 104.
However, while the improvement of the poor drinkers’ material condition was essential and persuading them was important, Gandhi emphasized that prohibition of intoxicating liquor would have to be, ultimately, by law. Recognizing that the colonial state was unlikely to damage its revenue base, Gandhi forecast that such a law would not come till “pressure from below is felt in no uncertain manner”. He rejected the “specious argument” that India could not be made sober by compulsion and that those who wished to drink should have facilities provided to them.

“The state does not cater for the vices of its people. We do not regulate or license houses of ill fame. We do not provide facilities to thieves to indulge their propensity for thieving. I hold drink to be even more damnable that thieving and perhaps even prostitution. It is often the parent of both”.

Addressing Congress workers at Barodli in 1929, Gandhi highlighted that Swaraj could not be established merely by “driving out the English”. Swaraj did not mean “the freedom to live like pigs in a pigsty without let or hindrance from anyone”. Self governance would therefore require prohibition to create a healthy public. He famously reiterated, “If I were appointed dictator for one hour for all India, the first thing I would do would be to close without compensation all the liquor shops, destroy all the toddy palms such as I know them in Gujarat…”

This emphasis on social transformation through the will of the state was unusual for Gandhi, who had always urged that social reform must first come through the inner transformation of people. He argued against the use of law and compulsion in all his other

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195 M.K. Gandhi, Young India, 8 June 1921.
“constructive” projects, be it emotive questions of cow protection and untouchability or developmental works such as the improvement of sanitation and hygiene. Mantena’s reading of Gandhian constructive work offers some clues to the reason prohibition was to be addressed by a different set of means. For Gandhi, constructive work and reform were necessary not just as duties to the project of nation making but also to the self, to regain the power of action. In his view, drink more than anything else damaged the self and took away the power of action.

The Congress’ first experience with government formation in the provinces in 1939 saw prohibition emerge as a significant part of its agenda. The governments of Madras, Bihar, Orissa, the North West Frontier, the Central Provinces and Bombay introduced prohibition in a phased manner. Gandhi praised the imposition of prohibition in Bombay in 1939, stating appreciatively that for the first time the city of Bombay, with its “dirty chawls, overcrowded lanes and uninhabitable hovels” would become truly beautiful when it went dry. It was only with prohibition, and removal of the temptation of drink from the laboring classes, that the municipality of Bombay could deal with the problem of improving the conditions of the poor.

It is perhaps not surprising that Bombay, the quintessential modern Indian city, would become the site for experiments with prohibition. As Gyan Prakash points out, an insistent demand of anti-colonial nationalism was the establishment of a modernity of one’s own. What better way to transform Bombay’s decadent modernity, with the hedonistic drinking of the rich and the squalid drunkenness of its workers, than through prohibition? Prohibition became an easy fix for

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the problems of the urban poor and its language of hygiene and morality elided critiques of class and caste.

While Gandhi mainstreamed and constantly urged the question of prohibition, the issue itself enjoyed support from a wide cross section of the party. Prohibition campaigns had been amongst the earliest activities that had drawn the mass participation of women. The All India Women’s Conference, a leading national women’s organization, took up prohibition as a major part of their agenda. Apart from economic analysis and moral opprobrium, scientific data was marshaled in support of prohibition. Pamphlets and government reports cited heavily from medical studies and chemical analyses which confirmed that alcohol damaged the body. Jawaharlal Nehru in his introduction to a Congress pamphlet on prohibition argued that if it was to triumph in India, it could not do so on religious grounds, but because of the well reasoned conviction that it was necessary for the well being and economic progress of the nation. Socio-economic studies of drinking tracking its impact on family finances were commissioned and circulated. The campaign for prohibition thus mirrored the state’s concern not just for its citizen’s morals, but also for their social and economic well-being.

Undergirding the project of prohibition was the notion of a strong state with a disciplined work force. Maharaj Singh, the Governor of Bombay in a speech upon the introduction of the Bombay Prohibition Act in 1948 said:

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201 All India Women’s Conference Annual Report, 1946, Hansa Mehta Papers, Nehru Memorial Museum and Library (Hereinafter NMML).
203 Ibid., i.
“India is on the threshold of a great adventure which is nothing less than the building of a modern and powerful state. This we can only bring about after a long period of hard and constructive work performed in a spirit of sacrifice and selfless service. Can we obtain in all its strength that vigour and simplicity which are so necessary for our task if important groups in our society remain or become victims of intoxication... to a large extent our country’s future depends the conduct and output of our industrial workers and our professional classes. The former are the backbone of our productive effort, the latter form a reservoir of leadership. Both classes... will be better for abstention from liquor”.

Prohibition became significant to the process of nation-building initiated by the Congress. It was a part of the Karachi Charter of Fundamental Rights and Economic Principles passed by the Congress in 1931 and was included in the election manifestos in 1937. Crucial to the legitimacy of prohibition was that it was being introduced by an elected government. As Gandhi emphasized while praising the Bombay government’s efforts in 1939, prohibition was not a superimposition, as it had been introduced by an elected national government. It had been a plank in the ‘national program’ since 1920 and therefore came in the “due fulfillment of the national will definitely expressed twenty years ago”.\textsuperscript{206} The conflation of the Congress will with the national will was easily made. Prohibition was critical to this imagining of the modern Indian nation. Deviations from this opinion were sharply criticized – Gandhi admonished Acharya Narendra Dev on leaving out prohibition of intoxicating liquor from the proposed constitution of the Congress Socialist Party.\textsuperscript{207}

Constitutionalizing Prohibition

The Constituent Assembly in 1946 spelt out the new state’s aspirations in Part IV of the Constitution, described as ‘Directive Principles of State Policy’, which though not enforceable by the court were supposed to be guidelines for the Indian government. In addition to general commitments to social and economic justice and the reduction of disparities of income, this Part IV also contained specific commitments to creating a system of social security, enacting a uniform civil code for all communities, redistributing wealth, and banning cow slaughter. Most significantly, Article 47 of the Constitution provided that the state “shall endeavor to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious to health except for medicinal purpose”.

The original draft of the Constitution brought to the Assembly by Dr Ambedkar did not have a provision for prohibition. The amendment first arose during a debate over the final draft of the Constitution which some members alleged was alien to the Indian ethos and the goals of the freedom movement. K. Hanumanthaiya lamented, “we wanted the music of the Veena or Sitar, but here we have the music of an English band”. This he attributed to the fact that the members of the drafting committee, while able lawyers, were not associated with the freedom movement. While he conceded that they may be “learned in the several laws and rules that were framed before we got independence”, that was insufficient equipment for hammering out a constitution for India.

Kazi Syed Karimuddin, the Muslim member who moved the amendment to include prohibition, expressed his astonishment that, given Mahatma Gandhi’s lifelong campaign for

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208 Marc Galanter, Law and Society in Modern India (Delhi: Oxford University Press, 1989), xxii.
209 See part IV of the Indian Constitution.
prohibition, there was no mention of this in the constitution. He pointed to the American precedent for incorporating prohibition into the constitutional framework and warned the assembly that rejecting this clause would be “the rejection of the wishes of the Mahatma”. The Kazi drew support from all sections of the house. As Mohamed Ismail Sahib, a Muslim League member from Madras emphasized, “prohibition must find a place in the constitution because there is absolutely… no difference of opinion in the matter”. Mahavir Tyagi, a Gandhian, to rousing applause reminded the House that Gandhi’s foremost plank of constructive national work was prohibition and “we all stand pledged to this programme, we had pledged in front of Gandhiji”. Prohibition thus became a plank that united the Hindu conservatives, the Gandhians and the Muslim League in the opposition. The ritual invocation of Gandhi’s name, six months after his assassination, made opposition almost impossible.

The inclusion of the prohibition clause played the part of an important performative gesture in rehabilitating the “western style” of constitution. The symbolic role of ‘prohibition’ emerges in Tyagi’s powerful closing speech, when he laments the failure of the Constitution to meet many of the promises of the national movement, such as socialism and decentralized government. He states, “[i]f we cannot accommodate even the idea of prohibition in our Constitution, then what else have we been sent here for? We have been talking of revolutions… but if we cannot even have this small reform in our Constitution, the book will not be even worth touching with a pair of tongs. I submit that if the Draft Constitution does not contain prohibition, it does not contain Gandhiji, because where there is liquor, Gandhiji cannot be”. Prohibition thus linked the liberal document to Gandhi, making it ‘modern’ and ‘moral’ at the same time. As a

211 Kazi Syed Karimuddin, CAD VI, 19 November 1949.
212 Mohamed Ismail Sahib, CAD VI, 19 November 1949.
213 Mahavir Tyagi, CAD, VI, 19 November 1949.
Bombay minister would later argue, “prohibition was to be the foundation stone of reconstruction schemes [through which] …we try to make a man sober, teach him the true value in terms of a standard living, eliminate waste and create a wholesome atmosphere for both the family and the village”\textsuperscript{214}. Unlike decentralization to village governments or radical land redistribution which would have led to a radical restructuring of the state, prohibition could be implemented within the existing framework.

In an extraordinary speech to the Bombay Assembly, the Prohibition Minister argued that “unrestrained free thinking and unlicensed individual liberty” were an ingenious machine introduced by the British to convince the traditionally abstentious Indians to drink.\textsuperscript{215} The British education system had corrupted the minds of young Indians, who challenged religion, tradition and the \textit{shastras} and blindly aped the British, taking up drink because the Englishmen drank. Patil suggested that both drink and the individualist civil liberty argument were poisoned British gifts, which needed to be resisted in an independent Republic.

The proponents of prohibition were well aware of the policy’s failure in America, but this did not deter them. As Morarji Desai rationalized, American cultural and social habits gave drinking social prestige, whereas Indian culture since time immemorial had abhorred drink and drunkards.\textsuperscript{216}

\textsuperscript{216} Morarji Desai, “A Word to the Prohibition Worker” \textit{in New Lives for Old} (1948), 127.
Creating Sober Citizens; Disciplining Drunkenness

As the Constituent Assembly deliberated in Delhi in 1946, they envisaged a Constitution that was not centered on the question of protecting individual rights from the tyranny of the state, but rather sought to empower the state to bring about the sweeping social and economic changes at which the Congress-led political struggle had aimed. Thus, the right to liberty granted in the Constitution was subject to permissible restrictions “in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence”. While the courts were granted broader powers of judicial review, this was on the understanding that exercise of these powers would be limited in practice and Parliament would continue to be the final authority over the Constitution. Keeping in mind the attitude taken by the American courts towards New Deal legislation, the assembly framed the right to life and liberty as limited by “procedure established by law” (i.e. any law correctly enacted), rather than by the due process of law (which would require the limited act to be substantively fair).

The limited opposition to prohibition was framed and articulated on four grounds – a certain liberal cosmopolitanism, minority rights, economic losses and sanctity of contract. It became almost unpatriotic to suggest as H.J. Khardekar did that prohibition went against the grain of liberty. In his maiden speech to the Assembly, Khardekar quoted Harold Laski’s “Liberty and the Modern State” to argue that prohibition militated against the development of personality that must be the goal for Indian citizens. The real development of personality comes

217 Art. 19(2) of the Constitution of India.
without suppressions, taboos and inhibitions. However, the individualist argument gained little traction in the Assembly.

Khardekar attempted to humanize drinkers and present drinking as social ritual, rather than a disease. Khardekar urged the house to remember that a majority (almost 90%) of drinkers were not drunkards and would be disproportionately inconvenienced while the 1% who were, would turn to illicit liquor, which was more dangerous.

Khardekar also challenged the so-called unanimous consensus on prohibition by pointing out that several Christians and Parsis, for whom drink was a part of social life, were not in favor of prohibition. Jaipal Singh Munda, a tribal representative, made the case for minority rights more vociferously, insisting that alcohol (particularly rice beer) was an essential part of tribal ceremonies. The amendment, he contended, was a “vicious one” seeking to interfere with his religious rights. Munda’s radical assertions of adibasi autonomy were rebutted by paternalistic arguments on the benefits experienced by tribals after they gave up liquor, while Christians and Jews were reassured that exceptions would be made for sacramental wine.

Arguments focusing on the loss of excise revenue were rejected by members of the Assembly, where pro-prohibition members pointed out that excise revenue on alcohol also generated “three times” the social cost through increased crime, poor health and lack of efficiency. Others claimed democratic legitimacy, by pointing to the experience of Madras

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219 Khardekar drew an interesting comparison between friends having a discussion over a glass of butter milk as opposed to an intellectual discussion over glasses of beer or wine in the evening. H.J Khardekar, Constituent Assembly Debates, Wednesday, 24 November 1948.


221 B.G. Kher (Bombay: General), Constituent Assembly Debates, Wednesday, 24 November 1948.
where despite the annual loss of nearly 170 million rupees, the party that had imposed prohibition was brought back to power.\footnote{V.I. Muniswamy Pillai (Madras: General), Constituent Assembly Debates, Wednesday, 24 November 1948.}

Kher was swift to brush aside the concerns of his fellow representative from Bombay stating that “it was too late in the day to argue that the use of intoxicating drinks do not affect the moral sense of the person who uses them”.\footnote{B.G. Kher (Bombay: General), Constituent Assembly Debates, Wednesday, 24 November 1948.} Drinking extinguished “the lamp that showed the distinction between right and wrong”, thus drinkers were incapable of exercising moral choice and their rights were “not a matter of individual liberty”.\footnote{Id.} The state was correct in curtailing the liberty of drinkers, since there “could not be individual liberty to commit suicide”.\footnote{Id.} L.M. Patil, Bombay’s first Prohibition Minister was even clearer when he noted that “advocates of personal liberty forget that no State can allow civil liberty to ruin oneself”. The concept of civil liberty thus had to be changed. The history of social legislation, he asserted, was a history of curtailment of civil rights.\footnote{L.M. Patil, “The Need for Prohibition” (Address to the Provincial Prohibition Board) in New Lives for Old (1948), 9.}

Thus, with the support of an overwhelming majority, Article 47 was introduced to the Constitution of India committing the state to

“raising the level of nutrition and standard of living and improve public health... and, in particular, … endeavour to bring about prohibition of the consumption except for medicinal
purposes of intoxicating drinks and of drugs which are injurious to health”.\textsuperscript{227}

Following Independence, while most States experimented with prohibition. Bombay and Madras were the only two to introduce a system of complete prohibition, having had a long history of prohibition activism. The leadership of both provinces were also committed to the idea of prohibition. Rajagopalachari, who was the Chief Minister of Madras in 1939 and again in the mid 1950s, had authored the Congress pamphlet on prohibition. Morarji Desai, Chief Minister of Bombay from 1951 to 1958, was a famously dour, humorless and abstentious man who made prohibition a priority. In the early 1950s, several States appointed committees to consider the working of prohibition. The Madhya Pradesh Prohibition Enquiry Committee and the Andhra Pradesh Prohibition Enquiry Committee recommended, in 1951 and 1956 respectively, that prohibition be repealed on the grounds that it had failed. They did not return to the status quo but instead brought about a system of rationing with individuals having to apply for permits to drink alcohol. Almost all other States declared certain districts ‘dry districts’ and monitored the sale of liquor closely. Despite this disparate approach between provinces, the Prohibition Enquiry Committee, appointed by the Planning Commission in 1954, recommended that “nationwide prohibition should be completed by 1\textsuperscript{st} April, 1958”.\textsuperscript{228}

\textsuperscript{227} Article 47, Constitution of India, 1950.
\textsuperscript{228} Prohibition Enquiry Committee Report (New Delhi, Planning Commission, 1955).
Fig 1.1. Districts with Prohibition in 1951

229 Bhansali (1952) annexure 1.
To accomplish this goal set by the Prohibition Enquiry Committee, the state was urged to enact stricter laws, check illicit manufacture, conduct public propaganda, ban drinking in hotels, bars, clubs and parties, and make abstinence a rule for all government servants and defense forces. The Committee spelt out its requirements: the public should be more cooperative, the magistrates should be less lenient in convicting prohibition offenders and the police should be more vigilant. The language used against drinking was so strong that the dissenting member, P Konada Rao, protested “consumption may be an offence… but it seemed to be an unwarranted violence of language and sentiment to stigmatize consumption as moral turpitude, a vice, a sin!”

Prohibition through law was an attempt to shape custom and morals. The Bombay Prohibition Act of 1949 reflected this expanded notion of state power and responsibility. The ten commandments of the Bill (as they came to be known) were that no person shall produce, manufacture, possess, export, import, transport, buy, sell, consume or use liquor except under a permit issue by the government. The Act declared that possession, consumption, manufacture, bottling and export of liquor would be non bailable offences. It provided that anyone found drinking in a common drinking house would be fined, and created the presumption that anyone found in a drinking house would be presumed to have been drinking. Drunk or disorderly behavior on the street was punishable as well. The Act even criminalized the act of commending the use of liquor or “encouraging or inciting any member of the public to do any

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231 ‘Decision on Total Prohibition in Bombay Reaffirmed’ Times of India, Feb 20, 1949
232 S.65, Bombay Prohibition Act, 1949
act that might be in breach of prohibition laws”.\textsuperscript{235} In order to check loopholes it penalized the opening of a drinking house, the commendation or offering of drinks, being found drinking in a common drinking house or conspiring to commit an offence under the Act, or defeating or frustrating the provisions of the Act.\textsuperscript{236}

The Bombay Prohibition Act of 1949 granted vast powers to the police and prohibition officers. It empowered prohibition officers and all police officers to “enter at any time, by day or by night, any warehouse, godown, shop, house, building, vessel, vehicle or enclosed place in which he has reason to believe… intoxicants or utensils, apparatus or implements used for manufacturing intoxicants are kept”.\textsuperscript{237} They could also open packages and confiscate goods that they suspected of containing illicit liquor. Warrants were not required for arrests for any of the above offences or for searching premises. The Act provided that persons believed to have committed an offence under the Act could be detained without trial and have their movements restricted.\textsuperscript{238} The prohibition policy thus created a system that operated outside of the penal code and the criminal procedure code that applied to most offences.

The idea of exceptions also undergirded the permit system introduced under the Act. The Act enabled the government to issue permits to exempt certain categories of persons from the purview of the Act such as military personnel, foreigners and former princes. It also provided that ‘addicts’ whose health would suffer if they were deprived of alcohol could be granted a permit on the basis of medical diagnosis.

\textsuperscript{235} S.23, Bombay Prohibition Act, 1949.
\textsuperscript{236} “To Be Drunk An Offence: Prohibition Act in Bombay,” The Times of India 17 July 1949.
\textsuperscript{237} S.123, Bombay Prohibition Act, 1949.
\textsuperscript{238} S.139, Bombay Prohibition Act, 1949.
The new prohibition regime greatly enhanced the police powers of the state to enable a crack-down on drinking. In its early days, the Bombay Prohibition Act created a “wholesome dread of committing an offence under it”, owing to the penalties of fine and imprisonment.\textsuperscript{239} The year after the enactment of the Bombay Prohibition Act in 1949 saw 19,814 prohibition offences being recorded, as against 9,063 the previous year.\textsuperscript{240} 11,748 persons were convicted in 1949 as against 3,468 the previous year. As the Annual Report pointed out, the number of persons convicted for excise offences per 1,00,000 of the population saw an increase of 240\%.\textsuperscript{241} The number of offences involving the manufacture of illicit liquor dropped, but what rose steeply was the incidence of possession or consumption of alcohol. To deal with its manpower shortage the government drafted special prohibition guards, who were non official workers but were granted statutory powers.\textsuperscript{242}

Police raids could take place almost anywhere and target anyone, as the ubiquitous prohibition arrests section in the daily newspapers of Bombay showed.\textsuperscript{243} Trains and railway stations were subject to sudden raids and searches leading to the arrests of both passengers and staff. The police also followed tip offs about private parties and raided both elite and middle class homes, arresting a range of people from the Vice President of the Kandivili Municipality, the ‘Sarpanch’ of Dahisar, lawyers, doctors, and leading businessmen – all of whom were named and shamed in the papers. Nor were women exempt; those targeted ranged from Catholic housewives in Thane found with cooking wine to Ameena Sultana, one of Bombay’s leading courtesans. Women were seen as especially complicit both in brewing illicit liquor and

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\item[\textsuperscript{239}] Bhansali, (1952) 11.
\item[\textsuperscript{241}] The number of persons convicted was 384 per one million as against 130 in 1948.
\item[\textsuperscript{242}] Bhansali, 1952, 13.
\item[\textsuperscript{243}] The information in this paragraph is taken from a survey of “Prohibition Arrests” columns in the Times of India between the years, 1949-1960.
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transporting it around cities. There was much excitement when one of the first female constables in Baroda arrested eight women on her first day who were said to be distributing illicit liquor to consumers. Prohibition and its enforcement became part of the daily language of the province.

The idea of exceptional laws and procedures was not new to Indian law, but they had largely been applied in times of war (for instance the Defence of India Regulations, 1914 and 1939), with respect to revolutionary terrorism (like the Bengal Criminal Law Amendment, 1925) and in cases of dacoity (the Special Tribunal Act, 1942). Why did prohibition offenders require a regime similar to those for terrorists and dacoits?

The answer lies in the way the postcolonial state viewed its relationship to its citizens. The dominant voices within the Congress believed that the state needed to ban intoxicating drugs and liquor that led to the ‘ruin of the people’. B.G. Kher, the premier of Bombay who had ushered in the Prohibition Act defended the inclusion of ‘prohibition’ as a directive principle of state policy on the grounds that drinking was injurious to health of the individual and to that of the public due to an associated increase in crime and a decrease in efficiency and productivity of the worker. The paternalism of the state ran through the debates: Shibban Lal Saxena defended the expected loss in revenue of Rs 35 crore by arguing that this would lead to at least Rs 100 crore saved in terms of the income of the “families of drunkards, especially to the labour and Harijan families where this vice is most prevalent”. Harijans and labour were more likely to spend their hard-earned money on drink, and given their lack of understanding of its ill effects, it was necessary for the state to intervene to protect them and their families.

244 Prohibition Arrests, 23 May 1953, The Times of India, p. 3.
The citizen was therefore visualized as a passive recipient of the government’s program and not a participant in it. Srirupa Roy observes that “Nehruvian India’s most frequently invoked figure was that of the ‘infantile citizen’ requiring ‘state tutelage and protection’.”

Two views of the drinker emerge. The first is that of someone incapable of making an informed choice, often a tribal, worker, Harijan or member of the lower order, who needs to be “‘uplifted’”. Morarji Desai, Bombay’s Home Minister, emphasized this inability of the lower classes to give up drink, even though they were ashamed of it. He asserted that the poor people in Surat had told him, “How nice it would be if the liquor shops were closed once and for all! …we make up our minds to abstain, but when we pass by the liquor shops, the temptation is too great for us to resist and we succumb”.

The second image of drinkers was that of bad citizens, who although aware of lost revenues the government was sacrificing for their welfare, persisted in their ‘selfish’ habits, doing damage to themselves and to society. When confronted with the innovative ways that people continued to consume illicit liquor, a Bombay legislator labeled them “mad men” and “subnormal”. Defending the enhanced punishments under the amendments to the Prohibition Act, he argued, “it must be the object of government to see the welfare of these people. They have to be looked after and that is a reason why we have got jails or mental hospitals”.

In the postcolonial state’s vision, there was unanimous support for prohibition, demonstrated in the electoral victories and the constitutional commitment. Those who wanted to

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250 Speech by Shri H.S. Metgud (Bailhongal), Proceedings of the Debate in the Bombay Legislative Assembly, 10th March 1954, Ministry of Home Affairs, File 5/14/49, Judicial Branch [NAI].
drink were a minority who had to be protected from themselves and prevented from damaging society at large. Given the importance of the goal (prohibition) and the costs of deviation (illicit drinking) exceptional measures were necessary and could be justified under the constitutional dispensation.

The Fundamental Right to Drink: Balsara v. State of Bombay

The first legal blow to the prohibition regime was struck on the 13 April 1950 when Fram Nusserwanji Balsara moved the Bombay High Court for a writ of mandamus against the State of Bombay in order that he may be permitted to “exercise his right to possess and consumer foreign liquor”. 251 Legal challenges to prohibition laws were not in themselves a novelty; the attempts by the Congress government to impose prohibition in Bombay in 1939 had been crippled by a decision of the Bombay High Court as well. In Chinubhai Lalbhai v. Emperor,252 the High Court struck down attempts to impose prohibition through notifications issued under the Abkari Act. Ruling that the Abkari Act was a piece of revenue legislation, the court found that the colonial legislature had not contemplated that it could be used for the “prohibition of intoxicants as a measure of social reform”. The court did not make a distinction between the Viceroy-in-Council that had enacted the Abkari Act in 1878, and the elected Congress government that brought in the prohibition amendment in 1939. While the case in question was brought by some traders arrested under the new amendment, the courts warned that granting a wide construction to government powers, might allow the government, “to bring the whole administration of the Abkari Act to an end, but further by a stroke of the pen, without any previous warning or the provision of any compensation, to destroy the value of businesses built up, it may be, over many

252 Chinubhai Lalbhai v. Emperor (1940) 42 BOMLR 669

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years and with the expenditure of much capital, in reliance on the continuance of Government policy under the Abkari Act”.253 The earlier challenges to prohibition, thus, were procedural and were remedied by the passing of the Bombay Prohibition Act in 1949.

Balsara was empowered to speak a new language of rights by the new Constitution that had come into force a few months before his petition. He argued that the Prohibition Act restricted his freedom of speech and action and that it violated his right to equal treatment. Moreover, the Constitution empowered him to approach the court for a writ of mandamus under Article 226.254 Article 226 significantly expanded the High Court’s power to issue writs for the violation of fundamental rights as well as for “any other purpose”. Balsara himself was a new type of litigant, perhaps best described as a public spirited citizen. He was a Parsi journalist who worked for several years with Jam-e-Jamshed, a Gujarati daily newspaper in Bombay. In the late 1950s, he would run for elections as an independent candidate from South Bombay.

Balsara launched a two pronged attack on the Act. He prayed for a writ of mandamus asking the government and the Prohibition Commissioner to allow him to exercise his right to possess, consume or use the prohibited items under the Act, including foreign liquor, eau de cologne, lavender water, medicines and medicated wines containing alcohol. In the event the court did not recognize this right, he argued that the right to equality conveyed an equal right to drink, and the court must therefore strike down the permit system which allowed exceptions to

\[254\] A writ was a form of relief that could be issued by a court of law. Prior to the commencement of the Constitution, the jurisdiction to issue writs existed only in the three High Courts of Calcutta, Madras and Bombay and was restricted to persons residing within their town limits. Further, in colonial India the government was immune from prosecution. Various indemnity clauses made it mandatory to obtain the consent of the Governor General before the institution of proceedings against government officials and the courts were precluded from investigating the validity of government orders. Articles 32 and 226 conferred wide powers to the courts to issue directions to the government. Writ petitions cost very little compared to regular civil litigation which had higher court fees. Most importantly, in a judicial system rife with delays, writ petitions took precedence over all other cases.
be made for soldiers and foreigners. He asserted that his right to free speech was restricted by the section that criminalized the commending of drinking, and that “encouraging or inciting any member of the public to do any act that might be in breach of prohibition laws” might even be extended to cover his writ petition. Finally, he argued that the new federal division of powers did not give the province the power to interfere with interstate trade and commerce and thus restrict the import of foreign liquor into the province. Given that the Act was being assailed on several grounds, he also prayed that the Bombay High Court declare the entire Act unconstitutional.

Early in the hearing of the Balsara case, the court recognized that there was no question of striking down the entire prohibition regime as the Constitution made it clear that drinking could be regulated by the state. They however declared that the doctrine of severability could be used to declare certain sections ‘ultra vires’ of the Constitution while preserving the overall structure of the Act.

While conceding that the state had the right to impose prohibition and confiscate property, they held that the legislature only had the power to regulate ‘alcoholic liquors’ and not all ‘intoxicating liquors’ as the Prohibition Act sought to do. Therefore, articles of everyday use which contained alcohol but were not ordinarily used as a beverage such as eau de cologne or medicines could not be proscribed under the Act. While they recognized the possibility of such liquids being consumed as alcohol substitutes, they also opined that the state could not prohibit their legitimate use, and that in fact such a prohibition would offend against Article 19(1)(f), which guaranteed the right to acquire and hold property. Further restrictions on medicines and cosmetics would hurt the objects of public health and social welfare laid down for the state.

255 Civil Appeal 182 and 183 of 1951, [Supreme Court Record Room, New Delhi] (Hereinafter SRCC).
Thus, while the court did not recognize a fundamental right to drink, they argued that the right to property conferred on citizens the right to possess liquids containing alcohol.\textsuperscript{256}

Further, they ruled that criminalizing ‘incitement’ and ‘encouragement’ would have the effect of allowing the state to do things which would defeat or frustrate the freedom of speech under Article 19(1)(a). C.K. Daphtary, the Advocate General of Bombay, argued that the restriction was valid since it sought to regulate morals. The judges pointed out that this morality was subjective since most of the neighboring provinces had not sought to regulate this. “How could the sentiments of common citizenship and equality in law be reconciled with different standards of morality in different places”, asked the Chief Justice.

The court took seriously the claim that the permit system denied the constitutionally guaranteed right to equality. Balsara had contended in his petition “that the system of granting permits under the Act resulted in discrimination of one citizen from another and a citizen from a non citizen”.\textsuperscript{257} The exemption of the army was arbitrary and without any reasonable basis. The judges rejected any attempt to show that the army could be treated differently from Indian citizens. Since India was not a military state, they ruled that the army could not be entitled to special rights and privileges. As the army was subject to ordinary law like any other citizen, the directive principles and standards of social reform in the Constitution applied to them equally.

The judges in Balsara were particularly scathing about the state’s attempts to distinguish the army from other categories of public servants. According to the bench, the maintenance of public order could not be seen as a higher order of responsibility since a similar responsibility

\textsuperscript{256} Fram Nusserwanji Balsara v. The State of Bombay, AIR 1951 Bom 210 (FB).
\textsuperscript{257} Fram Nusserwanji Balsara v. State of Bombay and M.D. Bhansali, Miscellaneous Application No.139 of 1950, Bombay High Court [SCRR].
was conferred on the police, who received no such exemptions. Neither did the judges agree with the argument that the armed forces were an all India service, and those transferred to Bombay for a brief period of time should not be forced to live under prohibition. When the Chief Justice attempted to suggest that the armed forces had been exempted to ensure the high morale necessary for the strenuous task of fighting, Balsara’s lawyer countered by asking “why the cultivator who worked in waist deep water for hours altogether was not exempt”. Justice Tendolkar agreed with Balsara, suggesting that similar exceptions would logically be applicable to miners working in deep mines. N.P. Engineer, Balsara’s advocate, turned the logic of the government against them by asking how the army could be permitted to drink, “if drinking liquor at the end of the day rendered someone unfit to perform their duties”. 258 Chief Justice Chagla in his judgment asked rather acerbically, “Why must the army be permitted to do something which is opposed to public welfare? Why should the army not conform to standards of social reform laid down by the legislature as much as the civilian population?” 259 He turned on its head the Advocate General’s contention that members of the armed forces, thanks to their discipline, could be trusted to drink in moderation, by suggesting that military discipline should make prohibition easier to enforce.

In addition to its skepticism of the state’s reasoning for exempting the army from the prohibition regime, the court struck down the like exemption for foreign tourists, stating that they had to be treated exactly as Indian visitors from other States were. The court was troubled by the idea that foreigner residents should be placed on a different footing than citizens. Noting that “before independence, we deeply resented any special treatment that was meted out to non-

259 Fram Nusservanji Balsara v. State of Bombay and M.D Bhansali, Miscellaneous Application No.139 of 1950, Bombay High Court, 18[SCRR].
Indians”, they expressed surprise that after Independence the legislature continued the same practice. They pointed approvingly to the fact that American prohibition laws had made no concessions in favor of foreigners. How could foreigners, who claimed equal benefit of national laws, not be subject to equal obligations as well? With “considerable hesitation and some reluctance” the court held that a state could in principle classify foreigners as a separate category, given that the state is not interested in their social reform, but they still struck down the specific exemption in question on the ground that the notification had not followed correct procedure.

Fig. 1.2 *The Laughing Atom* (Cartoon from a Bombay tabloid critiquing the racial distinctions under prohibition)

The court also challenged the system of granting exemptions to former Princes, bringing the question of postcolonial sovereignty to the centre of the prohibition debate. The rulers of princely states that had been absorbed into the Indian Union had received several constitutional guarantees such as social precedence, recognition of their titles, and privy purses. Despite
criticism of these concessions from the Left, the government had believed them expedient to ensure smooth integration of the Princes’ territories into India. The Attorney General’s argument that the government could not interfere with the “rights, privileges and dignities of a ruler” did not impress the court. They queries whether this was an admission that the ‘right to drink’ was a personal right.\textsuperscript{260} If so, they reasoned, how could this personal right be withheld from ordinary Indians while Princes were allowed to exercise it?

The court came down strongly on provisions of the Act which were akin to preventive detention, i.e. detention without the safeguard of mandatory production before a magistrate within 24 hours, a safeguard guaranteed by the right under Article 22(3) of the Constitution.\textsuperscript{261} While the legislature was competent to make laws for preventive detention, such legislation had to be for reasons connected with the maintenance of public order, or the provision of essential supplies and services. The court ruled that since the prohibition law did not deal with the maintenance of public order or security, the provisions under it that permitted a policeman to detain someone for 15 days without producing the detainee before a court were void as offending against Articles 19(d) and (e) of the Constitution (the rights to free movement and to reside in any part of the country). The court rejected decisively the legislature’s contention that these extraordinary powers were justified, or that intemperance in Bombay had assumed such proportions that it was a threat to public order.

The ‘Test Case’ for the New Republic

On 23 August 1950 the Full Bench of the Bombay High Court, ruling in the Balsara case, unanimously held that the capacity of the State Legislature did not extend to the legitimate use of

\textsuperscript{260} “Judgment Reserved in the Prohibition Test Case,” \textit{The Times of India}, 8 August 1950.

\textsuperscript{261} S.136, Bombay Prohibition Act.
non alcoholic beverages and medicinal preparations. They struck down the system of permits that distinguished between foreign visitors and Indian visitors; civilians and military personnel; and citizens and long-term foreign residents. They struck down the section which criminalized the commending of drinking and the publication of advertisements for liquor. Further, they issued a writ against the state to forbear from enforcing the provisions of the Act that had been declared void. They directed that Balsara was to be granted a liquor permit by the government without the ignominy of being classified an ‘addict’, a term the court found particularly objectionable because it carried a sense of moral obloquy. Furthermore, Balsara did not have to give an undertaking that he would do nothing that would frustrate or defeat the policy of prohibition.

Compared to the effect of the High Court judgments in the 1930s which had effectively ended the prohibition regime, the Bombay government initially believed that it had got off lightly in the Balsara decision. In fact, the Cabinet resolved not to appeal the decision before the Supreme Court. However, the cancellation of permits for the army and foreigners caused a storm of protest from the Ministries of Defence and External Affairs as well as army authorities. Further, there was a sense that even this was a dangerous precedent. Sardar Patel, the deputy Prime Minister, wrote an urgent letter to B.G. Kher, the Premier of Bombay, asking him to reconsider the decision of the Cabinet not to appeal the judgment. Forwarding a memorandum by the Attorney General outlining a possible legal strategy for the Supreme Court appeal, he warned, “Our Constitution is already so much against us that we should not accept any further

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encroachments by the judiciary, and in my opinion, any judgment of the High Court in constitutional matters which appears unsound should be appealed against”.

Patel’s reaction seems extreme, particularly given that he himself had mixed feelings about state-led prohibition. In 1939, he had been horrified by the implementation of prohibition policies in the provinces and had described them as an “utter fiasco” that in some States had led to drinking on a larger scale.

Where did this sense of unease Patel demonstrated come from? The prohibition policy had been hailed as critical to the refashioning of independent India, as necessary for social, economic and moral progress and enjoying the unanimous support of the public. Even its coercive aspects were seen as a bitter medicine administered by a government that cared for its citizens’ well being, as opposed to the irresponsible colonial government that sought to profit from alcohol revenues. Balsara’s petition, however, shattered the assumption of public consensus. How could prohibition reflect the promise of the postcolonial republic, if it violated the principles of equality on which the republic was built? It was no coincidence that Balsara’s arguments challenging the exemptions given to foreigners, soldiers and Princes gained the greatest traction in the media, as they showed uncomfortable similarities between the colonial state and the republic. Discrimination in favor of foreigners had been one of the main accusations of the national movement against the Raj. Apart from being representatives of an old feudal order, several Princes had allied with the British and crushed nationalist movements in their territories. Finally, the most uncomfortable question was the one raised about the army, which

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265 Sardar Patel to Rajendra Prasad, 19 July 1939, File 1-C/39, Patel Prasad Correspondence, Coll 2, Rajendra Prasad Papers [NAI].
had been a colonial institution and continued to have a Westernized officer core with a social life based around drinking.

Balsara’s writ petition was framed in terms of an individual citizen asserting his rights, but the case was seen from its earliest stages as being about the rights of all citizens. The case came to be referred by newspapers as the ‘Prohibition Test case’, and this was even picked up by government functionaries such as the Prohibition Commissioner, M.D. Bhansali.266 Fram Balsara had clearly not moved the court for the sole purpose of enjoying a drink in the evening. As a middle class man with social connections he could easily have acquired alcohol on the black market, bribed officials to look the other way or even obtained a medical permit as an “addict” based on testimony from a compliant doctor. The decision to go to court and invoke the Constitution was one consciously made, which he knew would have far reaching implications.

The concept of test cases had been around in both England and India since the 1920s, but its use peaked in the late 1940s with the expansion of the state. The early cases centered on tax and commercial questions, but from the late 1940s, this epithet came to be applied to cases that posed significant challenges to state policy. The test cases in the year preceding the Balsara decision give a flavor of the kind of litigation strategies that were being adopted; these included the ‘Sweepers Test Case’ where a municipal sweeper who had participated in the Bombay sweepers’ strike attempted to avoid prosecution under the new Essential Services Act, 1949267; the ‘Private Street Test Case’ where a local landlord challenged the municipalities designation of

266 Bhansali (1952), 4.
267 Incidentally, Balsara’s advocate Naushir Bharucha was also a member of the legislative assembly and was amongst the few that opposed the Bombay Prohibition Act. “Important Test Case in Sweepers Strike,” The Times of India, 10 July 1949, p. 9.
several private thoroughfares as public streets; and the ‘Tea Vendors’ case where a tea vendor challenged the requirement of licenses for tea stalls. The test case helped predict the consequences of non-compliance with laws, determined litigation strategies and typically was strongly defended. The judicial restructuring that took place at Independence had raised the pecuniary jurisdiction of the lowest civil courts of Bombay. Opponents protested that this change was likely to limit the chances of test cases being decided by the High Court and thus reducing their impact.

How a case came to be described as a test case remained unclear. In some cases, the court identified the issue before it as a ‘test case’. The Kushaldas Advani case, also in 1949, was treated as a ‘test case’ and given priority by the Bombay High Court since there were about 160 similar petitions before the court, challenging the powers of the State government to requisition private residences for public purpose. Similarly, in the ‘Milk Powder’ case the Magistrate, after holding that a coffee-shop owner using powdered milk was not guilty of violating the rationing orders on milk, described it as a ‘test case’ that would affect the decisions in 300 cases pending before him. In others, the test was being conducted by the government. In the ‘Money Lenders’ test case the government launched a prosecution against Maganlal Javerilal, a prominent businessman, for unlicensed lending of money, in order to test the machinery for enforcement of the Bombay Money Lenders Act, 1946. In Balsara’s case there was not a flood of other petitions challenging the Prohibition Act, neither was the government particularly keen

268 “Private Streets in Bombay: A Landlords Appeal,” The Times of India, 4 January 1949, p. 11.
271 “Validity of House Requisition Order,” The Times of India, 22 December 1948, p. 11. The case on appeal became one of the first decisions of the Supreme Court on the powers of a High Court to issue writs. See also, Province of Bombay v. Kushaldas S. Advani and Others, 1950 AIR SC 222.
272 “Use of Skimmed Milk Powder,” The Times of India, 23 August 1949, p. 5.
to put its legal regime to the test. Unlike many of the previous test cases, Balsara had not been arrested or charged under the Prohibition laws. His petition was not one of hundreds such similar cases. Unlike contemporary constitutional cases which arose from a situation where the petitioner’s liberty or property was being taken away, Balsara framed his petition purely as a matter of principle. The ‘test’ here was not only that of the prohibition policy but also the possibilities offered by the constitution.

Keeping this in mind the courts were lenient in respect of procedural safeguards. Balsara’s petition faced a preliminary challenge on the grounds that the writ of mandamus was not the appropriate form of relief in this case. Balsara had petitioned for a writ of mandamus. This was an order issued by a superior court to compel a lower authority or government officer to perform mandatory or administrative duties correctly. The advocates for Bombay argued that the writ of mandamus was not a remedial measure, and could only be used to compel an authority to do something but not force it to forbear from doing a thing. In the past, writ petitions had often failed for not asking for the right remedy, however the Bombay High Court was almost gracious in allowing Balsara to amend his petition appropriately to ask for different forms of relief. As Justice Tendolkar asked, “If a man goes to court and says ‘My rights are affected, give me a remedy’ can the court turn him away because he has not asked for a requisite remedy even if his grievance is real?”

The role played by the Bombay High Court it admitting this petition was significant, especially because the neighboring High Court of Madhya Pradesh had rejected a near identical petition for mandamus challenging the constitutionality of the Central Provinces and Berar Prohibition Act on simple procedural grounds. The petitioner like MR Balsara had not been

arrested for an offence nor had he had an application for exemption refused. The court ruled that as no legal right of the petitioner had been infringed, they could not issue a binding declaration.\textsuperscript{275} The courts recognized their own role in advancing the rights of the citizens. In most civil cases, the losing party usually had to pay the legal costs of the victorious party. The Attorney General of Bombay urged that since the petitioner had not succeeded in the entirety of his challenge he should pay the costs. However the court felt it could not overlook the fact that Balsara had succeeded in some important contentions. Since this was due to extraordinary leniency of the Court there should be no order as to costs.\textsuperscript{276}

Justice Tendolkar who was part of the Bombay High Court bench that ruled in Balsara’s favor, would later go on to critique other aspects of the Prohibition Act. Addressing delegates at an International Legal Conference in New Delhi two years later, he contended that the Bombay Prohibition Act which “enabled the police to raid a man’s home was a violation of the UN Charter”.\textsuperscript{277} He argued that a legislative measure that made a man’s home liable to be raided by the police for “finding out whether he was committing the heinous crime of having a drink in the evening” authorized interference with the privacy of the home and violated Article 12 of the UN Declaration of Human Rights. He asserted that the right of privacy had always been recognized in the Indian tradition and that the home was regarded as “more sacred here than elsewhere”. However, the “fanatical” and “fantastic” Prohibition law gave people no more privacy than “goldfish”. There was a lack of proportionality in the fact that private premises could be raided in order to discover “not the secret den of anarchists plotting against the state or a gang of

\textsuperscript{275} Sheoshankar v. State of Madhya Pradesh, 1951 Cri L J 1140.
\textsuperscript{276} “Parts of ‘Dry Law’ Held ‘Ultra Vires’,” \textit{The Times of India}, 23 August 1950.
\textsuperscript{277} “Violation of Rights,” \textit{The Times of India}, 31 December 1953.
murderous thugs planning an armed dacoity, but whether a bottle contains a dram of whisky or a tumbler emits the tainted smell of prohibited alcohol”.

Justice Tendolkar seemed to anticipate the language of judges of the Indian Supreme Court of the 1980s in promotion of public interest litigation when he said, “[b]y every canon of civic liberty, on every principle of civilized jurisprudence, a man’s home and private life should be immune from state interference and police inquisition. It is a fundamental human right, and a law that offends against these basic rights and liberties cannot be justified merely because it dangles before the public eye a lofty but unattainable ideal of ascetic virtue”.278

Apart from the judicial enthusiasm in championing the cause of the individual, the Balsara case was also a celebrated public event. The courtroom was packed on all days of the hearing and the case and its proceedings received detailed coverage in both English and vernacular newspapers. On the first day, the papers reported, long before the court assembled, “a large crowd clamoured for admission to the court room, and when the doors were opened there was a scrambled for positions of vantage”.279 There were blow-by-blow accounts of the oral arguments between the parties and the interventions of the judges. As the Bombay Chronicle noted, on the day of the judgment the street outside the High Court was brimming with people. Crowds gathered at the Poona Railway Station, eagerly awaiting the evening newspapers from Bombay carrying news of the decision.280 Newspaper offices were flooded with telephone inquiries regarding the outcome of the case, and it was the “topic of conversation on the street corners and restaurants”.281 Thus, the prohibition case played out as a legal spectacle. In the

278 “Right of Privacy,” The Times of India, 1 January 1954.
279 “High Court Hears Petition of Journalist,” The Times of India, 1 August 1950, p. 1.
280 “Cabinet to Meet Soon,” The Times of India, 23 August 1950.
281 Id.
public imagination, it never was simply about Mr Balsara’s rights, it was an event in which they all had a stake.

Balsara’s case triggered at least one similar challenge in another State. In the neighboring State of Madhya Pradesh, Sheoshankar applied for a writ of mandamus challenging the application of the Central Provinces and Berar Prohibition Act of 1938.282 Sheoshankar’s arguments were virtually identical to those raised by Balsara, and he expressly relied on the Balsara decision. The Madhya Pradesh High Court also referenced the Balsara judgment in their scathing critique of the system of exemptions for non-Asiatics and members of the armed forces. The legislature of Madhya Pradesh which was in the process of enacting a new prohibition law took notice of the Balsara judgment and amended the draft law to bring it into conformity.283

Immediately following the Balsara judgment the liquor stocks of the Area Commander, Bombay were sealed.284 However, the government by and large attempted to ignore the judgment and continued to issue permits to foreigners, servicemen and ex rulers for a few more weeks. On hearing of this Balsara’s attorneys wrote to the Director of Prohibition and the Collector of Bombay seeking to know whether the government had continued to grant permits even after the High Court judgment. They also asked that their client be granted an interim permit until a permanent exemption, as ordered by the High Court, could be issued to him. The government solicitors politely recommended that Mr Balsara follow the prescribed format for applying for the permit, and stated that the other information he sought not being relevant to the orders in his favor, the authorities could not be called upon to furnish it. Balsara reiterated that he was entitled to a permit under the High Court order and must be given an interim permit without having to

283 “M.P. Dry Act Amendment, Sequel to Ruling in Bombay Case,” The Times of India, 1 August 1952.
apply for it. He also pointed out that since no applications for permits had been made by the
former Princes, servicemen and foreigners, whose earlier exemptions had been struck down by
the High Court,—supplying them with permits would amount to an act of discrimination. Further,
apart from his rights as a petitioner in the case, he was entitled as a citizen of the state to the
information that he demanded; he warned the government that if he did not receive a reply in a
week, he would be forced to take legal steps, i.e. move the High Court for an action of
contempt.\footnote{“Issue of Permits to Foreigners: Storm Brewing Over Prohibition Laws,” The Times of India, 6 September 1950.} Balsara made it quite clear that he was not satisfied with securing his individual
right to drink, and that he would continue to push the prohibition regime.

All this led to the government hastening to appeal the High Court’s decision at the
Supreme Court. The Supreme Court located in distant Delhi was not as spectacular a venue as
the Bombay High Court. The court had been newly constituted and sat in an unused chamber in
the parliament building while the new courtroom was being constructed. Unlike the crowded,
bustling corridors of the Bombay High Court, the Supreme Court transacted few cases, had a
small bar and was largely empty.\footnote{I am grateful to Mr B. Sen for sharing his reminiscences of the early days of the Supreme Court. For more, see B. Sen, Six Decades of Law, Politics and Diplomacy (New Delhi: Jain Book Agency, 2010).} Despite the less charged atmosphere in Delhi, the stakes
remained high. Motilal Setalvad, the Attorney General of India, was asked by Sardar Patel to
defend the State of Bombay. Setalvad was assisted by C.K. Daphtary, M.M. Desai and H.M.
Seervai.\footnote{Daphtary was the Advocate General of Bombay and would within a year be appointed the first Solicitor General of India. Seervai was to succeed Daphtary as Advocate General of Bombay and emerge as the leading authority on Indian constitutional law.} Balsara was defended by a veritable legal battery – Sir N.P Engineer assisted by G.N.
Joshi, R.J. Kolah and Nani Palkivalah.\footnote{Joshi was a leading commercial and tax lawyer who also authored one of the early commentaries on the Constitution. Kolah was a leading practitioner in the Bombay Bar. This was one of the first cases in which Nani Palkivalah appeared, but he was soon to emerge as India’s leading constitutional lawyer and argue some of India’s}
High Court, the Supreme Court’s judgment preferred to focus on technical aspects of law, taking the occasion to pronounce on the doctrine of pith and substance and on the commerce clause. The constitutional bench was quite anticlimactic and it substantially reversed the judgment of the Bombay High Court with one important exception.

The Supreme Court reversed the High Court’s finding that the permit system militated against equality and held that military servicemen and diplomats could be granted permits to drink alcohol. It held that the armed forces could be treated as a class for certain purposes, because “they have their own traditions and modes of life… which aim at maintaining a high level of morale and those qualities which enable them to face dangers and perform unusual tasks of endurance and hardship”. Transient foreigners such as tourists and diplomats, Justice Fazl Ali argued, formed their own category of being only temporary residents.

The Supreme Court did, however, strike down all the restrictions on free speech and preventive detention. Notably, it upheld the ruling that the legislature could not prohibit the legitimate use of an article which was ordinarily not drunk, merely because its use could be perverted for the purpose of defeating or frustrating the objects of the Prohibition Act. The legislature could not deprive the general public of the legitimate use of their property, such as lavender water or eau de cologne.

The Advocate General, H.M. Seervai, attempted to downplay the impact of the judgment: “the petitioner had opened his mouth wide to drink intoxicating liquor and all he has been allowed to drink is medicated wine and denatured alcohol”. Noting that the petitioner failed to

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get what he came for, he urged him to return “to the odorous cleanliness of which he says he has been deprived”. Yet it was the carving out of this exception that would undermine the entire prohibition regime.

M.D. Bhansali, the Prohibition Commissioner who was a party in the Balsara case, authored a report on prohibition in Bombay. He noted that the Prohibition Act had created a “wholesome dread” (emphasis mine) of committing an offence under it as the punishment was sufficiently severe to be a deterrent. Immediately after the enactment of prohibition, consumption was noted to fall, even in areas known for illicit liquor traffic. However, the High Court judgment declaring certain section of the Acts invalid, followed by the Supreme Court appeal, resulted in an “intensifying [of] the tendency for illicit consumption of liquor”. Why did the consumption of liquor increase even after the dilution of the High Court judgment in the Supreme Court? Was Bhansali suggesting that the judgments blunted the edge of the “wholesome dread” produced by the Prohibition Act?

**Smelling Like a State: Procedural Justice under the Law of Prohibition**

Behram Khurshed Pesikaka, whose narrative this chapter began with, was arrested for smelling of alcohol a month after the Balsara judgment in the Supreme Court. Pesikaka’s defense rested on two grounds, the first that he had not consumed prohibited alcohol. He attributed the smell of alcohol to the consumption of B.G. Phos (a health tonic with 17% alcohol content). Secondly, he argued that the onus was on the prosecution to show that he had taken

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292 Bhansali (1952), 11.
293 Bhansali (1951), 12.
illicit liquor and not, as he contended, drinks that contained alcohol but were permitted by law. Both these claims rested heavily on the gains of Balsara’s case. The court in Balsara had ruled that the government could not ban all intoxicating liquids merely because they could be misused, and had thus legalized medicines and health tonics with alcohol content. The judgment had also launched a first assault on the special procedures that had been set up under the prohibition regime.

Immediately after the Balsara decision the front pages of newspapers carried the news that following the judgment of the Supreme Court, perfumed spirits and toilet preparations containing alcohol could be freely sold in Bombay without a license. Six months after the Balsara judgment the Times of India reported that there had been a sudden spurt in the sale of Tinctura Zingiberis Mitis (a weak tincture of ginger) in areas where the Bombay Prohibition Act applied. The tincture was being consumed on a considerable scale as a substitute for alcoholic beverages. Its production increased from 36,000 lbs in 1949-1950 to 380,000 lbs in 1951-52, in the period following the Balsara judgment. Other tinctures and tonics also showed a steady growth. The production of the tonic ‘Roma’ went up from 1,000 lbs in 1952 to 17,654 lbs in 1953, and ‘Carminative’ went up from 341 B.G. to 1,476 B.G. in the same time. The Bombay

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294 To give a sense of the relative alcohol content: the doctor on cross examination stated that beer contains between 2.9% alcohol, and sherry and port about 15-20%. Evidence of Witness Dr Keval Kumar Beri, Criminal Appeal 42 of 1953, [SCRR].
296 “Tincture of Ginger Sales Up: Use as Alcohol Substitute,” The Times of India, 14 October 1951.
297 “No Penal Action Against Pharmacists Contemplated,” The Times of India, 3 February 1953.
298 Letter from Board of Experts to Secretary of Revenue Department, Government of Bombay, 13 December 1954, File No. BPA 1654, Home III, 1954[ MSA].
government complained that these tinctures were sold everywhere, in hotels and restaurants, as well as groceries and barbershops.299

The newspapers of the period were replete with advertisements for these tonics. BG Phos, which Pesikaka claimed to have consumed, began to be produced in the same period. Pesikaka however stated that he had begun to take the tonic due to his deterioration of health during government service.300 Pesikaka was employed by the Transport Officer. Until a month before his accident, he served as enforcement supervisor and had to tour districts all over Bombay province to supervise offences under the Motor Vehicles Act. It was the constant strain of travel and vagaries of diet in villages, he said, that caused him stomach disorders and sleeplessness. Overwork and strain in the course of his duties as a public officer had led to his taking tonics, including B.G. Phos.

Pesikaka had been acquitted by the Magistrate’s Court. Given the importance of his defense, the state moved the High Court on appeal.301 Pesikaka’s claims were rejected by the Bombay High Court which sentenced him to a month’s rigorous imprisonment with a fine of Rs 500.302 The High Court was frankly skeptical of the B.G. Phos explanation. They noted it was “impossible that the doctor would ask him to take the tonic after dinner”, as the instructions on the bottle said the normal dose is taken before dinner.303 Further, they noted that when a bottle of B.G. Phos was produced before court, the smell of alcohol was not prominent, the predominant smell being that of vitamin B. The court disregarded Pesikaka’s written statement in its entirety

299 “Reply of Government of Bombay to General Questionnaire issued by the Prohibition Enquiry Committee”, in Prohibition Enquiry Committee: State Government’s Memoranda and Other Documents [Planning Commission, New Delhi, 1956], 85.
300 Written Statement of the Accused, B.K. Pesikaka, Criminal Appeal 1149 of 1952 [SCRR].
301 Judgment of Presidency Magistrate, 19th Court, Bombay, Criminal Appeal No.1149 of 1952 [SCRR].
302 Oral judgment of Justice Gajendragadkar, Criminal Appeal No 1139/1952 in the High Court of Bombay [SCRR].
303 Id.
and sentenced him. A worried Pesikaka moved the Supreme Court. His first appeal to the Supreme Court was dismissed by a majority of the bench, with Justice Bhagwati dissenting. The newspapers of the day opined that once the Supreme Court had made a pronouncement it was futile to discuss the legal merits of the case, but rued the heavy burden this onus of proof placed upon the accused person. The evidence establishing consumption of alcohol was often very flimsy, the court observed, being no more “than a hypersensitive nostril of an overzealous policeman”.  

This would leave citizens vulnerable to harassment and blackmail of “unscrupulous persons”.

Pesikaka persisted, and noting the differences of interpretation between the majority and dissenting judgments, applied for a review on the ground that the case raised important constitutional questions and needed to be heard before a constitutional bench. This bench was asked to clarify what the effect of declaring Article13(b) of the Prohibition Act (which criminalized consumption of medicines, tonics, etc.) invalid was on the consumption of the liquids like B.G Phos. Pesikaka argued that his entire conviction was based on three innocuous statements made in the medical evidence of Dr Beri: “breath smelling of alcohol”, “The accused had taken alcohol in some form or another”, and “Alcohol would also mean medicinal preparations containing alcohol”. His lawyers protested that no tests had been employed to ascertain the quantity or type of alcohol consumed. No mouth or stomach wash was taken, neither were blood or urine tests performed. The mere test was that of smell. The majority of this reconstituted bench held that to smell of alcohol was compatible with both his innocence and his guilt, and was thus a neutral fact. It was thus the duty of the prosecution to establish that the alcohol that he had smelt of belonged in the category of prohibited alcohols and not the permitted

305 Case for the Appellant, Criminal Appeal No 1149 of 1953 [SCRR]
variety. The court referred to the *Balsara* case to highlight that not all liquids containing alcohol were proscribed liquids.

The Supreme Court judgment threw open the question of the status of convictions that had already been made under the Act. Would these convictions lapse automatically, or would the convicted parties need to initiate separate legal proceedings to have them overturned? Since 1950, more than 40,000 people had been convicted in Bombay for consuming liquor without permit.  

In all these 40,000 cases the burden of proof had been placed upon the accused. In several cases the accused had presented empty bottles of tinctures and other medicinal preparations to support their contention but had them rejected. However, much to the alarm of the Bombay government, the courts leaned towards applying the new defense and standard of proof to other prosecutions.

In February, 1953 the police arrested Mr E.J. Saldanha, a resident of Bandra, after complaints that he was verbally abusing a neighbor while drunk. Upon medical examination, it was clearly proven that he was under the influence of alcohol. Saldanha’s defense was that he had consumed five ounces of Hall’s wine shortly before the police arrived and produced an empty bottle before the court. Hall’s Wine was a patent ‘restorative tonic’. considered rich in vitamins, that had been invented by Prof Yudkin, a nutritionist at the University College London. It was popular in Britain and the colonies and the subject of advertising throughout the 1930s. The magistrate rejected Saldanha’s defense on the ground that there was no evidence to show that he had consumed Hall’s Wine, and drew adverse inference from the fact that the normal

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dose of Hall’s Wine was only two ounces. Saldanha was acquitted on appeal by the High Court which ruled that since Hall’s wine was not ordinarily drunk in the presence of witnesses there was no evidence that he could have provided. His statement on the quantity consumed was consistent with medical evidence and the court had to take him at his word.\textsuperscript{308}

The shift in burden of proof began to be applied by magistrates in many everyday cases. For instance Runga Bala Koli, a tribal fisherman in Bombay, found with three bottles of illicit liquor and equipment for manufacturing liquor, was acquitted of charges of illicit distillation on the grounds that there was no evidence to show that he had actually used the equipment. In another case involving two Koli defendants, who were found with brewing equipment and empty containers with traces of liquor, the court sentenced them to imprisonment until the rising of the court on the grounds that all the items required for manufacturing liquor had not been found. These decisions caused a great deal of frustration in the administration, which described them as miscarriages of justice.\textsuperscript{309}

By 1963, the Planning Commission was protesting the number of tinctures available in India. It pointed out that the British Pharmacopeia had reduced the number of tinctures from 34 in 1932 to 14 in 1963, the US Pharmacopeia had reduced them from 19 in 1942 to 11 in 1960, but the Indian Pharmacopeia published in 1955 listed 42 different tinctures.\textsuperscript{310} The Planning Commission, after interviewing leading medical representatives, came to the conclusion that there was hardly any medical use for tinctures, which were outmoded and were being replaced with modern drugs which were not alcohol based. Spot checks revealed that several tinctures being sold were spurious to begin with, and consisted of alcohol colored with a suitable coloring agent.

\textsuperscript{308} “Medical Evidence in Dry Case: Accused Freed,” \textit{The Times of India}, 19 March 1954.
\textsuperscript{309} BPA: 1754, Home III, 1954, Maharashtra State Archives [Hereinafter MSA].
\textsuperscript{310} \textit{Report of the Study Team on Prohibition} (New Delhi: Planning Commission of India, 1963), 192.
agent. Other manufacturers were producing ear drops and eye drops with a large percentage of alcohol. A frustrated Planning Commission suggested that tinctures be abandoned for more modern medicine, and industrially produced eye and ear drops be replaced with prescriptions that could be made by pharmacists.\footnote{108}

Writ petitions continued to chip away at aspects of the prohibition regime. Acquittals abounded and new rules of procedure were formed. Since smell could no longer be the basis for arresting someone, the police were instructed to take suspicious parties to be examined by a doctor. However, even here the Bombay High Court ruled that the police did not have the authority under the Police Act or the Evidence Act to compel a person to be taken for a medical test. In the specific decision, the court also acquitted the accused farmer of the charge of assaulting a policeman holding that he was exercising his legitimate right of self defense.\footnote{311} The possibility of determining through medical examinations what kind of liquor had been consumed was slim. Doctors in hundreds of cases testified that prohibited spirits produced identical effects, reactions and smells to those that were permitted.\footnote{312} An association of doctors of all communities published an open letter in the press stating their opposition to prohibition as medical men. They rejected the claims of the government that prohibition was necessary on health grounds by pointing to alcohol’s role in medicine.\footnote{313}

The rising acquittal rate created a sense of unease in the government. This was partly explained by them as a problem of detection. They recognized that innocent people were harassed and the guilty managed to escape because of the ‘rough and ready’ methods employed

\footnote{108} Id.
\footnote{311} “People Cannot Be Forced Into Medical Tests,” \textit{The Times of India} 13 September 1958.
\footnote{312} Id.
\footnote{313} Id.
by the police to determine drunkenness. These involved examining gait, speech, eyes and behavior. Could a low ranking police officer be trusted to make this determination? Indirectly, the criticism in Pesikaka was that conviction had relied on the sense of smell of an “overzealous policeman”. Given the unreliability of medical testimony and the reluctance of any independent witnesses to come forward, the government moved towards a more ‘scientific’ method for determining guilt. The Commission on Prohibition settled upon the ‘breathometer’ after reviewing a wide range of appliances for determining alcohol content which were easy to use, gave accurate results and could be handled by persons who were themselves not experts in medicine or chemistry. The Commission made a very detailed study of a number of instruments used in the United States including the ‘drunkometer’, the ‘alcometer’, the ‘alcoholometer’, the ‘intoximeter’ and the ‘breathalyzer’. Compared with chemical tests, the breath test cost less and avoided delays since the result was instantaneous. The blood tests that the government was trying to rely on were frequently delayed. The Deputy Director of Medical Services in Bombay reported that in the first five months of 1963, there were more than 50,487 blood reports required by the courts which were pending. Moreover, the breath tests would make up for the want of trustworthy oral evidence.

Nevertheless, the Commission remained wary of the legal problems that could arise from breathometer use. They flagged the possibility of the courts questioning whether the breathometer test violated Article 20(3) of the Constitution (a safeguard against self incrimination), whether taking samples from an unconscious victim violated his rights, whether the breathalyzer could be forced upon an unwilling subject and whether refusal to take the test

\[316\] Ibid at 114.
\[317\] Ibid at 127.
could be penalized. The Commission consulted with lawyers and drew extensively on US precedents to evaluate whether the proposed provisions would pass legal scrutiny. It suggested that in order to avoid divergent views from the courts in India, ‘drunkometer’ tests should be given statutory recognition. Unlike the self confident regime of 1947, the government was now quite wary of courts and unsure of its ability to legislate problems away.

**Public Interest, Private Interest, Parsi Interest**

At first glance, Fram Balsara’s petition that started this chain of events appears to be a public interest case raising questions of individual liberty and equality. Balsara was a journalist. At one level, his profession suggested that he was a proto-typical public spirited citizen whose petition could be seen as an extension of a principled journalistic crusade against prohibition. Similarly, Pesikaka’s case was that of an individual caught in the grip of prohibition law, who was testing out various strategies to escape imprisonment.

This section will argue that despite appearances and rhetoric, these cases were not merely cases of individual rights, but were situated within understandings of status, class and community identity.

Balsara died early and left few papers and it is difficult to verify exactly why he went to court. However, it is likely, given the expensive lawyers he hired, that he was being helped by others. Given his journalistic background one cannot ignore the fact that the press was particularly hard hit by prohibition, because of the ban on advertisements of liquor in the papers. The Planning Commission noted that no serious reader could fail to note that the English

\[318 \text{Ibid at 129.}\]
language press in particular had a strong bias against prohibition. This tendency revealed itself in the extensive, skeptical coverage of prohibition, as well as the highlighting of prohibition excesses in the *Times of India* and the *Bombay Chronicle*. Almost all the English language newspapers cheered the liberalization of prohibition in 1963, hailing it as “a victory of good sense over shibboleth” and “belated return to reason and wisdom”. The Bombay based *Times of India* greeted the news with “three cheers for ... good sense and boldness”.

Similarly, Pesikaka’s role as a government servant was highlighted both by him and the media in different ways. Pesikaka referred constantly to his job, the strains caused by public duty and his contact with other government officials, such as the Commissioner of Police whom he met in the course of work on the day of the accident, in order to present himself as a responsible individual who was unlikely to violate the law. His lawyers argued that a conviction would lead to his dismissal from government service, a situation that would not have arisen had he been an ‘ordinary’ person. In consideration of his age and likelihood of unemployment the court was asked to be lenient. The prosecution on the other hand asked for the maximum penalty because Pesikaka was a public servant, who brought the prohibition law into disrepute. The press gave great attention to his case because he was a public servant, and the press reveled in stories of establishment figures who were caught violating prohibition laws. When the health minister’s butler was caught manufacturing illicit liquor in the minister’s house it made front page news,

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321 Written Statement of the Accused, B.K. Pesikaka, Criminal Appeal 1149 of 1952 [SCRR].
322 Oral judgment of Justice Gajendragadkar, Criminal Appeal No 1139/1952 in the High Court of Bombay, Criminal Appeal 1149 of 1952 [SCRR].
and most columnists gave ample space to the news that the author of the leading legal commentary on the prohibition act was convicted of a prohibition offence himself.323

Along with their profession, their community identities also shaped the strategies chosen by Balsara and Pesikaka, as well as judicial and public responses to the same. It is also difficult to ignore the fact that both Balsara and Pesikaka were Parsis, or Indian Zoroastrians. In fact they identify themselves in their writ petitions as “Parsi residents of the Fort of Bombay”. Balsara worked as a journalist for many years with the Jam-e-Jamshed, a Gujarati daily that had a largely Parsi readership. Not only did Parsis have strong links with the liquor trade, drinking was not considered taboo amongst them.

The largest organized opposition to prohibition in colonial India came from those who were involved in liquor industry. This was not just a professional or business group, but dominated by certain small communities with historic links to the liquor industry. These included religious minorities like the Parsis, backward caste groups like the Bhandaris and Dalit groups like the Pasis. Parsis had come to dominate the liquor trade in Bombay in its early days. The Parsis were Zoroastrians who had immigrated to India from Persia in the eighth century to avoid Muslim persecution. They were a closely knit and easily identifiable community that had flourished economically under colonial rule.324 A survey in 1864 showed that 21% of all alcohol dealers in the province were Parsi, despite Parsis constituting under 5% of the population of the city. Common Parsi surnames such as Toddywalla, Ginwalla and Daruwalla indicated their intimate links with the liquor business. Parsi businesses were picketed during the temperance

drives and during the 1921 Prince of Wales riots in Bombay, Parsis were attacked and their shops burnt.

Gandhi, while expressing great regret for the anti-Parsi violence, advised Parsis to renounce the liquor trade themselves, suggesting that it was better to “break stones or even beg” than to sell liquor. He periodically addressed Parsis, asking them to join the cause of prohibition and not let the name of their community be defamed by their links with alcohol.

The demand for prohibition had influential Parsi supporters, including Dr. Gilder who, as heath minister, had attempted to introduce prohibition in Bombay in 1939. However, the majority of the community saw this as an attack upon their business and way of life. Through the 1930s and ‘40s, they appealed to the colonial state to protect them from the activities of the prohibition activists. A petition from the “Country Liquor, Foreign Liquor and Toddy Merchants of Bombay”, dominated by Parsi signatures, protested the agreement between the British and Gandhi which permitted the peaceful picketing of liquor shops. The Parsi Panchayat, the leading community organization, passed a resolution declaring the Bombay government’s experiments with prohibition in 1939 a “serious and highly objectionable interference” with Parsi religious beliefs and a violation of Queen Victoria’s Proclamation of 1858 which safeguarded the interests of religious communities. However, Independence changed the relationship between the Parsis and the state. As a minority community they lost influence and access to state power with the introduction of majoritarian democracy.

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325 Speech at Meeting of Liquor Contractors, Bombay,” 12 July 1921, CWMG, Vol. 23, p. 408.
327 “Humble Petition from the Country Liquor, Foreign Liquor and Toddy Merchants of Bombay”, File No 750 (30) P II Home Special, MSA.
Since the early experiments with prohibition, Parsis had petitioned the government and the Congress to revoke anti-alcohol laws.³²⁹ Through the 1930s, Congress leaders but especially Gandhi had urged the Parsis to give up their association with alcohol. Following the Pesikaka case, the Council of the Parsi Central Association and the Political League appealed to the Bombay government to appoint an independent committee to inquire into all aspects of the prohibition policy in the State.³³⁰ The Council expressed that it was observing with misgivings the prohibition policy and the government’s attempts to bolster it with legislative change. The courts remained one of the few forums in which a minority community could represent its views to the state in an electoral democracy.

Parsis have had a unique relationship with the Anglo-Indian legal system and possibly had greater legal consciousness than other communities.³³¹ Mitra Sharafi suggests that due to a combination of factors in the nineteenth century, Parsis came to use the legal system at greater rates than other communities, and “de-Anglicized the law by sinking deeper into the colonial legal system”.³³² Parsi litigants and Parsi lawyers would have greater informational capital when dealing with the legal system. Not only were the litigants Parsi, seven of the eight lawyers involved in either side of the Balsara cases were Parsi as was Naushir Bharucha, Balsara’s lawyer and one of the few members of the state legislature that voted against the Prohibition Act. Thus, community identity played a major role in a case that was framed as one about individual rights.

³²⁹ “Parsis Objection to Prohibition,” *The Times of India*, 16 May 1939.
³³² Sharafi shows that despite Parsis making up less than 6% of Bombay’s population, 20% of all parties in reported cases were Parsi. Mitra J. Sharafi, *Parsi Legal Culture in British India* (New York: Cambridge University Press, forthcoming 2014), 3-4.
Finally, one could speculate that it was because Balsara was Parsi that the case succeeded before the court. As a largely educated, philanthropic and middle class community, the Parsis were in some ways the ideal citizens of the Nehruvian state and farthest from the image of the drinker that was presented by the proponents of prohibition. A Bombay legislator when confronted with the innovative ways that people continued to consume illicit liquor, labeled them “mad men” and “subnormal”, who deserved to be in jail or in an asylum. Drink was seen as the province of tribals, Dalits and migrant labor. But a discourse shaped around this identity of the drinker unraveled when confronted by the “good Parsi”.

A crude reading of interests would suggest that constitutional law was a tool that was used by Parsi economic interests to attack the prohibition regime. While their community interests and identity definitely enabled certain forms of litigation and affected their choice of strategy, they did not necessarily produce the desired results. The actual victories were meager and the large public liquor interests either went bankrupt or operated outside the law. As I will elaborate in the next section, Parsis led litigation for private interests, opened up avenues for other less networked groups, as well as provided an important site to critique the new state.

Prohibition, Law and the Question of Postcolonial Sovereignty

Postcolonial sovereignty is based on a contradictory logic, straddling as it does the bureaucratic methods of colonial rule and the republic’s claim of representing a free nation. This comes through in the sense of frustration repeatedly expressed by the state every time its

prohibition policies were taken apart in litigation. The Bombay government attempted to repair the gaps in the prohibition regime with repeated amendments and new executive notifications. After the judgment on medical tests, the Bombay government moved to amend the Prohibition Act to expressly empower prohibition officers and the police to submit a person suspected of drinking for medical examination or to have a blood sample collected to determine the percentage of alcohol.\textsuperscript{336} If the person resisted it was lawful to use all means reasonably necessary to secure them, examine their body or take blood.\textsuperscript{337} They also inserted a provision creating a body of experts who would decide whether a certain alcoholic liquid was capable of recreationally consumed, and thus proscribed.

A pessimistic reading of this process would make it appear that the legislature was able to undo the rights assertion of citizens. However, this reading would not take into account the sense of despondency the legislators expressed. Introducing the fourth set of amendments in four years to the Bombay Prohibition Act, Dr Jivraj Mehta, the Prohibition Minister, apologetically explained, “What is to be done? The moment one hole is patched up, something new appears on the market”.\textsuperscript{338} An exasperated legislator responded that he did not remember a single session of the House when the government did not make a present of some form of prohibition to the public. It was a “pathetic confession” by the government that, in spite of numerous attempts to tighten the law, public ingenuity continued to find new ways to circumvent prohibition regulations.\textsuperscript{339} The government’s helplessness was apparent in the face of the rising market in tinctures. In an attempt to reduce the production of tinctures, the government amended the Drugs Act, 1940 and the Prohibition Act to limit the production of ethyl alcohol in the state. But after

\begin{footnotesize}
\begin{enumerate}
\item S.129-A, Bombay Prohibition Act, 1949 (as amended in 1959).
\item S.129-C, Bombay Prohibition Act, 1949 (as amended in 1959).
\item Dr Jivraj Mehta, Proceedings of the Bombay Legislative Assembly, 10 March 1954.
\item Naushir Bharucha, Proceedings of the Bombay Legislative Assembly, 10 March 1954.
\end{enumerate}
\end{footnotesize}
the Balsara ruling on the limits of the State government’s power to restrict inter-state commerce, these restrictions on ethyl alcohol and tinctures could not be imposed on imports from other States. The police officers involved also expressed frustration at the ineffectiveness of the prohibition law in practice and the difficulties raised by its administration.\textsuperscript{340}

On being asked what legal changes were required to implement prohibition more effectively, the Bombay government blandly replied that \textit{no legal change short of a constitutional amendment would work} (emphasis mine). Fundamental rights and the wording of the directive principles had limited the power of the state to create a strong legislation.\textsuperscript{341}

The Pesikaka decision and those that followed created a strange cycle. The government admitted that the Pesikaka case had made it very difficult to secure convictions in consumption cases.\textsuperscript{342} Procedural legal challenges would make it easier to secure acquittals. A frustrated executive would tighten the laws to secure convictions and these new amendments would again be watered down through legal challenges. Thus, larger numbers of people were being charged with prohibition offences, but most of those charged could not be convicted; these arrests and prosecutions thus had no impact on enforcement while costing the exchequer Rs 45,00,000 annually.\textsuperscript{343} Examining the latest amendments to the Prohibition Act in 1959, an editorial noted with wry amusement, “the game of the lawyer picking holes in the legal armour of a moral law, the law courts exposing its seamy side, the legislature seeking to patch up the dilapidated fabric,

\textsuperscript{340} Ibid at 93.
\textsuperscript{342} “Reply of Government of Bombay to General Questionnaire issued by the Prohibition Enquiry Committee”, in \textit{Prohibition Enquiry Committee: State Government’s Memoranda and Other Documents} [Planning Commission, New Delhi, 1956] 89.
\textsuperscript{343} Figure for 1963, quoted by R.K. Karanjia, “There is Money in the Racket,” \textit{Seminar}, August 1964, 22.
with the lawyers and law courts at it again has been played before”.\footnote{“Curate’s Egg,” \textit{The Times of India}, 29 January 1959.} The nationalist critique of the colonial state was often focused on the latter’s failure to deliver justice and to promise accountability. Prohibition was introduced through a popularly elected government to meet the goals laid down by a republican Constitution. It was supposed to signify a break from the colonial state, but the successive constitutional cases brought attention back to the continuing lack of justice and accountability.

In the matter of prohibition the government was finding itself at its wit’s end. On New Year’s Eve, 1963, Vasantrao Naik, the Chief Minister of Bombay made a radical shift: he liberalized the issue of liquor permits to all people above the age of 40 and permitted the free sale of beer and toddy with less than 3.5% alcohol to all people. Naik justified his actions as necessary to check the business of illicit liquor and associated lawlessness. The main object was to stop “the people from ruining their health by drinking illicit liquor which was in most cases, worse than poison”.\footnote{“All Round Welcome Gratifies Naik,” \textit{The Times of India}, 2 January 1964.} This step marked the beginning of the end of the early Indian prohibition regime.
While the government continued to assert that it was speaking for the majority of the populace, the legal defeats it suffered, and the public’s enthusiastic exploitation of any lacunae that appeared, forced the government to consider that perhaps it did not represent the public will on this issue. The legitimacy of the prohibition project had been based on the argument that it enjoyed widespread public support. As the Governor of Bombay pointed out, the one

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unanswerable argument for prohibition was that it received the “unanimous support of every legislature in India”. Only one legislator out of the three hundred-odd in the Bombay Legislative Assembly had voted against the Prohibition Act. The will of the people was taken to be expressed through their representatives; otherwise, as the Governor said, democracy would become “a farce”. As a columnist remarked, it was a great shock to the government to discover that the public did not consider ‘drink’ a blight. The Bombay government regretfully noted that the public had “learnt to look upon the prohibition officer as an outcast”.

Conversely, the petitioners and the court had to both deal with the fact that the government in question was a popular government. Balsara, in a rare interview after his victory, noted that it was hard to be proud or joyful to have succeeded against the state, since this was a “popular government”. However, when such a government “rode roughshod over the rights of citizens and disregarded public opinion” there was no other alternative than to approach the highest tribunal. Further, as a journalist, Balsara considered the judgment an achievement, as the petition vindicated the rights of freedom of speech and expression.

Constitutional Law as an Arena of Politics

It would be easy to dismiss constitutional politics, as several scholars do, as a product of liberal-bourgeois politics and thus not relevant to the wider populace. However, as the litigation under prohibition laws indicates, constitutional cases became public spectacles consumed by a wide range of publics. Strategies against the state, though devised perhaps by the middle classes

347 New Lives for Old (1948), ii.
who had access to legal resources and information, were consumed and adapted by a larger populace. Further, constitutional politics forced both private petitioners and the courts to see individual causes as representative of the needs of the people. To paraphrase Hannah Arendt, the Constitution emerged as a hybrid realm where “private interests assumed public significance”.351 Thus, Balsara’s demand for an individual permit to drink became a case in the public interest which resulted in the judiciary diluting rules and procedures.

There clearly was something different about the judicial space that had opened up. Reflecting upon the restructuring of the prohibition laws by the Court, the Planning Commission report highlighted the essential distinction between the outlook of a legislator and of a judge – while the former “focuse[d] on the removal of a specific abuse, the judge look[ed] upon a statute in the background of the entire legal system” 352 By way of illustration, the report mentioned the executive’s frustration at its inability to secure convictions in the face of the courts’ tendency to reject the evidence of ‘panchas’ wholesale, on the ground that most were stock witnesses. Panchas were “respectable members of the local community” whose presence was required at a police raid to ensure that the evidence recovered was admissible in court. The report tried to explain the courts’ position by attributing it to their general experience that testimony was unreliable. They remained unsympathetic to the police who were rendered helpless by the non-cooperation of independent eyewitnesses. The courts’ attitude was that in the absence of credible evidence they had to give the accused the benefit of the doubt. This view led to an alarming rate of acquittals, and according to the Planning Commission, demoralization of the prosecution agency. The high rate of acquittal reflected an older judicial distrust of the police. As stated in a memo on criminal justice authored by Chief Justice Spens in 1944, “antagonism between the

The judiciary and police is permitted to continue and increase and if the fate of a criminal or suspected or alleged criminal is more and more determined by the police, the whole system of administration of criminal law is going to break down and become a farce. A judiciary predisposed to suspect the police was likely to be unsympathetic to the wide police powers made available under the prohibition regime.

The distinction between liberal-constitutional politics and street politics becomes further blunted if we compare the reaction of the Nehruvian elite to both processes. Both groups were viewed as seeking to undo the legitimacy of a democratically elected government that represented the people, and in the post Nehruvian era the “democratic government” hit back at both, suppressing people’s movements, overturning judicial verdicts and packing the courts. Examining governmental attitudes towards careers of civil disobedience and non violent protests, Dipesh Chakrabarty finds an idealization of apolitical behavior.

So how did the Constitution make a difference? It opened up a space where the state’s vision of social order could be contested. It offered a neutral language to challenge the democratic legitimacy that was enjoyed by the state.

Social histories of prohibition have tended to emphasize and even valorize resistance to elite projects, largely through the persistence of subaltern culture. While subaltern classes may resist cooption into state projects, they are not always able to avoid state coercion. Ironically, Hardiman’s evidence of resistance in the form of the prevalence of, and increase in, drinking actually comes from increasing numbers of arrests and convictions under the prohibition laws.

353 Memorandum by Sir Patrick Spens on the Reform of Administration in India, IOR/L/PJ/8/463.

Constitutional litigation highlights a possibility of engagement with state structures which fractures the state’s authority and coercive power. Given that the entire prohibition regime was reworked through the courts, it was quite ironic that one of the most common methods of liquor smuggling involved the smuggler dressing in a black coat, as a Bombay advocate, and concealing the tins of liquor in the “advocate’s” briefcase. 355

Prohibition, being a favorite project of Gandhi’s, gained a degree of moral sanctity after his death which made it difficult to challenge the policy on the grounds of religious freedom or economic efficiency. Conventional critiques of the prohibition policy had often been framed on economic considerations, arguing that it led to significant revenue losses and entailed high costs of administration, for scant guaranteed results. Noted economist K.N. Raj even argued that given the Rs 100-150 crore (Rs 1-1.5 billion) in revenue that the government lost to bootleggers each year, prohibition should be considered a luxury good. 356 However, the economic argument received little political traction when faced with moral rhetoric. Neither did the attempt to describe the prohibition supporters as faddists or puritans. As L.M. Patil, the Prohibition Minister stated, “we do not mind being called puritans.” 357

The legal challenge, however, allowed the prohibition debate to be conducted on two fronts of attack. The first emphasized the anti democratic character of prohibition laws; the second highlighted the consequences of a widespread failure of the state to ensure convictions under the same laws.

The language of constitutionalism and correct administrative procedure increasingly emerged as a site where state policy could be safely critiqued. On the enactment of the Bombay Prohibition Act, a Mr Aranha wrote to the editor of the *Times of India*,

“[A] lot of preaching is done invoking Gandhiji’s name but nothing is done to follow Gandhi’s lead in the right conception. If Gandhiji was living, he would have been forced to fast to see his people reformed a most ruthless and savage manner with utter disregard of his principles thereby exposing the country to risks”.  

Another angry reader drew on Gandhi himself to challenge the expanded police powers of the state, arguing that “[t]he Mahatma was against giving absolute powers to police as it constituted a negation of true democracy. He always taught that the end did not justify the means… if prohibition cannot be gained except by the proposed Bill, then clearly it is an admission of the part of the government that the people are not behind it”. Prohibition was seen as ‘police raj’ which was the very antithesis of democracy. In their open letter the doctors pointed out that only 6% of the legislators had admitted to drinking, therefore the law was being passed upon drinkers by a body comprising 94% teetotalers. A law enacted by minority on a majority that stood in unanimous opposition to the same, was coercion and not democracy. The legislature had passed a law in spite of the unanimous opposition of all the admitted drinkers. The question of majority opinion came up more than once, beginning with Khardekar’s submission in the Constituent Assembly. On finding that the Congress opinion was

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358 *The Times of India*, 24 February 1949.
overwhelmingly in favor of prohibition, he reminded the assembly, “that there are things other than liquor that go to the head and power is one. Let not the majority party suffer from it”.

This caution was echoed before the Bombay High Court in the *Balsara* case when the Chief Justice quipped that “power is also an intoxicant” – to which Balsara’s lawyer replied that it was “the worst kind of intoxicant”. As figures 1.4 and 1.5 indicate, people were receptive to the image of a government intoxicated with its own power and uncaring of its citizens.

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**Fig 1.4.** A Power drunk Morarji Desai demands more sacrifices for Prohibition.  

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361 *Film India*, January, 1953. As reproduced on [http://8ate.blogspot.co.uk/2012/05/rows-of-inappropriate-indian-political.html](http://8ate.blogspot.co.uk/2012/05/rows-of-inappropriate-indian-political.html) (as visited on 24 January 2012).
Finally, its experience with prohibition forced the Indian state to rethink the effectiveness of law. Justice Tek Chand admitted that it was not entirely correct to say that every law represents the will of the people.\textsuperscript{363} If unanimity were always embodied in a statute, statutory amendment would have become unnecessary. Particularly in the area of social legislation, laws that ceased to represent a consensus of support, no longer remained effective. Recognizing the

\textsuperscript{362} Shankar’sWeekly, 12 August 1962.

\textsuperscript{363} Planning Commission, (1963) 289.
impact of human agency, Justice Chand reflected that legislators and law courts cannot secure obedience to laws when the forces of disobedience and evasion are strongly entrenched. Congress President, U.N. Debhar attempted to argue (rather ineffectually) that India was not like America, and the failure of the legal mechanism should not be seen as indicative of the lack of support for prohibition. As Figures 1.6 and 1.7 indicate, the increasing number of prohibition arrests just underlined the absurdity of the prohibition laws. Commenting on the fact that 400,000 people had been convicted of prohibition offences in just fourteen years, Chief Minister Naik was quoted to the effect that unless he relaxed prohibition he would be ruling over a state of convicts.

A retired police officer wrote a series of articles for the tabloid press suggesting that the only way to rid Bombay of crime was to do away with prohibition. Not only were policemen being forced to give priority to cases of drinking over rape, murder and robbery, they were also demoralized by not being allowed to relax with a drink themselves. Moreover, he argued that prohibition begat criminals, in the form of smugglers and illicit distillers, who hired thugs to protect themselves from the police and from each other. The policemen who should have tackled this new menace were “too busy smelling the mouths of citizens or searching the bottoms of vehicles”. The Planning Commission noted that several distinguished jurists had stated that a law that is not effectively enforced has the pernicious effect of bringing all laws into disrepute. Ineffective laws thus posed a serious challenge to the body politic. This admission was a sea change from the heady belief in law as an instrument of social transformation, expressed in the early years of Independence.

366 Blitz, 31 May 1952.
Fig. 1.6. Civil Disobedience

“... AND PROHIBITION WILL TRAIN PEOPLE TO BREAK LAWS AS WE DID IN THE BRITISH DAYS.”

Fig. 1.7

“POLICE UNEARTHED AUTOMATIC ‘DISTILLERY IN HEART OF BOMBAY AND SEIZED 2000 BOTTLES OF LIQUOR. A CASE OF PROHIBITION HELPING PRIVATE ENTERPRISE.”

367 Shankar’s Weekly, 8 April 1956
368 Shankar’s Weekly, 22 June 1956
Chapter Two

Mr. Bagla’s Baggage: Commodity Controls, Capitalists and the Making of Administrative Law

On the night of 28 November 1948, Train 197 of the Indian Railways was carrying hundreds of sleeping passengers 1,288 kilometers from Bombay to the industrial city of Kanpur. As the train trundled down the tracks, a telegraph message raced ahead on the wires warning the railway police in the town of Itarsi that the “Marwadi occupants in first and second class compartments were suspected of illegally transporting cotton cloth”.\(^{369}\) Preetam Singh, the turbaned sub-inspector of the Government Railway Police stopped the train as it pulled into Itarsi around noon on 29 November and went on board to search the passengers.

In a first class coupe of the Lucknow compartment, Preetam Singh found a middle aged Marwadi couple, Harishankar and Gomtidevi Bagla, who were travelling with three of their servants. During a search of the compartment, he found two *maunds* and thirty *seers* of cloth (one *maund* is around 82 lb and a seer around 2 lb) concealed in the bathroom, around thirteen seers below the mattress, twelve seers concealed inside Mrs. Bagla’s luggage and two bundles of cloth tied up in the blanket of his manservant, Kedarnath. In total, the Baglas and their companions were found to be in possession of 6 *maunds* (or around 493 lbs) of new cotton cloth and no valid permit to transport them from Bombay to Kanpur.\(^{370}\) The cloth and their tickets were seized and charges were filed against the Baglas for committing an offence under the

\(^{369}\) Copy of Railway Service Wire, 29 November 1948 in Criminal Appeal 7 of 1953[SCRR].  
\(^{370}\) First Information Report, Police Station Itarsi, in Criminal Appeal 7 of 1953[SCRR].
Essential Supplies (Temporary Powers) Act, 1946 (hereinafter the ESA) and for violating the Cotton Textile (Control of Movement) Order of 1948.

What offence had the Baglas committed? The goods were neither illicit nor harmful. They were not evading taxes, nor had they taken goods illegally across a customs border. However, the mere act of moving cloth without a movement permit had placed them in breach of the system of economic controls that came to dominate the early decades of independent India. These controls had been created by the colonial government during the Second World War to mobilize production for the war effort and to deal with consumer goods shortages. Drafted as a draconian emergency legislation, the controls met few requirements of fair procedure. The controls had been the subject of severe criticism by Gandhi and the nationalists. Nonetheless, after Independence these same restrictions were adopted by the postcolonial government in the name of harnessing the national economy for development. The life of the ESA was extended several times, and it was later replaced by the more comprehensive Essential Commodities Act in 1955.

The Baglas were charged under the Essential Supplies (Temporary Powers) Act, 1946 which contained a series of stringent provisions, including one which placed the burden of proof on the accused and one for a summary trial with a limited number of appeals.\(^371\) Most significantly, it provided that no order made in exercise of a power conferred by the ESA could be challenged in court.\(^372\) The Baglas and their legal counsel must have understood that the evidence against them was overwhelming: they had been the subjects of police surveillance for months and the state had built up considerable evidence against them.\(^373\)

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\(^{371}\) Sections 15 and 14(1), Essential Supplies (Temporary Powers) Act, 1946
\(^{372}\) Sections 17(1) and (2), Essential Supplies (Temporary Powers) Act, 1946
\(^{373}\) List of Prosecution Witnesses, Criminal Appeal 7 of 1953 [SCRR].
criminal trial began at a District Magistrate’s Court in Hoshangabad, the Baglas moved first the Nagpur High Court and then the Supreme Court, challenging the constitutionality of the ESA, 1946. There were several grounds for this challenge, the two most relevant to this study being that the ESA infringed the Bagla’s rights under Article 19(1) of the Constitution, and that large parts of the ESA were void inasmuch as the legislature had delegated its powers to a non-legislative body.\textsuperscript{374}

In the course of the Baglas’ constitutional litigation, it emerged that Article 19(1) challenges to the state’s right to regulate economic life were difficult to argue; however, the charge of excessive delegation to a bureaucracy had better traction. The Baglas would go on to lose their appeal in the Supreme Court, but the decision in their case began an important debate over the role of the courts in curbing administrative action in the Indian republic. This chapter examines litigation around the laws governing the circulation of commodities. It maps how those affected by the regime of commodity controls sought to challenge it through assertions of fair procedure and democratic values as standards to which economic legislation must conform.

The system of commodity controls exemplified the ‘permit-license-quota Raj’ that was established in independent India. Despite their centrality both to the economy and to daily life, historians and social scientists have largely neglected the operation of commodity controls, except to the extent of identifying such controls as sites of corruption and rent-seeking. This blank in accounts of post-Independence India is curious, given that commodity controls had the

\textsuperscript{374} Article 19(1) of the Constitution guarantees basic civil liberties to all citizens of India. In its words, 1) All citizens shall have the right to : (a) freedom of speech and expression; (b) assemble peaceably and without arms; (c) form associations or unions; (d) move freely throughout the territory of India; (e) reside and settle in any part of the territory of India; (e) hold property; (g) practise any profession, or to carry on any occupation, trade or business.
greatest impact on the everyday life of the people, compared to, say, controls over industry or imports, yet the latter two have been the more prominent subjects of research.\(^{375}\)

Noting the endemic corruption in the controlled economy, Paul Brass has argued that one needs to eschew laudatory concepts like ‘the rule of law’ to describe postcolonial India. He has instead characterized it as a ‘corrupt bureaucratic state’.\(^{376}\) In contrast, I argue that judicial review of administrative action in India, the hallmark of a ‘rule of law’ state, emerged from illegality (itself developing from the misuse of emergency powers) and was rooted in a culture of corruption. Petty traders and merchants who were denied political legitimacy, such as those belonging to the Marwari community, began to claim their citizenship through the language of administrative law. State control of the economy was contested by critiquing the unregulated discretion exercised by low-ranking bureaucrats.

Administrative law had existed in a very limited form under the colonial regime in India. The emergence of administrative law through these post Independence citizenship-rights challenges made commodity controls a prime focus for the legal academy and for bodies like the Ford Foundation, which were invested in building the ‘rule of law’ in India. In doing so, the administrative law challenges were able to collapse the distinction between ‘economic subjects of interests’ and ‘subjects of rights’ that Foucault argues is characteristic of modern political economy.\(^{377}\)


The commodity control system is an important site to examine the emergence, through law, of the economy as an object of governance in postcolonial India. Such an examination brings to the forefront the fact that the bazaar, or the sum of the daily local circuits of production, consumption and retail, was a cause of anxiety to the postcolonial state. In response, the state, through law, began to penetrate economic activity at all levels. However, as administrative law challenges demonstrated, this brutal regulatory power of the state had to reconcile itself with the simultaneous constitution of citizens as free economic actors.

Beginning with Michel Foucault, scholars have examined how the economy becomes constituted as an object of governance during the development of modern states. Recent scholarship on South Asia has begun to chart the processes through which the Indian economy was imagined and concretized. Such studies have focused on a range of sources including the emergence of statistics, national accounting, the circulation of maps and globes, nationalist tracts on the economy and the building of railways, but have all neglected to consider the role of law as an instrument of governance. Ritu Birla’s pioneering study of market governance in late colonial India is possibly the sole exception. Drawing upon the archive of fiscal and commercial legislation enacted in colonial India, Birla traces the emergence of the market as an object of legal regulation. Law standardized market practices and made indigenous commercial practices commensurable with the new order.

The Constitution emerged as a site for contestation over market governance, between bureaucrats, economists and planners on the one side, and petty merchants, traders and retailers on the other. Research on the relationship between Indian capital and law has usually focused on the abstract notion of capital or has studied the role played by big business and industrialists. The challenges to commodity controls bring into the discussion the role of local traders and cornershop retailers.\textsuperscript{381} Using the Baglas’ petition and its successive litigational challenges to the controls system, the chapter attempts to rebuild the ways in which the everyday life of the Indian market interacted with the world of constitutional law.

**The Wartime System of Controls**

The Baglas were arrested for violating the ESA and the Cotton Control Order, both of which were products of wartime governance. The colonial state’s goal had always been to control and subordinate India’s economy to meet the government’s needs, and to this end the state had intervened in industry and agriculture. However the nature of this control was transformed by the outbreak of the Second World War. Economic historians have long pointed out that the nature of modern war increases both the range and intensity of the state’s control over daily life.\textsuperscript{382} Beleaguered by the blitz in Britain, threatened with Japanese invasion on the Eastern Front and facing non-cooperation and internal rebellion led by Indian nationalists, the colonial state in 1942 was facing challenges on multiple fronts. Indivar Kamtekar has argued that these challenges to its authority prompted a massive expansion of the colonial state, and a deeper penetration into Indian society and economy than before – through increased military recruitment, provisioning of the Allied armies, requisitioning, rationing, censorship and

\textsuperscript{381} For a classic work on the same, see Stanley A. Kochanek, *Business and Politics in India* (Berkley: University of California Press, 1974); and more recently, Vivek Chibber, *Locked in Place* (2006).

detention. The Congress party’s withdrawal from provincial ministries in 1939 and the mass detention of nationalist leaders in 1942 gave the colonial government space to govern unchecked by the constitutional safeguards provided in the Government of India Act, 1935.

As colonial India was mobilized for war, it became urgently necessary that a greater part of its productive activity be geared towards the war effort, and the production of consumer goods limited to essential commodities. Under the original dispensation of the Government of India Act, commodity control was a power that was given exclusively to the provinces. The Central List contained a single entry – entry 34 – which encompassed “development of industries, where development under federal control is declared by federal law to be expedient in [the] public interest”. The Provincial List on the other hand included “trade and commerce within the province” and “production, supply and distribution of goods and development of industries”.

The colonial government at Delhi seized control of the economy through the proclamation of a state of emergency under the Government of India Act, 1935. This was followed by enactment of the Defense of India Act, 1939 (hereinafter DoIA) which conferred extensive powers upon the Central government. The DoIA empowered the Central government to make such rules, “as appear to be necessary to or expedient to securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintain supplies and services essential to the life of the community”. They required the state to collect information and statistics with “a view to rationing of any article essential to the life of the community”. More specifically, the Defence of India Rules (hereinafter DoI Rules) empowered the government to regulate or prohibit the production, treatment, storage, movement, transport and

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distribution, acquisition, use or consumption of any article. The government could prevent an article from being sold or force it to be sold. It could fix prices of any commodity.  

The DoI Rules provided for the complete control of markets by the state. Initially, state intervention was limited to controlling the prices of necessities such as medical supplies, food, salt, cooking oil and cotton cloth. The maximum price for sale of these commodities was fixed according to a formula. However with Japan’s entry into the war, controls were extended to other industrial commodities like iron and steel. The Iron and Steel (Control and Distribution) Order, 1943 ensured that no person could acquire or dispose of iron and steel without the authority of a license issued by the Central government or a written order from a bureaucrat designated the Iron and Steel Controller. Against the backdrop of chronic food shortages and famine conditions in Bengal, a Food Department was created in 1942 and controls imposed on all foodgrains in a similar pattern to those on essential supplies and iron and steel. Finally in 1943, faced with chronic shortages of consumer goods, the government set up a Department of Civil Supplies that was tasked with creating a comprehensive system of controls over the production and distribution of almost all consumer goods and with the initiation of measures to eliminate hoarding and dealing on the black market. From ballpoint pens to nylon shirts, almost every commodity on the market was “controlled” by 1947. A provincial minister for Food and Civil Supplies noted that given the interconnectedness of the market, controls tended to multiply rapidly:

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386 Rule 81(2), Defence of India Rules.  
387 C.N Vakil et al., Price Control and Food Supply with Special Reference to Bombay City, (Bombay: N.M Tripathi, 1943), 15.  
388 For a detailed account of the development of controls see, Report of the Commodity Controls Committee (Delhi: Manager of Publications, Government of India, 1953), 5-10.
“Control over foodgrains led to control of fuel, then to sugar and jaggery and onto potatoes, and groundnuts, and then to tamarind, and from tamarind to chillies, and from chillies to onions. Every complaint about shortage or high price of any item brought an excuse for imposing control on that item. Seekers of permits and licenses crowded the multiplying offices and the lines got longer and longer”.

This large and proliferating system of controls gave the government untrammeled discretion over commodities. The administrative authorities controlled commodities through an elaborate system of licenses and permits to control production, distribution, sale, purchase and storage. For instance, to plant rubber, a license would have to be obtained from the Rubber Board under the Rubber Control and Production Order, 1946. Further permits would be needed to sell the rubber in the market, only at the price fixed by the government, to store it without selling it, and to move it to another location.

The DoI Rules provided for the appointment of a Controller for each commodity at the provincial level, and the demands of the licensing system led to the creation of a massive economic bureaucracy. A.D Gorawalla, a bureaucrat who headed the food rationing system in Bombay at that period, recalled,

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390 These included the Machine Tool Controller under the Machine Tool Control Order; the Iron and Steel Controller under the Iron and Steel (Control of Distribution Order), 1942; the Sugar Controller under the Sugar Control Order, 1942; the Wheat Commissioner under the Wheat Control Order, 1942; the Gur and Molasses Controller under the Gur Control Order, 1942; the Vegetable Oil Products Controller under the Vegetable Oil Products (Control) Order, 1946; the Paper Controller under the Paper Control (Economy) Order, 1945; the Textile Commissioner under the Cotton Cloth and Yarn (Control) Order and the Textile Industries (Miscellaneous Articles) Order, 1943; the Director of Paper under the Paper Control Order; the Coal Commissioner under the Colliery Control Order, 1945; and the
“The role of the general administrator altered with a vengeance. In addition to his other duties he had now become a monopolist, the only wholesale dealer in grain throughout the province with full control over all retail dealings…”

While powers of the officers varied, they were all able to impose significant restrictions on the trade and usage of commodities. There was an absence of any standards or tests to control the exercise of executive discretion, as well as a lack of safeguards for the interests of those affected. There was little or no protection given to producers, dealers and consumers against the misuse or improper exercise of power by the administrative officer. Almost no criteria had been established that were required to be kept in mind while granting licenses, and most licenses could also be cancelled at will. For instance, the Textile Commissioner, who issued licenses regulating the movement of raw cotton and cotton cloth, had the power to cancel or suspend licenses if the license holder had given incorrect information in his application, if he had violated the conditions of his license, and “for any reason” that the Textile Commissioner believed the licensee was not fit to hold the license. The Foodgrains Order specifically provided that the license could be canceled without giving any notice or reasons to the licensee.

There were no procedures for a licensee or an applicant for a license to challenge the decision to refuse or revoke a license. There were no limits placed on the licensing authority’s powers to impose virtually any condition on the licensee, as well as to exempt any licensee from

Controller General of Civil Supplies under the Prevention of Profiteering and Hoarding Ordinance and the Consumer Goods (Control of Distribution) Order, 1945


393 See for instance the requirements under the Cotton Textiles (Dyes and Chemicals) Control Order, 1945.
generally applicable conditions at the authority’s discretion. But perhaps most significantly, these control orders declared that the decisions taken by an administrative officer were final and could not be challenged before a higher authority.\textsuperscript{394} This gave tremendous power to the administrators over traders, because they could effectively shut down a business leaving no scope for redress.

The DoIA exemplified colonial legislation. It was a skeletal law that delegated broad powers to make rules upon various administrative bodies and took discretion away from the legislatures. The DoI Rules allowed various bureaucrats and levels of government to formulate orders to govern each commodity. Several critical commodities such as cotton were regulated by more than one order. The orders further conferred several rule-making powers on lower administrative authorities, such as the determination of license conditions.

Despite the enormous infrastructure for commodity controls, the system was unable to achieve most of its objectives. Due to the emphasis on meeting wartime production targets, the government was unable to control prices and was confronted with rapid food inflation. There was also widespread scarcity and short supply of essential commodities. The system’s most dramatic failure was its inability to prevent the Bengal Famine in 1943, in which an estimated seven to ten million people died due to chronic food shortages.\textsuperscript{395}

\textsuperscript{394} Jain mentions several examples, but perhaps most relevant to the Bagla cases was the Cotton Textiles (Sizing and Filing) Control Order, 1945, which provided that the conclusive proof that certain required tests (to determine the proportion of material to the weight of cotton) had been carried out, was a certificate signed by an officer authorized to carry out the tests.

Reviewing the situation a decade later, M.P Jain pointed out that the policies intended to remedy scarcity were made belatedly, often after an item had already become scarce. Policies were marked by a constant sense of ‘ad-hocism’ and were improvised without long term planning. Price control, for instance, was started before controls on production and distribution had been established, leading to a rapid expansion of hoarding and the black market. A government committee examining the causes of the Bengal famine acknowledged that “the poor of Bengal fell victim to circumstances for which they were not themselves responsible …there had been an administrative breakdown”.

But it wasn’t just poor policy design that led to the failure of the controls. Bureaucrats and academics both acknowledged that they were hampered by the widespread lack of public support and sympathy for the government. Newspapers noted that the general public feeling was that the control of prices had been mainly for the benefit of the government in requisitioning stocks for the army and industrial production, while the public was left to the mercy of the black market. Prices rose to astronomical amounts. For instance, within six months, prices of tomatoes went up six times and those of mutton increased by 50 percent. The rationing system did not necessarily guarantee a fairer distribution of goods. As ‘Perplexed’, the resident of the small town of Dhulia companied, in the absence of any rules or etiquette with regard to queues in the mofussil, all shops witnessed a “great scramble” in which only the strong could get their allotted rations.

396 Jain (1964), 23.
399 “Cost of Living in Bombay: Rises in Prices in Foodstuffs,” The Times of India, 26 May 1942, p.4.
400 “Letter to Editor,” The Times of India, 5 November 1942, p.6.
A study by economists in Bombay University identified the psychological pre-requisites for a successful policy of requisitioning supplies, which were lacking in the country. Requisitioning would require “a people fully conscious of their rights and duties… but bearing inevitable hardship with cheer” and an administration that was “efficient, incorruptible... and capable of getting its work done by evoking popular consent and support”. However, this could only be achieved if there were confidence between the government and the governed. The breakdown of confidence was blamed upon the wide discretion allowed to local officers, who were proved “corrupt, oppressive, partial, and unaware of people’s needs”. A newspaper correspondent touring Bengal during the famine observed that there had been no preparation of the public mind for rationing, and most people believed even during the famine that rationing was unnecessary. Consumers continued to buy on the black market, as evidenced by the many government advertisements appealing to them to desist from doing so. A large majority of the poor were often “under the radar” of the rations and controls system — that is, unaccounted for and thus unable to claim their entitlements. Even in the midst of the Bengal famine, the public distribution of goods was done on the basis of the list of landowners and householders, thus leaving the most vulnerable, such as landless laborers outside the system.

That the controls policy had dubious legitimacy in the eyes of the population can be demonstrated from the numerous cases of evasion, exploitation and non compliance by ordinary citizens. Wartime controls were not unique to India, but the colonial state was unwilling and unable to give people a sense of being stakeholders in the system. In contrast, the Office of Price Administration in the USA, which implemented very similar programs, was able to base it on a

401 Vakil (1943), 40.
402 Vakil (1943), 41.
403 “Stricken Bengal: Why Control Failed,” The Times of India, 27 November 1943, p.4.
404 “Stricken Bengal-IV: Feeding the Other 54,000,000,” The Times of India, 26 November 1943, p.4.
network of popular participation. The American regulatory authorities were able to convince hundreds of thousands of householders to sign pledges not to buy goods on the black market and to act as vigilantes to check violations.\textsuperscript{405} However, despite the state’s attempts at rapport with the Indian citizen, for instance through the advertisements studied further ahead in this chapter, it could not successfully engage the public.

People, understandably critical of a ration and control system which appeared to them unsuccessful in controlling scarcity or price inflation, subverted it with impunity. M.A. Sreenivasan, who oversaw the system of commodity controls in Mysore as Minister for Food and Civil Supplies, emphasized that people resorted to “ingenuity, inventiveness and plain unvarnished mendacity” to evade the controls or to dull their edge.\textsuperscript{406} A common tactic to increase rations was the ‘ghost in the ration card’, in which a grandmother or aunt appeared as a dependent on multiple ration cards, thus increasing the number of household members. Abandoned villages appeared to teem with living residents, all claiming rations.\textsuperscript{407} Anxieties about the multiplication of ‘paper truths’ led to the government developing new forms of identification and targeting, such as the use of fingerprints on ration cards and stricter requirements of proof of residence. These increases in stringency only exacerbated the problem of exclusion, leaving more people out of the rations ambit.\textsuperscript{408}

\textsuperscript{406} M.N. Srinivasan, 2, N.G Barrier Collection of South Asian Political Tracts, Centre for South Asian Studies, Cambridge University, Cambridge.
\textsuperscript{407} M.N. Srinivasan,4, N.G Barrier Collection of South Asian Political Tracts, Centre for South Asian Studies, Cambridge University, Cambridge.
The control system was not only manipulated by the citizens, it had also emerged as a major site of governmental corruption. Recent scholarship has suggested that this was the result of the peculiar structure of the commodity controls and the new hierarchy of administrative officers set up to execute them. Corruption became common due to the vast untrammeled discretion available to these petty bureaucrats and became public knowledge as a result of the temporary nature of their posts, which meant they did not enjoy the same degree of immunity as permanent civil servants did.\textsuperscript{409} This ‘corruption’ was very visible, as commodity controls brought the state into the everyday lives of its citizens.

The strongest critique of commodity controls was articulated by Gandhi who remained adamant that they would have to be dismantled in independent India. Gandhi’s campaign against the controls took center stage immediately after Independence, when he declared that his two immediate goals were to restore communal harmony in India and to launch a national campaign for removal of food control and rationing.\textsuperscript{410} Having always expressed deep skepticism about state control, he argued that controls imposed from above were “always bad” and made life unnatural. Discussing the subject of cloth control, he asserted that solutions could not be imposed from above but had to evolve from below.\textsuperscript{411} To his way of thinking, controls bred dependency. Gandhi argued that the country could become self sufficient in food, if not for the government policy that sought to wrap citizens up in “cottonwool” and did not train them to stand by themselves. Commodity controls for Gandhi, thus, were a shortsighted measure for the government of free India to adopt – a responsible government would seek to involve citizens in

the crisis, improve transport, pay attention to small farmers and improve agricultural yields. He emphasized individual responsibility, suggesting that Indians combat the cloth shortage by taking up the spinning of *khadi*. Controls, he worried, were turning Indians into an army of idle hands who were likely to turn to mischief. The solution lay in the “public being true to themselves”, and not in the hands of a few members of the cabinet.

A second line of Gandhi’s critique was based on the observation that price control disproportionately hurt small farmers. Acknowledging that doing away with controls could lead to price rise, he argued that the government’s efforts should be geared towards ensuring that this rise in prices benefitted the small farmer and was not absorbed by middlemen. Gandhi believed in the necessity of daily reminders to the people that the urban populace had a duty to make sacrifices to help the poorer farmers. Similarly, on being warned by an interlocutor that derationing may lead to discontent, Gandhi emphasized that it was an empirical fact that there was a cloth shortage. This shortage could not be resolved only through distribution; a sufficient and long term solution lay either in nationalizing the textile industry and working it excessively, or in giving citizens the resources to spin their own cloth. He did not favor the former solution as it would not redress mass poverty in the way that spinning *khadi*, in his vision, would.

The experience of controls for many Indians during the war is neatly summed up in an observation by Srinivasan.

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“Controls begat hardship, hardship begat resentment, resentment begat evasion, evasion begat blackmarket, blackmarket begat corruption. It was a dismal business”.  

Controls and Freedom in the New Republic

Several countries had adopted some form of price controls and rationing during the Second World War. However, in the United States and in Western Europe these mechanisms were dismantled with surprising swiftness after the war. Given the general level of dissatisfaction with the existing system of controls and the vociferous opposition to it from the Gandhian wing of the Congress party, one would imagine that commodity controls in India would have gone the same way of rapid dismantling. As an Indian Finance Minister noted, the popular conception of controls was that they were basically wrong, being “an anathema to the producers, a bugbear to the consumers; …and hated by the average politician as an unnecessary interference into people’s lives by the government”.  

Within two months of Independence, Dr Rajendra Prasad, the Food Minister, grimly noted “that controls were becoming increasingly unpopular, in spite of their being administered by a popular government”. The Congress Party Central Committee managed to defeat a resolution demanding immediate abolition of controls by only ten votes.  

Contrary to the pattern in other countries, apart from a brief period of decontrol in 1948, commodity control actually intensified in postcolonial India. Murarji J. Vaidya, President of the Indian Merchants Chamber, a business lobby that was very close to the Congress leadership, expressed his puzzlement that countries that were more directly involved in the war like the UK,
and those that had suffered severe ravages like Germany and Japan, were devising ways to remove various economic controls, while India remained the “only free and democratic country” that sought to continue and even extend the controls in various spheres of activity.\footnote{Murarji J. Vaidya, \textit{Crisis of Controls} (Bombay: Forum For Free Enterprise, 1960), 3.}

Extended in 1946 as a temporary measure in the face of a continuing economic crisis, commodity controls became established as the government’s permanent practice with the enactment of the Essential Commodities Act of 1955 (hereinafter the ‘Commodities Act’). The wartime commodity controls system operated as an emergency measure. Accordingly, when the emergency was officially rescinded in April 1946 at the end of the war, it may have been expected that all existing controls would lapse, and that going forward, the responsibility for commodity controls would reside only with the provinces. By this time, an interim government headed by Nehru held office in Delhi and preparations for Independence were underway.

The interim government asked the British Parliament to amend the Government of India Act to temporarily grant the Central legislature the power to make laws with respect to trade and commerce\footnote{India (Central Government and Legislature Act), 1946.}. The Central legislature went on to replace the old regime of controls with the Essential Supplies (Temporary Powers) Act of 1946, the ESA that Harishankar and Gomtibai Bagla were charged under. The operation of the ESA was time bound, as the powers of the Central government to regulate commodities were set to lapse in five years, by which time it was expected that the economic emergencies caused by high prices and chronic shortages would have been resolved. The ESA empowered the government to regulate or prohibit the production, supply and distribution, and trade and commerce of any commodity designated an “essential commodity” as far as it seemed “necessary or expedient” to maintain supplies or secure its
equitable distribution at fair prices. Mirroring the DoIA (which it replaced), the ESA through a system of licenses allowed the Central government to regulate the manufacture and production or any commodity and the expansion of cultivable land; to controlling prices; to regulate the storage, transport, supply and distribution of essential commodities; to set limits on storage and stockpiling; to require the sale of goods to a particular category of persons; and to prohibit any transactions which were in the opinion of the Central government or other authority under the ESA detrimental to “public interest”. Controllers were appointed for each essential commodity and vested with extensive powers and duties, including the responsibility of collecting information and statistics. Controllers under the ESA had the right to inspect accounts, records and receipts of persons engaged in the production of or trade in essential commodities, as well as to search premises without a warrant.

The government sought to ‘Teflon-coat’ the ESA to protect it from legal challenges. The ESA provided that orders made under its section 3 had effect irrespective of their inconsistency with any other law. It also sought to insulate such orders from judicial review, by providing that no order made under the ESA could be called into question in any court. The ESA also bestowed immunity from legal proceedings upon officers and the government, in respect of any damage that may be caused by any action done in furtherance of an order under the ESA. In effect, then, there was little incentive for administrators to take commercial or trading interests into account, as they would not be liable even if a decision of theirs caused substantial economic losses.

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423 S.3(1), ESA, 1946.
424 S. 3(4), ESA, 1946.
425 S.6, ESA, 1946.
426 S.14(1), ESA, 1946
427 S.16(2), ESA, 1946.
The ESA was expected to lapse by the end of 1949, but the government used crises of shortages and inflation to periodically extend its life. The assumption persisted that the ESA and commodity controls under it were merely a temporary solution. This supposition was bolstered by the Constitution of 1950 replicating the formula used in the Government of India Act, of delegating the powers of commodity controls to the provinces.\footnote{Entries 26 and 27 on List II, Seventh Schedule, Constitution of India, 1950.} Article 369 of the Constitution provided an exemption to this structure, for the purpose of tiding the government over an urgent crisis. By this exemption, the commodities under the purview of the ESA would remain items on the concurrent list for five years. Such commodities included all food products, cattle fodder, cotton textiles, raw cotton, cotton seeds, coal, iron and steel. As the expiry date of the ESA approached, the government appointed a ‘Commodity Controls Committee’, headed by a member of Parliament but composed entirely of bureaucrats, to examine the existing controls and streamline the system. This Committee examined economists and representatives from State governments, sectors of industries, chambers of commerce, and trade unions and concluded that controls on all essential commodities needed to be regulated on an all India basis.\footnote{Report of the Commodity Controls Committee, 1953 (Delhi: Manager of Official Publications, 1953), 18.} Acknowledging evidence that controls could and did cause harm, the Committee argued that they should nevertheless be retained because they could also be used for a positive purpose. The Committee recommended that the Constitution be suitably amended to vest the Central government with reserve powers to control any commodity, and that Parliament enact a comprehensive permanent law on the same lines as the ESA. Parliament acted upon the advice of the Committee, amended the Constitution and enacted the Commodities Act in 1955.\footnote{The Constitution (Third Amendment Act), 1954.}
How did an emergency wartime measure by a colonial government become a ‘routine’ element of the postcolonial republic which opposed and then succeeded it? There is now a considerable body of scholarship that has identified the “state of exception” as a characteristic of the modern state that allows the government to expand its powers over its citizens.\textsuperscript{431} The Indian Constitution itself institutionalized emergency by incorporating provisions explicitly authorizing the use of extraordinary powers and the suspension of civil liberties during a designated time period.\textsuperscript{432} However, the scholarship on emergency has focused largely on political crisis and overtly political actions such as the detention of political prisoners, restrictions of free speech and dismissal of elected governments.\textsuperscript{433} Controls in India assumed a different dimension not just because of their framing as a purely economic, politically neutral question, but also because the emergency was seen as a permanent condition arising from an underdeveloped economy.

The Nehru government’s enthusiasm for retention of controls was the combined product of modes of imagining the postcolonial state’s relationship with its citizens, and the adoption of centralized economic planning as the main instrument for administering the economy. The Indian Constitution guaranteed “economic justice” to all its citizens.\textsuperscript{434} The Governor-General on the eve of Independence reminded the Constituent Assembly that it was their responsibility to ensure the happiness and prosperity of the people and to “provide against future scarcities of food, cloth and essential commodities and to build up a balanced economy”.\textsuperscript{435} Moving the

\textsuperscript{434} The Objectives Resolution adopted by the Constituent Assembly in 1946 stated, “WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political”.
\textsuperscript{435} Lord Mountbatten, \textit{Constituent Assembly Debates}, Friday, 15 August 1947.
‘Objectives Resolution’ in the Constituent Assembly, Nehru acknowledged that the first task before the assembly was “to free India through a new Constitution to feed the starving people and clothe the naked masses”.\textsuperscript{436} As another member reflected, the Constitution needed to ensure food and cloth for the villagers, as it was lack of these necessities that had led to the demand for swaraj.\textsuperscript{437}

These statements acknowledge that the independent republic, unlike its colonial predecessor, was expected to ensure that its citizens received the basic amenities of life. However, this was cast as a responsibility of the state rather than a right (to food or clothing) vested in the citizen by the Constitution. The Constitution directed the state to make policy towards securing that the ownership and control of the material resources of the community were distributed to serve the common good.\textsuperscript{438} It also required the state to ensure that the “operation of the economic system” did not result in the concentration of wealth and means of production to the common detriment.\textsuperscript{439} This provision arose from a concern over the provision of daily commodities. The original wording of the provision had read that the state would ensure “that the operation of competition shall not be allowed to result in the concentration of ownership and control of essential commodities” (emphasis mine).\textsuperscript{440} It was now the duty of the state to intervene in the quotidian life of markets.

\textsuperscript{436} Jawaharlal Nehru (United Provinces), \textit{Constituent Assembly Debates}, Wednesday, 22 January 1947.
\textsuperscript{437} Moturi Satyanarayana (Madras: General), \textit{Constituent Assembly Debates}, Tuesday, 9 November 1948.
\textsuperscript{438} Art. 39(a), Constitution of India, 1950.
\textsuperscript{439} Art. 39(b), Constitution of India, 1950.
However, the framing of the problem as a responsibility rather than a right meant that citizens were unable to make these claims through the Constitution.\footnote{The present-day ‘Right to Food’ campaign in India provides an interesting contrast to the discussion on controls. A network of non-governmental and civil society groups began a campaign in the late ‘90s for recognition of the fundamental right of all Indian citizens to be free from hunger and access nutrition. The realization of this right required not only equitable food distribution systems, but also entitlements to job security, land reform and social security. The Supreme Court of India in 2001 ruled the ‘Right to Food’ a ‘justiciable’ right, setting in motion legislation guaranteeing employment, and enacting universal child development services, several nutrition related schemes, social security arrangements, etc. While these entitlements were claimed from the state, they were articulated through civil society groups; and support for them was mobilized outside Parliament – through conventions, village level mobilization, rallies, and public hearings. For more, see, Lauren Birchfield and Jessica Corsi, “Between Starvation and Globalization: Realizing the Right to Food in India,” \textit{Michigan Journal of International Law}, 31 (2009): 691.} As Ananthasayanam Ayyangar complained,

“Food and clothing are essentials of human existence. Where is a single word in the Constitution that a man shall be fed and clothed by the state? …We have not yet taken any lesson from the 35 lakhs of people who died in the Bengal famine? Is there a single word in the Constitution that imposes on future governments that nobody in India shall die of starvation? What is the good of saying that every man shall have political rights …and so forth, unless he has the wherewithal to live?”\footnote{A. Ayyangar (Madras: General), \textit{Constituent Assembly Debates}, Tuesday, 9 November 1948.}

The expansion of the police powers of the state with a view to meet an emergency was not exceptional among the constitutions of republics. What was unique to the postcolonial situation in India was the institution of these powers as a permanent instrument. The need to address the economy as an emergency was based on the national experience of the decade preceding Independence, which had witnessed a devastating famine and chronic
underdevelopment. The new government believed that the economic crisis could only be managed through regulated circulation of goods and services.

The welfare state that would emerge as a result of this approach to economic governance was directed from the top and based upon the perceived needs of the people rather than upon their actual demands, as voiced through elected representatives or in other forums. As a result, economic controls did not need popular support to be continued. As Partha Chatterjee has pointed out in his analysis of the reasons for postcolonial India’s adoption of planning, the state acquired its representativeness not just through elected representatives but also by leading the nation to economic development. Thus, the sovereign powers of the state were directly connected to the economic well-being of its citizens.\footnote{Partha Chatterjee, \textit{The Nation and Its Fragments: Colonial and Postcolonial Histories} (New Delhi: Oxford University Press, 1993), 203-204.} What was good for the economic well-being of the people therefore ‘outranked’ public preferences, and could contradict and supersede the expressions of these preferences through elections, the media and the market. Chatterjee argues, planning emerged as a “crucial institutional modality” through which the state would determine the material allocation of all productive resources within the nation: “a modality of power that was constituted outside the political process itself”.\footnote{\textit{Id.}}

The Planning Commission in its First Five Year plan argued that the free market was not a dependable mechanism for providing essential commodities in an economy that was likely to experience pressure from shortages and international fluctuations. Postcolonial India was imagined by its governing classes as a ‘needy nation’, permanently afflicted by an essential lack, in this case of consumer commodities.\footnote{Srirupa Roy, \textit{Beyond Belief: India and the Politics of Postcolonial Nationalism} (Durham: Duke University Press, 2006), 117.} This lack would only be met at some point in the
distant future, and until that indeterminate date extraordinary measures from the state would be required merely to manage it. While the original justification for controls had been to ensure an equitable distribution of scarce commodities, they tended to perpetuate themselves even when scarcity had ended. For instance, even when sugar production increased significantly, the control on sugar was retained on the ground that it had to be exported to earn foreign exchange.\footnote{A.D Shroff, \textit{Controls in a Planned Economy} (Bombay: Forum For Free Enterprise, 1960), 5.}

The ‘Parliamentary Select Committee on Commodity Controls’ was convinced to retain controls in a permanent form by the ringing endorsement this measure received from the Planning Commission. The Planning Commission argued that controls provided a means by which the government could balance various sectional interests, they could control the limit of freedom of action on certain classes and providing incentives to others.\footnote{The Commodity Controls Committee stated that it could do no better than to restate the findings of the Planning Commission on controls, Commodity Controls, p.16.} It noted that the origins of the controls in wartime obscured the wider role they could play in the peacetime planned economy, such as “safeguarding the minimum consumption standards of poorer classes, preventing excessive or ostentatious consumption by the well to do, and facilitating the country’s programme of direct utilization of unemployment manpower for investment”.\footnote{Report on the First Five Year Plan, (New Delhi: Planning Commission of India, 1951).} This argument resembled others that had been used to justify the continuation of various structures of colonial government, such as the army and the police, in postcolonial India. It suggested that the institution in itself (in this case economic controls), operated within a ‘rational universality’ which had been misapplied in the colonial state but could now be utilized for development.\footnote{Chatterjee,, \textit{Nation and its Fragments}, (1993) 204.}

For controls to be legitimate, they had to stand above sectional interests and the normal processes of politics, and be directed by a neutral rational body of experts rather than by
Parliament. The non-involvement of politicians, civil society and community groups in the process of implementing controls make it a striking departure from the experiences of rationing and controls in other democracies like the USA.\textsuperscript{450} Even the opposition Socialist Party, which pointed out the people’s loss of faith in the desirability and efficacy of the present system of controls, itself continued to advocate commodity controls. They attributed the public dissatisfaction to the centralized bureaucratic nature of controls, which the Socialists promised to remedy by devolving authority from government departments to people’s representative committees and associations.\textsuperscript{451}

The Cotton Textiles (Control Order), 1948 (hereinafter ‘Cotton Order’) under which the Baglas had been arrested and whose legality they challenged provided a typical example of the byzantine systems of economic regulation. The Cotton Order had been passed in the immediate aftermath of the war, when certain parts of the country faced a severe shortage of cloth. The situation grew so bad in the major cities that there were rumors of cloth being stolen from shrouds and coffins and fear of cloth riots outside of shops.\textsuperscript{452} The Cotton Order sought to confer the power to control and regulate every phase in the production of cotton cloth and yarn on the office of the Textile Commissioner. The aim of the Cotton Order was to assure an adequate supply of yarn to the handloom industry by requiring compulsory sale of yarn by manufacturers. It limited installation of powerlooms; controlled installation of power spindles; set the prices of cloth; and ensured its distribution across the country. In order to prevent hoarding, the Textile Commissioner could set the maximum quantity of cloth and yarn that could be possessed by a


\textsuperscript{451} \textit{Controls: End or Mend? A Socialist Publication}, 1951, N.G Barrier Collection of South Asian Political Tracts, Centre for South Asian Studies, Cambridge University, Cambridge.

producer or dealer as well as the maximum period of time that they could retain possession of it. To assist enforcement of these controls, the date of its production was to be marked on all cloth and yarn. The country was divided into zones, and cotton cloth could be moved between the zones only with a permit from the Textile Commissioner. The creation of a new permit regime allowed the entry of new players into the cotton trade who were able to secure the governmental permits.\textsuperscript{453} In some cases these new retailers were able to resell these licenses to those they had displaced, thus reducing the margins of profit. The entry of new players meant that the dealers in older important centers of distribution such as Bombay, Calcutta, Delhi and Kanpur (the Baglas’ base of operations) lost their positions and the trading networks they had built across the country collapsed.\textsuperscript{454} The complicated system of price and distribution controls, along with the displacement of normal trade channels, caused severe difficulties to even those traders who had obtained licenses. As a leading economist remarked, “the temptation of evading the control orders and the difficulty in comprehending them was so great” that there was hardly a trader who had not either knowingly or unknowingly evaded the controls. For traders, abiding by the regulations would have meant acquiescing in the destruction of their business.\textsuperscript{455} The complexity of the orders regime was such that even the parliamentary committee reviewing commodity controls had difficulty in obtaining a list of all notifications issued under various orders. Several administrators admitted to Parliament that even they were not sure of the latest position on the notifications governing the commodities they controlled.\textsuperscript{456} The Cotton Order demanded enormously increased burdens of paperwork from traders. For instance, the mills in Bombay city had to submit 577 forms a year to a variety of authorities including the Textile Commissioner,

\textsuperscript{453} Report of the Commodity Controls Committee, 81.
\textsuperscript{454} Ram Gopal Agrawal, Price Controls in India Since 1947 (1956), 98.
\textsuperscript{455} Id at 102.
\textsuperscript{456} Report of the Commodity Controls Committee, p.35
the Factory Inspectorate, the Labor Department and the Registrar of Companies. The failure to submit accurate and timely returns was punishable with fines.\footnote{Report of the Commodity Controls Committee, 82.}

\textbf{The New Economic Criminal}

The controls system created a new class of crimes in India that later came to be described as ‘socio-economic offences’.\footnote{29\textsuperscript{th} Report of the Law Commission of India, (New Delhi: Law Commission of India 1966).} The initial list of these offences comprised hoarding, dealing on the black market, tax evasion, food adulteration and illegal trading in licenses and permits. The novelty of these offences is apparent from their absence in the Indian Penal Code, which as a model piece of utilitarian legislation had attempted to list all possible offences in the mid-nineteenth century. The only economic offences that appeared in treatises and commentaries before the Second World War were various types of betting and gambling, food adulteration and counterfeiting of currency.

These new ‘socio-economic offences’ consisted of acts calculated to prevent or obstruct the economic development of the country.\footnote{K. Santhanam, Report on the Committee on the Prevention of Corruption (New Delhi: Government of India, 1962).54.} The victim of these offences was the state and a section of the consuming public. The crime was one that was perpetuated by fraud and not force. The Law Commission headed by Justice Gajendragadkar drew an analogy between the necessity for penalizing these offences and the need to defend every inch of territory in war, stating that “in an economic crisis or in a massive effort to build up a healthy social structure, the purity of every grain had to be protected and every dot of evil wiped out”.\footnote{47\textsuperscript{th} Report of the Law Commission on India on the Trial and Punishment of Social and Economic Offences, (New Delhi: Law Commission of India, 1972.), 5.} Recommending greater punishments for violating the Commodities Act, the Law Commission argued that these offences affecting the health of the entire community had to be crushed, and that the legislative ‘armory’...
for fighting socio-economic crimes needed ‘weapons’ that were sharper and more effective than those used for ordinary crimes.

The controls system was undergirded by an exceptional regime of criminal law. This framework arose from the belief that “socio-economic” criminals would respond only to stronger deterrence than fines and public shaming. Indeed, a socio-economic offence was characterized as one that was not challenged by the ‘organized moral sentiments’ of the community, because the crimes were often complex and public agencies like the press were themselves controlled by businesses involved in violating these laws.\footnote{29\textsuperscript{th} Law Commission Report, 5.}

Violating an order made under the ESA and the Commodities Act was punishable with imprisonment for three years or with a fine or both, and periodic amendments to the applicable law increased the punishments several times.\footnote{S.4, ESA, 1946.} Property involved in such violations, like the bales of cloth found in the Baglas’ carriage, could be forfeited. As Hiralal Sutwala, the Baglas’ servant found out, attempt to commit, or abetment of such contraventions was also deemed punishable. In recognition of the likelihood of companies attempting to contravene such orders, the controls regime made all directors, managers and officers of a corporate body liable for a contravention, unless they could prove that it took place without their knowledge or negligence.\footnote{S.9, ESA, 1946.} In cases of violation of control orders (in a deviation from the Indian Evidence Act, 1872), the burden
of proof was shifted to the accused.\textsuperscript{464} Perhaps most ominously, those charged with violating control orders would be subject to a summary trial under the Criminal Procedure Code, 1873.\textsuperscript{465} Ordinarily a summary trial was mandated only for cases involving goods of less than Rs 200 in value, and where the maximum punishment possible was less than imprisonment for two years.

Fig. 2.1 ‘Crush the Black Market’\textsuperscript{466}

A summary trial was ordinarily provided for in minor offences, where in the interests of a speedy resolution, several procedural requirements could be ignored. The accused would, for instance, only have one opportunity to cross-examine witnesses and no or limited rights of appeal. Continuing leakages and failures of the controls system led to Parliament amending the law several times to increase the penalties for the offences. An examination of just one of these debates illuminates the reasons for the state’s conviction that extraordinary measures against such offences were necessary.

The ESA was amended in 1949 to provide that in cases arising from violations of orders involving foodgrains and textiles, a sentence of imprisonment would be obligatory and

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\textsuperscript{464} S.14(1), ESA 1946. \\
\textsuperscript{465} S.12, ESA, 1946. \\
\textsuperscript{466} The Times of India, 15 September 1943.
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exceptions could only be made if the judge provided a reason in writing. Further, any vehicle or animal used for smuggling food grains or textiles could be confiscated.\footnote{467}{The Essential Supplies (Temporary Powers) Amendment Act, 1949.}

The 1949 amendment to the ESA, which was successfully passed, sought to remove all judicial discretion in sentencing. This change was a response to magistrates having given light sentences in most cases involving controls infringement. Prabhu Dayal Himatsingka, a Marwari lawyer from Calcutta and one of the few opponents of the amendment in Parliament, tried to convince the House that the reluctance of the courts to administer strict punishment indicated that public opinion in favor of the controls was weak. He failed.\footnote{468}{Prabhu Dayal Himatsingka (West Bengal: General), Extract from the Constituent Assembly of India (Legislative) Debates, 25 March 1949, Essential Supplies (Temporary Powers Act, Ministry of Law, File 38-XXII/50-L [NAI].}

Other members criticizing the amendment pointed out that the real cause of violations of control orders was not criminal intent in the people but the shortage of goods. These shortages coupled with the poor quality of available products, even in the ration shops, forced people to buy from the black market.\footnote{469}{Naziruddin Ahmad (West Bengal: Muslim) Extract from the Constituent Assembly of India (Legislative) Debates, 25 March 1949, Essential Supplies (Temporary Powers Act, Ministry of Law, File 38-XXII/50-L [NAI].}

Could a father buying food for his children from the black market be considered a criminal?

The amendment to the ESA was passed by an overwhelming majority, thanks in part, perhaps, to a furious member of the Constituent Assembly reminding the House that other countries had imposed even the death penalty for violating economic controls. He urged the government to increase the period of compulsory imprisonment to seven years. Exasperated by the high incidence of violations, he concluded that these criminals were particularly amoral and unaffected by the threat of imprisonment. As they evidently cared more about money than the

\footnote{467}{The Essential Supplies (Temporary Powers) Amendment Act, 1949.}
\footnote{468}{Prabhu Dayal Himatsingka (West Bengal: General), Extract from the Constituent Assembly of India (Legislative) Debates, 25 March 1949, Essential Supplies (Temporary Powers Act, Ministry of Law, File 38-XXII/50-L [NAI].}
\footnote{469}{Naziruddin Ahmad (West Bengal: Muslim) Extract from the Constituent Assembly of India (Legislative) Debates, 25 March 1949, Essential Supplies (Temporary Powers Act, Ministry of Law, File 38-XXII/50-L [NAI].}
prospect of serving time in prison, the government should devise penalties involving confiscation of their property.  

The provision for compulsory sentencing placed all violations of controls at the same level, so that an industrialist who forgot to file a return, a small trader moving goods without a permit, and a buyer trying to obtain food from the black market, would face equal periods of imprisonment. Voices dissenting with this amendment had noted that in practice, penalties for violation of the controls were pursued mostly against “small dealers and helpless buyers” who did not have the capacity to bribe the police. The law’s desire to punish offenders would not end the ‘open’ black markets but merely drive them underground, forcing the public to take greater risks and to pay more for the same goods. Banarsi Prasad Jhunjhunwala, another Marwari Member of Parliament, recounted how in Bihar the anti black market officials arrested a poor widow who sold saris to women from her home rather than targeting the prominent dealers on the black market. The President of the Rationing Employees Union in Uttar Pradesh warned the House that in his experience the majority of people convicted of violations of the controls were poor peasants who were transporting small quantities of grain from one place to another.  

Despite the anecdotal and empirical evidence that controls were infringed upon by various categories of people, both public and governmental imaginations envisioned a particular kind of villain: the hoarder and the ‘black-marketeer’. War propaganda advertisements (Fig 2) visualized the legitimate market as consisting of three figures: the cultivator, the dealer and the

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471 Naziruddin Ahmad (West Bengal: Muslim) Extract from the Constituent Assembly of India (Legislative) Debates, 25 March 1949, Essential Supplies (Temporary Powers Act, Ministry of Law, File 38-XXII/50-L [NAI].
customer. These advertisements asked people to cut out the sinister ‘fourth man’, the hoarder, who was an “unscrupulous speculator who hoards vast stocks of grains waiting for an increase in prices to make profits”. While these advertisements cautioned individuals against buying and storing more than they needed (Fig 3), they also acted as reminders of the danger posed by the unscrupulous hoarder, usually depicted as a member of the trading classes.
Fig 2.2 “The Fourth Man”, Classified Ad 4, *The Times of India*, 18 March 1943.

Advertising in South Asia has only recently become the object of study with the emphasis on changing social milieus in contemporary South Asia. More historical engagements can be seen in Douglas Haynes, “Creating the Consumer? Advertising, Capitalism and the Middle Class in Urban Western India, 1914-40,” in Douglas E. Haynes.
Shopkeepers and traders, including those who worked at government ration shops, were seen as particularly corrupt. Some public advertisements reminded customers that they should keep all paper receipts obtained from ration shopkeepers for a month, which would allow the

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475 Classified Ad 20, *The Times of India*, 5 March 1943.
rationing inspector to check the shopkeepers’ sale registers and prevent rationed goods from entering the black market. Others (Figs 2.4 and 2.5) encouraged individuals to smash the black market by complaining about unscrupulous traders to the police.

![Fig 2.4 Smash the Black Market, I](image1)

![Fig 2.5 Smash the Black Market II](image2)

Despite the close links forged by some business houses with the Congress, merchants and traders in general were viewed with suspicion in independent India, both by political elites and

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476 Classified Ad No.5, *The Times of India*, 19 January 1945
477 Classified Ad No.18, *The Times of India*, 5 January 1945
the general population. The public frustration with shortages and poor-quality products was articulated against the retailer with whom the consumer came into daily contact, rather than the big industrialist or corporate capital. Government documentaries of the period explicitly marked out the shopkeeper as a bad citizen. The film *Citizens and Citizens*, released in 1952, opens by defining the good citizen as the family man, who obeys laws made by his elected representative and meets his obligations to other members of society with the same consideration that he expects to receive. The film goes on to introduce a number of undesirable citizens, including Chagganlal, who runs a government licensed store, and having heard rumors of a shortage of oil, decides to hoard it. Chagganlal brusquely informs his young customer that all stocks of oil have been exhausted, and at night is seen inside his secret godown gloating over all the oil he has hoarded. The voiceover wryly comments, “Chagganlal has just put a spoke in the wheel of progress, though such a suggestion would outrage him”.

![Image](image_url)

Fig. 2.6 “Oil stocks are exhausted”, *Citizens and Citizens* (1952)

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478 *Citizens and Citizens* (Films Division, 1952).
The merchant’s loyalty to the nation was subject to constant suspicion. In an effort to win goodwill, an Indian confectionary manufacturer put out advertisements (Fig.8) appealing to the commercial community to cooperate with the government. It was high time, said the advertisements, that traders realized that they now had their own government in independent India. Unless they wholeheartedly cooperated with this government, they would fail to get the benefits of a ‘truly national government’. Hoarding and dealing on the black market were depicted as spanners thrown in the government machinery, leading to higher labor costs and more expensive raw materials. The supporters of the periodic amendments made to the controls laws viewed every trader as a potential criminal, and the language against them grew more vitriolic. An amendment to the Commodities Act would describe hoarders as “these maneaters” who were “playing hell with the lives of millions of people”.479

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A 1956 survey of popular attitudes towards the public and private sectors saw over half the respondents describe private businessmen as people who exploited the public to make large profits. These feelings were only marginally more pronounced amongst the urban middle classes as compared to the rural masses.\footnote{Indian Institute of Public Opinion, “The Structure of Urban Opinion on the Socialist Pattern of Society,” Monthly Public Opinion Surveys I (1956): 36-39.} Stanley Kochanek in his magisterial study described business in India as functioning in a hostile environment of suspicion and mistrust. As a senior bureaucrat told him, business did not just lack a rapport with the government; it also had a poor rapport with the public, affecting its ability to make representations to the government.\footnote{Stanley Kochanek, Business and Politics in India (Berkley: University of California Press, 1974), 198.}

In colonial India, indigenous business interests emerged as a legitimate interest group that was guaranteed representation in legislatures. Chambers of commerce and merchants’ associations formed electorates that sent members to legislative assemblies representing “native commerce”.\footnote{For more on the idea of “native commerce” as a class, see Ritu Birla, Stages of Capital: Law, Culture and Market Governance in Late Colonial India (Durham: Duke University Press, 2009).} These were abolished after Independence, and interest groups like the Indian Merchants’ Chambers and the Federation of Indian Commerce and Industry lost ground to planners and economists as spokespersons on market policies.\footnote{The relationship of the Indian business class and the postcolonial Indian state has been the subject of much discussion. Recent scholarship has challenged the earlier consensus of a quiescent nationalist bourgeoisie. However, the focus in much of this literature has been big industrialists and big business, and the role of petty traders and small businessmen has been ignored. This bias is apparent in the plethora of work done on industrial and investment controls, set against the absence of any academic study on commodity controls. For a more detailed discussion see Vivek Chibber, Locked in Place: State Building and Late-Industrialization in India (Princeton: Princeton University Press, 2006).} This is not to suggest that traders and industrialists became powerless to influence policy. However, their ability to act legitimately and publicly was greatly constrained. As Kochanek observed, due to the distrust of
business that permeated public culture, business interests attempted to make direct contact with the higher bureaucracy while staying out of the public eye.484

Fig. 2.8. Classified Ad. 7, The Times of India, 26 January 1948

‘The Marwari Occupants of the Lucknow Bogie’: Caste, Criminality and Constitutionalism

As we saw in the above section, traders, by virtue of their profession alone, were viewed as potential criminals by the postcolonial state. The Marwari had for long been the figure of the trader that inhabited both official discourses and popular folklore. Marwaris emerged as a particularly suspect community in postcolonial India.

The railway police officer who arrested the Baglas at the beginning of this chapter was alerted of their involvement in smuggling by a telegram that asked him to investigate the “Marwari occupants of the Lucknow Bogie”. There were no names or seat numbers required – a Marwari’s identity was considered sufficient for locating him in a crowded carriage. The Baglas identified themselves explicitly as ‘Marwari’ in the police chargesheet, as did Hiralal Sutwala in his application before the Nagpur High Court. This section will show how their caste identity was pivotal to the predicament in which they found themselves.

Over the history of the community, the term ‘Marwari’ came to describe migrant merchant traders from Rajasthan who settled across the country. Once a heterogeneous group of merchants, consisting of both Hindu and Jain families, they grew into a more homogenous community by forging networks of trade and credit. Though they were always involved in trade, it was the particular circumstances of the nineteenth century colonial economy that led to the Marwaris emerging as a pre-eminent trading group. In the absence of a formal banking system, Marwari traders across the country became creditors and moneylenders. Drawing upon networks of trust within the community, Marwaris were able to support a system of hundis, i.e.

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485 For more, see Birla, 18.
486 Chargesheet dated 27 May 1949, Criminal Appeal 7 of 1953[SCRR].
indigenous bills of exchange. The late nineteenth century saw Marwaris migrating to prominent colonial cities and market centers as bankers and traders in agricultural commodities. Their involvement in commodity speculation helped them raise capital and emerge as financiers by the First World War. Several Marwari families such as the Birlas, Dalmias and Ruias emerged as pre-eminent industrial houses in late colonial India. However, the everyday Marwari encountered by the typical Indian was most likely to be the local grain, cloth merchant or moneylender.

It is unsurprising that Marwaris, acting as powerful economic intermediaries between the elites and the masses, were viewed with hostility and suspicion by local populations. Anne Hardgrove in her ethnography of Calcutta Marwaris, compares the Marwaris to other middlemen minorities, such as the Jews in Europe, the Chinese in Indonesia or the Lebanese in West Africa, who also emerged through the globalization of capitalism.\textsuperscript{488} Since the late nineteenth century, Marwaris were often criticized for being ‘rapacious and miserly’ and were accused of involvement in unethical business practices, including gambling, speculation on commodities, food adulteration and hoarding of food. Anti-Marwari feelings were demonstrated most dramatically during the Deccan Riots of 1875 during which thousands of peasants from rural Maharashtra, mired in indebtedness, joined in attacks against Marwari moneylenders.\textsuperscript{489}

Despite their rise to prominence as products of the colonial economy, the public/governmental imagination visualized Marwaris almost as pre-modern economic actors, and not as the ‘homo economicus’ required by modern capitalism. This was in striking contrast to other commercial communities, like the Parsees, who were viewed as modern, and almost Western,

\textsuperscript{489} The literature on these riots is extensive, but see especially David Hardiman, \textit{Feeding the Baniya: Peasants and Usurers in Western India} (Delhi: Oxford University Press, 1996).
This anachronistic image of Marwari business practice is captured neatly in Omkar Goswami’s comparison of Burrabazar, the Marwari commercial district in Calcutta, with Dalhousie Square, where most modern European firms were located:

“Burrabazar is the very antithesis of Dalhousie Square. In the place of the well laid out roads were filthy, crooked, bye-lanes and alleys; instead of palatial offices there were small, holes-in-the-wall-gaddis where the Marwaris conducted business worth millions of rupees in hard cash or against bills of exchanges (hundis) taken out from strong boxes; instead of maintaining audited accounts, the Marwaris made single entries in huge red cloth bound ledgers which were undecipherable by anyone other than their family”. 491

The close kinship networks they maintained across the nation, and their private business practices (like coded account books), granted Marwari businesses a degree of opacity from governmental market discipline. The state remained aware of this. In Rights and Responsibilities, a documentary from 1952 that was aimed at educating citizens, the audience is first told that not paying taxes will obstruct the state’s functioning, and then reminded that “some have made tax evasion a fine art”. This is accompanied by a visual of a recognizably Marwari businessman, who on being informed of a visit by the tax department, hides his account books in a secret compartment behind a bookshelf.

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Fig. 2.9. Hiding tax registers on secret shelf, *Rights and Responsibilities* (1952)

Fig 2.10. Account books are concealed behind the false bookcase
Marwari prosperity and influence had developed due to their ubiquitous presence across India, unlike other commercial groups like the Parsees, Khojas, Gujaratis or Chettiars that operated primarily out of their home base. However, it was their very cosmopolitanism that made them, in the words of a contemporary political scientist, an “unusually sensitive political factor” in India in the 1950s. The period after Independence saw the strengthening of regional identities and the increasing demand for reorganization of the States on a linguistic basis. The Marwaris, by virtue of being the dominant business community and outsiders, became a target for political attacks, not just by the population that felt exploited but also by local business groups who found this an easy way to harass the competition. Riots over shortages of food or cloth often targeted Marwari traders, in the course of which shops owned by Marwaris were looted and the traders beaten and had their faces blackened.

Marwaris added fuel to the fire by publicly opposing the linguistic reorganization of States. Writing in the 1950s, Harrison documented quite extensively how Marwaris were portrayed as ‘evil demons’ and Marwari politicians attacked with epithets based on their caste identity in areas as far apart as Bombay, Calcutta, Coimbatore, Bihar, Assam and Kerala. Posters in Kerala during the first general election demanded “Marwaris! Go Home!”

State propaganda was quite unsubtle in portraying the Marwari trader as a threat to the new state. In the 1948 film, *The Case of Mr. Critic*, the audience is introduced to a number of fellow citizens who are cynical and who hinder the nation’s progress. These include the middle class employee who rubbishes the government’s projected plans for growth, the radical student

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495 *The Times of India*, February 11 1956, p.3.
496 Harrison (1960), 121.
who is impatient with the pace of development, the superstitious farmer who is suspicious of modern technology, and finally ‘Sethji’, who is introduced as a ‘shady character’. Sethji (Fig.11) appears as the stereotypical Marwari trader, with prominent caste marks, dressed in a Marwari turban, dhoti and short kurta pulling tightly across his expansive girth. He lounges against a bolster in his gaddi, where he oversees obsequious clerks, the telephone the only necessary representative of modernity.

Fig. 2.11. Meet Sethji, a shady character. The Case of Mr Critic (1948).

Sethji’s morning reverie is broken by his clerk informing him that the government has imposed controls upon sugar. A furious Sethji shouts, “satyanash ho sarkar ka” (‘May this
government be destroyed’), and complains that the government should stick to governing and leave the selling of sugar to him. His clerk concurs that the government is useless. For the audience, who might have still missed the message, the voiceover explains that because the government is trying to check undue profiteering, Sethji considers it his personal enemy. At the conclusion of the movie, all the critics have been converted, except Sethji, who “even grumbles in his sleep”. Sethji is both a figure to be mocked and to be distrusted. Of all the dissident citizens, only the Marwari merchant, motivated by greed, remained irredeemable and permanently reluctant to join the national project.

Fig 2.12. Sethji is not happy to hear news of sugar being controlled, The Case of Mr Critic (1948)
The regulation of merchants and market practices by the state was not a new development. Since the late nineteenth century, the Marwaris’ customary economic practices had come into conflict with new market disciplinary ethics and had been subject to criminal law. Ritu Birla has demonstrated that Marwaris developed two complementary strategies to negotiate these new regulations. First, they resorted to the claim of cultural autonomy, coding commercial practices as ‘culture’ and drawing upon the colonial state’s promise not to intervene in the cultural domain. Secondly, they sought to redefine and represent certain indigenous activity as legitimate and modern commercial activity.\textsuperscript{497} However, these strategies that were developed against the colonial state had to be refashioned when dealing with the postcolonial state and with a democratic public.

\textsuperscript{497} Birla (2009), 139.
It was difficult to argue for “cultural autonomy” from the state, given that the state now comprised Indians and was not external to the society it governed. Secondly, in an atmosphere where the profession of trader was itself shrouded in suspicion, it became increasingly difficult to argue that certain business practices were legitimate indigenous practices.

The control system created many barriers for Marwari businesses. Marwaris played a disproportionately large role in the commodity trade and controlled a significant part of the indigenous cotton cloth industry. Unsurprisingly, Marwari associations expressed themselves in opposition to the controls. As soon as the Second World War ended, the Marwari Chamber of Commerce expressed its apprehension that the “crippling controls of wartime origin” were being perpetuated.498 Marwari members of the Constituent Assembly, such as Prabhu Dayal Himatsingka and Banarsi Prasad Jhunjhunwala, were among the few critics of the ESA and its subsequent amendments.499 Since 1940, almost every session of Federation of Indian Chambers of Commerce and Industry had heard expressions of the concern over state controls among the industrial and business communities. In 1951, a resolution on the subject of controls was adopted which stated, inter alia, that “controls have led to a good deal of administrative abuse …have displaced the normal and traditional channels handling the distribution and thus thrown out of useful employment a large number of middle class people …have caused dissatisfaction all around and created a situation in which normal functioning of trade and industry has become impossible”.500 These demands went unheeded by the government. Rejecting a memorandum for the relaxation of controls, Dr Rajendra Prasad pointed out to members of the Marwari Chamber.

499 Prabhu Dayal Himatsingka was a lawyer and businessman from Bengal who had a long legislative career as a member of the legislative assemblies of Bengal and Assam, before becoming a member of the Constituent Assembly and subsequently being elected to the Lok Sabha and the Rajya Sabha from Bengal. Banarsi Prasad Jhunjhunwala was an MP from Bihar.
500 Controls: A Study (New Delhi: Federation of Indian Commerce and Industry, 1952) 96.
of Commerce that it was not right for businessmen to set their minds on profit when the public at large was in distress.\footnote{“Do Not Set Your Minds on Profits: Dr Prasads Plea to Marwaris,” *The Times of India*, 15 April 1947.}

The formal channels of Parliament and civil society having proved ineffective in blocking the perpetuation of the controls system, traders had to develop various forms of accommodation with it. Several businessmen, including most of the prominent Marwari industrial houses, sought to achieve a modicum of cooperation with the Congress party.\footnote{Claude Markovits, *Indian Business and Nationalist Politics, 1931-39: The Indigenous Capitalist Class and the Rise of the Congress Party* (Cambridge: Cambridge University Press, 1985).} The controls system created several opportunities for rent seeking which the larger players in the market were able to exploit, thus securing the permits and licenses required.

Marwari groups sought to actively counter negative perceptions about them. Facing allegations from regional associations that Marwaris were exploiting people, the President of the All India Marwari Conference reminded people that Marwaris had made their fortunes by “hard and painstaking enterprises and had given an impetus to growth and development of industry”.\footnote{“Spirit of Provincialism Criticized,” *The Times of India*, 11 May 1943.} In 1949, Acharya Tulsi, the spiritual leader of Marwari Jains founded the Anuvrat Sangh which sought to kindle “moral life” amongst the community and fight greed. The *sadhus* and *sadhvis* affiliated to this order sought to counter black marketing in trade and dishonesty in professions.\footnote{“Acharya Tulsi to be Feted,” *The Times of India*, 25 January 1954.} This was followed by extremely public performances of self purification by traders. Over six hundred Marwari men and women, including several millionaires and multi-millionaires, gathered in Delhi to take a solemn pledge that they would not indulge in black-market trading in the future. The other pledges taken included vows not to obtain false ration cards, not to indulge in false advertising, not to pay or accept bribes, not to travel without tickets,
to give up gambling, not to commit suicide, not use manual rickshaws, to only give correct information about quality and size when dealing in property or commodities, and to refuse to forge signatures.\textsuperscript{505} The ceremony acknowledged the existence of certain practices and simultaneously attempted to showcase a new set of mercantile ethics, but perhaps in recognition of circumstances, the pledge was only for a year.

A majority of traders either simply disregarded the controls system or exploited its loopholes. For instance, the Cotton Order limited the ration of cloth to fifteen yards a head for six months. Poorer consumers rarely used their entire allotment and sold the balance to illegal traders who then resold it on the black market at a much higher margin.\textsuperscript{506} Others restamped the prices of cloth, forged permits and attempted to move more cloth outside the controls regime into the black market. This was countered by the state’s toughening the system of surveillance and enforcement.

Newspapers reported the arrests of wealthy businessmen with glee. Four millionaire cloth dealers in Gaya were arrested for violating the ESA due to irregularities in their cloth registers. They were handcuffed and marched on foot to the courtroom as thousands of jeering citizens lined up on either side of the road.\textsuperscript{507} The sentencing of the richer merchants was often harsh, for instance, a Marwari cloth merchant from Bombay who was found selling cloth at Rs. 5.14 per yard (the controlled price being Rs.3.74) found himself fined two lakh rupees and sentenced to a year’s rigorous imprisonment for violating the Cotton Order.\textsuperscript{508}

\textsuperscript{505} “No More Indulgence in Black Marketing,” \textit{The Times of India}, 1 May 1950.
\textsuperscript{506} “Relaxation of Cloth Control Essential: Piecegoods Market,” \textit{The Times of India}, 12 January 1946.
\textsuperscript{507} “Millionaire Cloth Dealers Arrested: Public Humiliation,” \textit{The Times of India}, 7 October 1950.
\textsuperscript{508} “Rs 2 Lakh Fine and Jail,” \textit{The Times of India}, 26 November 1947, p.4.
The Crime Branch and the Department of Civil Supplies both organized periodic raids on suspected businesses. They had the power to search buildings and persons without a warrant, so a Bombay constable who noticed strange lumps in a washerman’s bundle was able to search it and recover four maunds of illicit sugar. Policemen noticed some people frequently queuing before shops selling wrist watches and went on to search their houses. 509 Raids had also taken place in Harishankar Bagla’s hometown of Cawnpore, where over 200 bales of cloth were found in the godowns of well known firms, in boxes labeled ‘soap’. 510

The police set up elaborate plans for the entrapment of black market traders. Two multi-millionaire Marwari cloth dealers based in Bombay’s Dalal Street were arrested for selling cloth at higher prices than those set by the applicable orders. On receiving information of the dealers selling cloth marked for export on the local black market, the police had placed their firm under surveillance, tapping all their phone conversation. The police also set up a decoy ‘customer’ with whom the dealers struck a deal for sale of cloth on the black market. The police raided the dealers’ premises on the day of the promised delivery and arrested the mill owners and their entire staff. 511

Hari Shankar Bagla had also appeared on the police’s list of ‘people of interest’ whom they placed under surveillance. Bombay was a major centre of cotton textile production and thus had large stockpiles of cotton cloth. Since 1947, the police had been alert to cloth being smuggled out of Bombay on passenger trains, concealed in luggage and bedding. 512 As the investigation record demonstrated, the Baglas and their contacts had been under investigation for

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509 “Bombay’s War on the Black Market,” The Times of India, 22 May 1946, p.3.  
510 “Cawnpore Raids on the Black Market,” The Times of India, 3 June 1943, p.3.  
511 “Two Millionaire Mill Owners Arrested: Charge of Selling at High Price,” The Times of India, 6 February 1951, p.1.  
some time by the Textiles Division of the Bombay Police. The police were also able to trace and arrest Richard William Race, the superintendent at India United Mills in Bombay, who had supplied Bagla with the black market cloth.

By arresting Bagla, the authorities had netted a big fish of whom they would have liked to make an example. Harishankar Bagla was involved in the management of a number of cotton textile mills in Kanpur. He had been elected President of the Uttar Pradesh Chamber of Commerce the preceding year. He had dabbled in electoral politics, emerging runner-up as a representative of Indian Commerce in the 1946 U.P. provincial assembly elections, and had also contested elections to the Central Assembly as an independent. 513

The world of Marwari owned textile mills in Kanpur, of which Bagla was the prominent face, was mired in shadowy practices and now faced increased state surveillance. Other Marwari traders, including members of Bagla’s extended family had already faced arrest, and more would have to face them. His cousin, Harish Chandra Bagla, had been convicted in 1945 of selling cotton cloth at Rs 14 rather than at the approved rate of Rs 13.46. 514 Prominent among the group of targeted Marwaris were directors of the Swadeshi Cotton Mills, Mannu Lal Bagla and Sitaram Jaipuria, who were arrested for violating the ESA by “overstamping” the approved prices of dhotis and sarees. 515

Criminal Law, Constitutional Strategies

The Baglas were confronted with an overwhelming amount of evidence against them. Under the ESA, moreover, the burden of proof had been shifted to the defence. The Baglas faced

513 “UP Nominations,” The Times of India, 29 October 1945, p.5; “UP Elections: Results and Analysis,” The Times of India, 13 April 1946, p.5.
514 Harish Chandra Bagla v. King Emperor, AIR 1945 All 90.
mandatory imprisonment if convicted. Their original defence – that the cloth found on the train was for personal consumption – was not accepted by the magistrate. In the second year of the prosecution, their lawyer, S.C. Dube, decided to move the case to another forum. He petitioned the High Court of Nagpur on the grounds that the case raised substantial questions of law, namely, that S.3 of the ESA was ultra vires the Constitution as it delegated excessive powers to the legislature, and that the extension of the ESA beyond its original date of expiry through resolutions of Parliament was impermissible. The initial arguments were tentative, and new decisions by the Supreme Court on delegated legislation led to the lawyers modifying their petition and including additional grounds. They argued that the power given to the government under S.3 of the ESA could not validly be delegated to a subordinate officer or authority.

Mr. Bagla retained Gopal Swarup Pathak, a leading figure from the Allahabad Bar, to argue his case before the Nagpur High Court. Pathak’s presence was critical. Through the 1940s, several convictions under the ESA had been unsuccessfully challenged on the grounds of excessive delegation. The government lawyers raised a preliminary objection asking that this case be dismissed following the earlier precedents. However, Pathak successfully argued that since the previous applications had been made prior to the enactment of the Constitution they could not be applied to the Bagla case.

Pathak, in his arguments, confined himself solely to the question of whether the ESA was unconstitutional and suffered from the defect of excessive delegation, choosing not to argue the other procedural points raised in the petition. This decision was strategic, as the Supreme Court

516 “Order of the High Court in Criminal Revision No. 659 of 1949,” in Criminal Appeal 7 of 1953[SCRR].
517 Pathak was a leading lawyer in Allahabad and had even briefly served as an additional judge in the Allahabad High Court in 1945-46. A decade after the Bagla case, he would be elected to the Rajya Sabha and become Law Minister in Indira Gandhi’s cabinet. In 1974, he would be elected Vice President of India.
and other High Courts had already ruled upon several of the technical contentions Pathak was laying aside, interestingly also in cases involving Marwari traders.\textsuperscript{518}

Pathak’s primary argument was that essential legislative functions could not be delegated. These functions included the laying down of policy and principles and the setting out of standards and limits which would restrict the actions of the authority to which power was being delegated. He attacked the ESA for conferring unlimited arbitrary power without a policy to guide it. Examples of this arbitrary power included the conferral of subjective discretion upon officials that could not be examined by a court, the power to select a delegate or instrumentality and the power to repeal an essential legislative function. Under S.3 of the ESA, Parliament made the Central government the judge of the expediency of making an order. It provided no policy or standard to direct such judgment, and conferred power of the widest latitude. S.4 of the ESA left the choice of instrumentality and delegation to the government. Finally, S.6 allowed the government to enact orders that were inconsistent with other laws enacted by Parliament. The last provision virtually empowered executive authority to act inconsistently with the expressed desires of the legislature.

In particular, Pathak argued that the Cotton Order had implicitly overruled the Indian Railways Act, 1890. Under S.27 of the Indian Railways Act, the railways authorities had a duty to afford all reasonable facilities for receiving, forwarding and delivering traffic, and every citizen therefore had a corresponding right to transport by the railways any goods of their choice. The Cotton Textiles (Control and Movement) Order, 1948 required any person wishing to transport cloth, yarn or apparel by rail to secure a permit from the Textile Commissioner. The

\textsuperscript{518} The Supreme Court and the Bombay High Court both ruled that the life of the ESA could be validly extended through parliamentary resolutions, \textit{Joyal Agarwala v. Union of India}, S.C.R.127; \textit{State v. Hiralal}, AIR 1951 Bombay 369.
effect of this requirement was virtually to abrogate the general right conferred upon all citizens under the Railways Act and replace it with a considerably attenuated right. According to Pathak, the Cotton Order, by placing restrictions on the right of citizens to transport goods on railways, was partially repealing the Railways Act. The power to repeal a law could not be conferred upon an executive authority like the Textile Controller and had to be exercised by Parliament. Therefore, Pathak contended that S.6 of the ESA which permitted the Central government to make orders under the ESA that were inconsistent with earlier laws was invalid.

There was a curious irony underlying Pathak’s distinction between executive and legislative authority. The Indian Railways Act (that the ESA was alleged to have partially repealed) was a colonial law enacted by the Viceroy and his Council, predating reforms that allowed some Indian representation in the legislative process. The ESA on the other hand, that provided for delegation to executive authorities, was authored by the Constituent Assembly and administered by a Congress-led government. However, Pathak was conscious of the fact that the railways in India had always served as an arena in which relationships of power were defined and resisted. The railways were presented to India as an instrument of progress and a sign of modernity and rail travel was seen as central to developing Indian national consciousness. Therefore, Pathak spelt out in legal terms what popular opinion had often expressed, that commodity controls were transforming older conceptions of rights and privileges.

**Separating Powers in the Indian Republic**

The argument Pathak made in the Bagla case, on the unconstitutionality of excessive delegation, was not novel; however its timing was critical. Similar arguments had been made in

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cases involving the ESA and the DoIA Rules before the coming into force of the Constitution and had been dismissed. However, the enactment of the Constitution allowed Pathak to develop several arguments drawing from American jurisprudence.

The earliest legal arguments on the issue, arising from convictions for violations of controls during the Second World War, had taken the ground that the subject matter of the ESA was itself beyond the jurisdiction of the colonial legislature. These arguments were repeatedly dismissed by the courts.\(^{520}\) The validity of several of the DoI Rules had been challenged on the grounds of the Rules being delegated legislation but had failed on every occasion. In *Meer Singh’s* case, a shopkeeper who had refused to accept a valid currency note and had been charged with undermining public confidence in the government, challenged the validity of S.2 of the DoI Rules on the ground that the Indian legislature had no power to divest itself of legislative authority. The Central Legislature that had enacted the DoIA derived its powers from the Government of India Act, 1935. Meer Singh argued that the delegation to the Central government of authority to make the DoI Rules, was tantamount to constituting the Central government as a fresh legislative body. Meer Singh’s lawyers argued that by committing important regulations to its agents, the legislature was effacing itself. The court rejected this contention, noting that the legislature still retained the power to take back the authority it had delegated and destroy the agencies it had set up.\(^{521}\) The decision in *Meer Singh* became the authoritative precedent for all challenges to the DoI Rules till Independence.\(^{522}\)

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\(^{520}\) *Niharendu Dutt Mazumdar v. King Emperor*, AIR (29) 1942 P. C. 22; *Bimal Protiva Debi v. Emperor*, 43 Cr.LJ. 793; and *Baldev Mitter v. King Emperor*, AIR (31) 1944 Lah. 142

\(^{521}\) *King Emperor v. Meer Singh*, ILR 1941 All 617.

\(^{522}\) *Gopal Narain v. Emperor*, AIR (30) 1943 Oudh 227; *King Emperor v. Sibnath Banerjee*, AIR (30) 1943 P. C. 75; *Haveliram v. Maharaja of Morvi*, AIR (32) 1945 Bom 88 (Full Bench); *Harkishan Das v. Emperor*, AIR (31) 1944 Lah 33 (Full Bench); *H. N. Nolan v. Emperor*, AIR (31) 1944 ALL. 118.
Regardless of their determination, the cases mentioned above made visible an important line of argument. Lawyers recognized that the powers of a legislature would be circumscribed by the Government of India Act, 1935, which was repeatedly referred to as the constitution. This helped distinguish the Indian legislature from a Diceyan understanding of British parliamentary sovereignty. As Chief Justice Varadachariar noted in another case involving detention under the DoI Rules, “on account of the absolute sovereignty of Parliament, no question of the constitutional invalidity of any Parliamentary enactment can ever be raised in a court of law”.\(^523\)

While courts in late colonial India began increasingly to recognize that there were limits to legislative power, they were initially uncomfortable enforcing them. The Allahabad High Court in \textit{Meer Singh} warned that in judging legislative propriety the court must be careful not to “be led into a criticism of the constitutional propriety of that method, instead of confining our attention to its strictly legal aspect”. Acknowledging the debate over delegated powers that was emerging in Britain, the court nevertheless ruled that such questions were besides the point in India.

Lawyers continued to attempt challenges to the Commodities Act and commodities orders on the ground of excessive delegation, often “driven to it as [a] last resort”, because commodity control laws did not leave much scope for the usual criminal defences on the normal rules of evidence. Similar challenges were made to the ESA even after Independence, among others by a Marwari trader found hoarding excess amounts of rice in Bengal. The High Court of Calcutta noted that there was no difference in principle between the rules made under the ESA and those made under the DoIA.\(^524\) This was echoed by several other High Courts who noted that

\(^{523}\) \textit{Benoari Lal Sharma v. King Emperor}, AIR (30) 1943 F.C. 36.
\(^{524}\) \textit{Ramananda Agarwala v. State of West Bengal}, AIR 1951 Cal 120.
Parliament did not delegate its authority under the ESA, but merely permitted the executive and its officers to carry out the policy stated in the Act.\footnote{Monomohan v. Gobinda Das, 55 C.W.N. 6, Haveliram Shetty v. His Highness, Shri Lukhdhirji, the Maharajaheb of Morvi, ILR 1944 Bom 487.}

Gopal Swarup Pathak however had been developing a more sophisticated version of the excessive-delegation argument. A year before he was retained by the Baglas, he had defended another Marwari trader who had been arrested tampering with the stock registers at his kerosene shop.\footnote{State of Uttar Pradesh v. Basdeo Bajoria, AIR 1951 All 44.} Despite noting that the question of excessive delegation had been decided by the courts several times, the Allahabad High Court agreed to consider the question again out of deference to Pathak’s elaborate arguments drawing on the work of several constitutional theorists.

Pathak’s brief was to persuade the court that with the enactment of a written Constitution, parliamentary sovereignty in India had become transformed. Pathak quoted extensively from American Administrative Law, a recent treatise authored by Bernard Schwartz. A law professor at NYU School of Law, Schwartz had recently completed his doctorate at Cambridge and was able to draw clear distinctions between the role of the courts in the British and the American systems. Pathak quoted him saying “In Great Britain, excessive delegations of parliament are political concerns while in the United States, they are primarily judicial”.\footnote{Bernard L. Schwartz, American Administrative Law (London: Pitman, 1950), 23. Schwarz was a professor of law at the NYU School of law. In the 1950s, just after writing the book, he served for two years as the chief counsel to a Congressional sub-commission on legislative oversight looking for misconduct in Federal regulatory agencies. Wolfgang Saxon, “Bernard Schwartz Dies at 74: Legal Scholar and Historian,” New York Times, 26 December 1997.} He went onto argue that as a ‘non sovereign’ parliament, the Indian legislature did not enjoy the immunities the British parliament did. Pathak used Schwartz’s work to contend that any delegation of power by a non-sovereign legislature must be a limited one, and that the legislation enabling such
delegation must contain a framework within which executive action shall have to operate.\textsuperscript{528} The Allahabad High Court was reminded of Justice Cardozo’s words that the grant of authority must be “canalized within banks that keep it from overflowing”.\textsuperscript{529} Pathak directed a special attack against a proviso that allowed the delegated authority to create new offences and prescribe punishments. He argued that, as in America, any penalties for violation of administrative rules and regulations must be fixed by the legislature itself.\textsuperscript{530} The debates before the court highlight that there was no fixed conception of the constitutional order in India. Despite an extremely detailed constitution and long deliberations by the Constituent Assembly, arguments over quotidian acts could reshape how the Constitution was understood.

The Allahabad High Court responded extremely conservatively to Pathak’s arguments, holding that the views of constitutionalists and American Courts were not binding on Indian legislatures. It ruled that it was not open to a court to throw out an enactment which was within the scope of the powers of the relevant legislature, on the grounds of it being unreasonable, unnecessary or improper or because it delegated excessive authority. The High Court further held that the views of constitutionalists on what powers ought to be retained by the legislature and what could be conferred on other authorities were not binding in any way and could at best serve as a guideline that a legislature was free to ignore. The Court held that it did not have the powers to strike down an enactment on the basis of constitutional theory and foreign precedent. The Court rejected Pathak’s arguments and upheld the prosecution of Basdeo on the grounds that the courts had no power to reject an act as \textit{ultra vires} only because to the vice of excessive delegation.

\textsuperscript{528} Schwartz (1950), 22.
\textsuperscript{529} \textit{A.L.A Schechter Poultry Corp v. United States}, 295 U.S 495.
\textsuperscript{530} Quoting Schwartz (1950), 31.
The Court preferred to follow nineteenth century precedents from the Privy Council to determine that the power to create penalties could be delegated to administrative authorities. Recognizing that the American position on creating penalties was different, the court pointed out that even the American legislature could lay down policies and establish standards, before leaving it to other authorities to fill in the details. It went on to uphold the DoI Rules on the basis that they were made by a legislature which faced a serious emergency, and could not at once make laws to ensure public safety as they were short of time and were not cognizant of all the practical situations that might arise. The emergency was justification enough for the legislation to confer the rule-making powers upon the Central government. It was not for the judiciary to go into the question of reasonableness or propriety of any enactment of even a non-sovereign legislature.

The decision in Bagla reflected two long standing characteristics of Indian courts that would change with the commodity control cases. First, courts exhibited a general deference to the executive, especially in political and security cases. Scholars have suggested that it was this history of deference that made the expansion of the court’s jurisdiction under the new Constitution uncontroversial. The members of the Constituent Assembly assumed, given their experience with the courts, that their interventions in government policy would be rare.

Secondly, when considering foreign precedents, Indian courts relied largely on English decisions, and especially the decisions of the Privy Council. With the enactment of the Government of India Act, 1935, and the institution of the Federal Court, the courts began to

531 Hodge v. Regina (1883) 9 AC 117.
532 There remained a few exceptions to this general trend, for instance the behavior of the Federal Court of India, established in 1939. For a more detailed account, see Rohit De, “The Federal Court and Civil Liberties in Late Colonial India,” in The Legal Complex in Postcolonial Struggles for Political Freedom, ed. Terrence Halliday, Lucien Karpik, Malcolm Feeley (Cambridge: Cambridge University Press, 2012), 59-50.
increasingly pay attention to decisions from other dominions with constitutional government, particularly Australia and Canada. An inventory of the Judge’s Library of the Federal Court of India revealed seven commentaries on the American constitution compared to over 30 dealing with the constitutional law of Britain and of other dominions.\(^\text{534}\)

However, with the enactment of the Constitution of 1950 and the incorporation of enforceable fundamental rights, both of these characteristics of the Indian courts began to change. Significantly for the Baglas’ case, both phenomena came together in an advisory opinion of the Supreme Court of India in the *Delhi Laws’* decision.

**The Delhi Laws Problem**

Given the importance of the decision to Indian constitutional law, the origins of the *Delhi Laws* case were surprisingly routine. The law in question authorized the executive to extend to the newly formed States the laws that were in force in the older States. The executive was also authorized to modify these laws to the extent that they did not affect policy. The laws were referred to the Supreme Court for its advisory opinion due to the increasing number of questions being raised about the delegation of executive power.\(^\text{535}\) The judges of the Supreme Court responded in a lengthy decision with seven separate opinions. The majority of the court upheld two of the Acts, following a nineteenth century precedent of the Privy Council.\(^\text{536}\) However, it struck down the third Act, which had authorized the executive to repeal or amend legislation.

Chief Justice Kania writing as part of the majority stated that with the enactment of the Constitution, they could not endorse the view that the Indian legislature had unlimited powers like its British counterpart. After a careful reading of cases from Canada, Australia and the

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\(^\text{534}\) Letter from Justice M.R. Jayakar to B.L. Mitter, 6 April 1937, M.R Jayakar Papers [NAI].

\(^\text{535}\) *In Re Delhi Laws Act*, 1951 AIR SC 332.

\(^\text{536}\) *Queen v. Boorah*, 3 App. Cas. 889 (PC 1878).
United States, Kania ruled that while a legislature, as a part of its legislative functions, could confer powers to make rules and regulations for carrying out the objects of the act, it could not delegate “essential legislative functions”. He rejected the contention of the Attorney General that India had adopted the English and not the American system of government and that the delegation of legislative function was valid as long as the legislature retained the final power to control the actions of the body to which it had delegated.537

The Baglas in Court

Pathak’s gambit in the Bagla case was partially successful: the Nagpur High Court in its decision recognized that the The Delhi Laws case had changed the law on the delegation of authority and on that basis, overruled over nine frequently cited precedents. The Nagpur High Court further noted that sections 6 and 3 of the ESA conferred a wide power upon the executive to make a law that might be inconsistent with pre-existing laws. It went on to find S.6 of the ESA to be ultra vires the powers of Parliament. However, to secure the acquittal of the Baglas it was necessary to establish that S.3 of the ESA, under whose authority the Cotton Order had been formulated, was also ultra vires.

Pathak had argued that the section was ultra vires, as the ESA conferred power without guidelines to the authority under the Cotton Order, did not lay down a policy and did not provide for a standard directing and limiting the use of such power. Pathak relied on the decision of the US Supreme Court in Yick Wo v. Hopkins.538 The judges were unpersuaded that the analogy drawn from the American case would apply. They held that the power entrusted to the Textile Commissioner was guided by the policy laid down in the preamble to the ESA, which was to

537 Interestingly, treatise writers focused on the decisions of Justices Kania and Fazl Ali and not the other judges. See, Markose, Cases and Materials, 219.
538 Yick Wo v. Hopkins (1886) 118 US 356.
regulate the transport of cotton textiles in a manner that would ensure even distribution at a fair price to all. The High Court held that the grant or refusal of permits under the Cotton Order was governed by this policy, and the discretion given to the Textile Commissioner was to be exercised to effectuate this.

Encouraged by the judicial application of the principle of excessive delegation, Pathak moved an appeal to the Supreme Court of India. The first and primary contention he made was that S.3 of the ESA was unconstitutional and *void*, as it was the delegation of essential legislative functions to a non-legislative body, without setting out any standards that would limit its discretion. In Pathak’s argument, the subjective discretion given to the Textile Commissioner was not examinable by the Court and therefore the conferral of such discretion was tantamount to the conferral of an arbitrary power. The Supreme Court of India was receptive of this argument and criticized the decision of the Nagpur High Court by pointing out that the aims mentioned in the ESA were merely illustrative of matters with regard to which orders could be made. They did not exhaustively list the powers that were actually conferred.

Pathak also argued that the powers conferred upon the Textile Commissioner interfered with the rights of citizens under Articles 19(1)(f) and 19(1)(g) of the Constitution, which recognized the rights of citizen to dispose of property and carry on a trade and business. However, this argument was made last in an almost formulaic fashion and did not received much attention in court.

The Supreme Court dismissed the Baglas’ petition.\(^{539}\) While they reiterated the principles underlying the proscription of excessive delegation, they were unconvinced that S.3 of the ESA, 

\(^{539}\) *Harishankar Bagla and another v. State of Madhya Pradesh*, 1954 SC AIR 465
in particular, suffered from this defect. As the Baglas had never applied for a permit to move cloth in the first place, the Supreme Court was reluctant to hold that the Textile Commissioner had been given an unregulated and arbitrary discretion to refuse or grant a permit. The court did concede that if the permit had been applied for and then refused, the Baglas might have had a stronger challenge to the law. The court’s decision was carefully phrased. It emphasized that the judiciary had the right to review legislation on the grounds of excessive delegation. It gestured to the fact that the discretion given to the Textile Commissioner could potentially be seen as excessive. However, it also appeared reluctant to reward economic wrongdoing. The attitude of the court seemed to be that since the Baglas had failed to follow procedure in the first place, they were not entitled to ask for procedural protection. Little is known about what happened to Harishankar Bagla and his wife after the decision of the Supreme Court. The only record shows that their prosecution restarted in the district court at Hoshangabad.\textsuperscript{540} However, the decision in the Bagla case would have a long afterlife.

The Arbitrary Administrator: The Shadow of the Bagla Case

Despite the final decision, the Bagla litigation demonstrated that the courts were receptive to arguments challenging excessive delegation of authority to the bureaucracy, and were open to recognizing that British precedents on administrative law could not be easily applied to a constitutional republic. For instance, in Dwarka Prasad’s case the Supreme Court accepted the identical argument made (and ultimately rejected) in Bagla and struck down provisions of the U.P. Coal Control Order.

The petitioners in the Dwarka Prasad case were a firm of traders who, prior to the cancellation of their licenses, had been retailing coal in the town of Kanpur, the Bagla’s

\textsuperscript{540} “Essential Supplies Act Held Valid; Supreme Court Dismisses Appeal,” \textit{The Times of India}, 17 May 1954, p.11.
hometown. Under the Uttar Pradesh Coal Control Order, 1953 (hereinafter the ‘UP Coal Order’), the District Magistrate of Kanpur and the District Supply Officer had been appointed as licensing authorities. Frequent directives had been issued by the individual officers imposing restrictions on the sale, and fixing the prices, of various kinds of coal and soft coke. In 1953, the District Supply Officer issued a directive drastically reducing the selling prices of all commodities, effectively bringing down the profit margin by 50%. The prices were also fixed far lower than those set under the same UP Coal Order in other towns within the state of UP. The petitioner firm was found in non-compliance with the new directive and their license to sell coal cancelled. This left the firm incapable of disposing of the stocks of coal it already had and simultaneously made them liable to charges of hoarding, as holding on to coal stocks without a license was a criminal offence.\(^{541}\)

The petitioners attacked the validity of the UP Coal Order on the ground that its provisions vested an “unfettered and unguided discretion” in the licensing authority, in questions of granting and revoking licenses, fixing prices and determining conditions of trade. The ability of the State Coal Controller to delegate licensing power to an unlimited number of subordinate authorities was also attacked. The ability of the licensing authority to exempt certain persons from the general application of the UP Coal Order was particularly targeted as an example of the arbitrary nature of the authority delegated. The Supreme Court, after a careful perusal of the facts, reiterated that it was indisputable that

\[\text{“for ensuring equitable distribution of commodities considered essential to the community and their availability at fair prices, it is quite a reasonable thing to regulate sale of these }\]

\(^{541}\) Uttar Pradesh Coal Control Order, 1943.
commodities through licensed vendors to whom quotas are allotted in specified quantities and who are not permitted to sell them beyond the prices that are fixed by the controlling authorities”.

The Court also conceded that these powers had to vest in public officials who would be required to exercise a certain amount of discretion. However, they argued that “mischief arises” when the power delegated is an arbitrary power unregulated by any rule or control by a higher authority. Keeping this in mind, they found the delegation of absolute power to grant licenses for the trade in coal, as well as the ability to exempt certain persons from the licensing regime, prima facie unreasonable. In the absence of rules or directions to regulate the discretion of the licensing officer, the UP Coal Order committed to “the unrestrained will of a single individual” the power to grant, withhold or cancel licenses in any way he chose. Echoing the decision of the US Supreme Court in *Yick Wo v. Hopkins*, they pointed out that the action of an officer in this position could proceed from “enmity, prejudice, partisan zeal, animosity, favoritism or other improper influences which were easy to conceal”.

The Supreme Court rejected the contention of the state of UP that requiring controllers and other officers to record reasons for the grant or refusal of a license was a sufficient safeguard against abuse of authority, on the grounds that there was no appeal to any authority against the decision to refuse a license. The Supreme Court struck down several clauses of the UP Coal Order on the grounds that it delegated excessive and arbitrary power to the executive and was an unreasonable restriction on fundamental rights. It also restored the coal trading license to the petitioners.

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In an almost identical situation, Marwari grain traders from Jodhpur in Rajasthan successfully challenged the Rajasthan Foodgrain Controls Order, 1948 (hereinafter the ‘Rajasthan Order’). The petitioners, licensed traders in bajra, had their stocks frozen and compulsorily acquired by the government at half the market price. The traders had challenged the clause that gave requisitioning powers to officers on the grounds that no principles were laid down for freezing and requisitioning stocks. The Supreme Court rejected this contention, holding that the circumstances under which the stocks could be frozen had to be read along with S.3 of the ESA. The requisitioning of stocks could be reasonably related to the object of the ESA. However, the court struck down as invalid the clause of the Rajasthan Order that allowed the government to requisition and dispose of stock at any rate or price, on the ground that this clause delegated an unrestricted authority. As the court observed, this made it possible for the government to requisition the stocks at a price lower than the ceiling price, thus causing loss to the traders, while the Government remained free to sell the same stocks at a higher price and make a profit.

The 1950s saw a plethora of cases being filed in courts challenging various aspects of commodity controls on the grounds that they conferred arbitrary powers on the designated officials. The success rates of these challenges varied. Towards the end of the decade, commentators observed that it was becoming extremely difficult to get relief from the judiciary, except in cases involving licensing. The judicial decisions differed widely and turned on the interpretation of specific facts, and the precedents set in both Dwarka Prasad and Nathamal, while never expressly overruled, were in many cases carefully distinguished on the basis of fact.

546 M.P Jain, Administrative Process under the Essential Commodities Act (Bombay: N.M. Tripathi, 1964), 47.
and not followed. However, the multitude of cases before the court kept governmental decision making in a state of complete flux. The uncertainty experienced by traders and consumers in the market at the onset of the controls regime, was directed towards the government through the law courts. The government took the litigation seriously, and the Attorney General was asked by the Central government to intervene in several cases where it had not been impleaded as a party. But perhaps most significantly, the litigation was able to shift the focus of the commodity control question from the needs of a planned economy to a debate about the role of the administrator in a democracy.

The Rule of Law in a Planned Society: Controls and the Birth of Administrative Law

The commodity controls regime had created an atmosphere which caused the noted economist, D.N. Gadgil to observe, “the ordinary man on the street alleges today that the average administrator in India is neither efficient nor honest”. The effect of channeling litigation strategy to attack administrative discretion was that the figure of the dishonest (Marwari) trader produced by the state was effaced by the figure of the corrupt, power hungry administrator. As Mr. Pathak’s argument in the Bagla case indicated, the turning point in litigation over commodity controls had arrived with the introduction of administrative law arguments along with the discussion of American precedents.

This administrative turn in the area of commodity controls was supported by the entry of the Ford Foundation in the Indian legal academy. The involvement of organizations like the Ford

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548 This trend is evident from the very early case of Santosh Kumar Jain v. State of Bihar, AIR 1951 SC 201. Also see State of Rajasthan v. Natha Mal, AIR 1954 S.C. 307.
Foundation in India just after Independence has begun to be documented. India, with its modernist leadership and its adoption of liberal democratic principles, was identified as a critical site that contained both new markets as well as an environment where democracy and rule of law could be strengthened. From 1952 onwards, the Ford Foundation began investing substantially in a ‘rule of law’ project in India. Aiming to build capacities of the legal profession in India, Ford sponsored exchanges of American law professors to India, arranged for Indian lawyers and judges to attend courses in the United States, hired experts to advise Indian law schools on structural and curriculum reform and set up a legal research centre modeled on the American Law Institute. Ford gave 7.5 million dollars to certain American law schools to develop strong international law curricula, train foreign lawyers in the United States and help American academics develop expertise in comparative law.

While Ford’s interest in developing a rule-of-law program in India and the initiatives it started have been noted by scholars, the content of the research it sponsored has not been examined. Almost all the new research sponsored and published by the new Indian Law Institute and the scholars trained in the United States dealt with administrative law, and the dominant portion of it involved the study of administrative process in a planned economy.

Much of the collaborative research agenda was laid out at a five week conference on public law problems in India convened at Paolo Alto by Carl. B. Spaeth, then dean of Stanford

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553 Spaeth Merrilat Visit, Final Report, p.17 [Ford Foundation Archives].
Law School, and funded by the Ford Foundation. The Indian Solicitor-General and the Dean of the Delhi Law Faculty coauthored the proposed topics for administrative law research with two American law professors. The first issue of the journal of the Indian Law Institute contained articles by the Attorney General of India and the Solicitor General, as well as several judges and law professors, focusing on judicial control of administrative action. These were complemented by comparative articles by American law professors from Stanford, Cornell and Harvard that sought to highlight American administrative procedure. A.T. Markose, the Yale educated founding director of the Indian Law Institute, authored the first treatise on judicial control of administrative action and produced a volume on cases and materials on administrative law, the only American style casebook that was used in Indian law schools till the 1990s. Over two thirds of the studies commissioned by the Indian Law Institute in its first three years dealt with questions of administrative law, including a detailed study of the administrative process under the Essential Commodities Act.

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559 M.P. Jain, *Administrative Process under the Essential Commodities Act, 1955* (New Delhi: Indian Law Institute, 1964). The other studies addressed delegated legislation in India, administrative procedure under labor conciliation,
The focus on administrative law was prompted by a need to reconcile a planned economy with the rule of law. The ILI casebook on administrative law excerpted extensively from Hayek, reminding law students that there was no justification for the belief that as long as power was conferred by democratic procedure it could not be arbitrary. This critique effectively challenged the rationale behind much of the Nehruvian regulatory state. As Hayek pointed out, planning involved deliberate discrimination between particular needs of different people, effecting “a return to the rule of status, a reversal of the movement of progressive societies which in the famous phrase of Sir Henry Maine ‘has hitherto been a movement from status to contract’.”

The new legal academy sought to emphasize a distinction between legality and the rule of law. To make the central direction of all economic activity possible, the government had to legalize what to all intents and purposes was arbitrary action. The legal academy recognized that national planning would involve public control and direction of economic and social activities, including control of basic industries, ceilings on land ownership, increased taxation, mobilization of labor, control of exports and imports and slum clearance. However by granting the government unlimited powers, the most arbitrary rule could now be made legal. The project of administrative law now became to reconcile national planning and administrative discretion with the greatest amount of legal safeguards.

It is important to emphasize that unlike the West, where systems of administrative law were shaped through legislative and bureaucratic action (such as the system of the court administratif in France or the enactment of the Administrative Procedure Act in the United


States), Indian administrative law was almost entirely generated through case law.\(^{562}\) In postcolonial India, it was in the arena of ‘public law’ rather than ‘private law’ (torts, contract or \textit{lex mercatoria}) that judge-made common law developed, often through ad-hoc, tentative and dynamic decisions. Baxi argues that this development created a dilemma, because the state’s need for “ruthless certitude” was far greater than the need for certitude between the individual orderings of social and economic relations.\(^{563}\)

Given that the stakes had to be high before the ordinary citizen was motivated to initiate litigation, the majority of the cases that generated administrative law involved traders as litigants. The two other sites for administrative law litigation – cases involving refugee resettlement and civil service employment cases – received little research interest from the new legal academy.\(^{564}\) Thus, litigation over commodity controls became the foundation for administrative law in India. The decisions in \textit{Bagla} and \textit{Dwarka Prasad} circulated through a variety of legal networks.

Writers of legal treatises and commentaries paired the \textit{Bagla} and \textit{Dwarka Prasad} decisions together, framing the strategy for most litigants. The first prong of the challenge would be procedural, attacking the regulation for delegating essential legislative function without a set of guidelines to guide the officials in performing such functions. If the court, as in \textit{Bagla}, found for the existence of such guidelines, the lawyers would make a substantive challenge, arguing that the guidelines were not sufficient to regulate the discretion or operate as a check upon injustice that might ensue from improper exercise of discretion.


\(^{563}\) Upendra Baxi, Introduction to M.Rama Jois, \textit{Services under the State} (Bombay: N.M Tripathi, 1987), xliii-lxii, l. In contrast, in the United States this ‘common law’ system of case by case decision making had been attacked as slow and expensive. See, John Landis, \textit{The Administrative Process} (New Haven: Yale University Press, 1938), 34.

\(^{564}\) For more on the impact of partition and refugee resettlement on the making of the modern Indian and Pakistani states, see, Rohit De, “Taming of the Custodian: Evacuee Property and the Making of Administrative Law in India and Pakistan” (forthcoming).
Despite Harishankar Bagla’s conviction and the validation of the ESA, the Allahabad High Court read the Bagla and Dwarka Prasad together and held that these judgments indicated that it was not open to a legislature to give arbitrary power to the State government unrestrained by discretion. In the absence of such guidelines the courts could annul the laws impugned for excessive delegation without limits or guidelines.\(^{565}\) The Supreme Court, in a challenge to the powers of the Delhi Rent Control Authority, also read the two judgments together and set up a similar test.\(^{566}\) In a narrow majority of the decisions, the challenges to administrative action were rejected. However, in many others, the courts could and did strike down the challenges.

A particularly effective example is the case of Amir Chand. Amir Chand was a Marwari cloth trader in UP who had a temporary license for storing cloth at his business premises. A month after the license had expired he was found selling a *sari*, and he was convicted and sentenced to three months rigorous imprisonment for violating the clauses of the Cotton Order as well as the UP Controlled Cotton Cloth and Yarn Dealers Licensing Order, 1948 (hereinafter the UP Cotton Order).\(^{567}\) Amir Chand challenged the constitutionality of certain clauses of the Cotton Control Order which gave the Textile Commissioner unrestricted power to refuse to grant a license without assigning a reason. He also challenged the provisions which allowed the Licensing Authority the discretion to refuse to grant a license, even though they were required to write reasons. The Allahabad High Court considered the decisions in both *Bagla* and *Dwarka Prasad*. The *Bagla* decision had upheld the validity of other provisos of the Cotton Order on the grounds that it bore sufficient connection with the stated policy of ensuring equal distribution of cotton textiles at a fair price to all. The court held that despite the same order being in question,

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\(^{566}\) *Jyoti Pershad v. Administrator for the Union Territory of Delhi*, AIR 1961 SC 1602.

\(^{567}\) *Amir Chand v. The State of Uttar Pradesh*, AIR 1956 All 562.
the decision in Bagla could not be completely followed. They argued that the decision in Bagla had turned on the fact that the Baglas had never approached the authority in the first place, unlike Amir Chand who had originally held a license. Second, they followed Dwarka Prasad in holding that even though the delegation of power was connected to the policy behind the Cotton Order, the fact that the decisions were made on the basis of the subjective satisfaction of a licensing authority, and provided no remedy to the affected party, counted against the legitimacy of the delegation. The validity of the delegation itself was not enough; the discretion granted to the authority could not be “arbitrary and unfettered”. Amir Chand was accordingly acquitted of all charges.

**The Trader as a Constitutional Actor**

Why is the Baglas’ brief journey through law courts, particularly in light of their eventual defeat, considered significant? First, it is an important early episode of an administrative challenge to the regime of commodity controls. The Bagla case would be followed by five hundred and sixty eight reported cases of challenges to the ESA, and close to four thousand reported challenges to its successor, the Commodities Act.\(^568\) Reported cases are only a small fraction of the litigation that appears before the High Courts, and their number does not take into consideration the hundreds and thousands of unreported cases before the lower courts.

Secondly, Bagla was important doctrinally as precedent and was cited in one hundred and ninety four reported cases, thirty three of them before the Supreme Court.\(^569\) It allowed the courts to claim the authority to adjudicate the question of excessive delegation, thus empowering them to search for policy. It also set a broad pattern for administrative law in India, where the courts

\(^568\) Surveyed on www.indlaw.com (as visited on 22 January 2013).

\(^569\) A very basic survey of indlaw.com (an Indian legal database) shows that the Bagla decision was cited as authority in at least 194 cases (33 of them Supreme Court cases), and the Dwarka Prasad decision in 50.
could uphold the validity of a delegation while simultaneously being critical of the specific actions. Reviewing the developments in administrative law till the 1970s, a critical lawyer noted that courts in India had been more energetic in policing discretionary delegated powers, rather than challenging the validity of the delegation.\textsuperscript{570}

It is tempting to read parallels between the anxieties over administrative process in the United States after the New Deal and in Nehruvian India. Both periods saw the expansion of the administrative state and resistance from the judiciary. However, this similarity elides the important differences in their respective legacies. Historians of US government emphasize that through the nineteenth century, in the absence of a large well insulated bureaucracy, the courts and political parties provided the basic institutional structures of governance. This led to a conception of justice that was oriented to the individual and threatened both by codification and by the rise of the administrative state.\textsuperscript{571} India on the other hand had been governed by a large, centralized and powerful bureaucracy from the late nineteenth century which was hailed as the ‘iron frame’ of the state. Colonial India had a limited history of judicial intervention, and had been the arena of several experiments with codification.\textsuperscript{572} Therefore opening up the space for judicial contestation over the regulations was a significant achievement.

At first glance, the fact that traders were able to turn to the law courts to challenge the commodity control regime does not seem a surprising one. Law and courts have been critiqued as instruments of class control and the Indian Supreme Court in its early years came under severe

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criticism for being a court of the “propertariat and not the proletariat”.\textsuperscript{573} A closer empirical investigation suggests a more complicated picture. A study of all reported Supreme Court decisions until 1970 revealed that businessmen constituted the largest category of litigants against the government, i.e., about 22\%. However, their success ratio of 42\% was only marginally higher than the 40\% success ratio of the average individual against the state, and considerably lower than, for example, the success ratio of government employees and trade unions at 55\%.\textsuperscript{574}

This chapter complicates the rather simplistic narrative of the Supreme Court favoring the propertied in two ways – by complicating the category of the ‘businessman’ and by focusing on the process of litigation rather than the substantive outcome. Political scientists studying the postcolonial Indian state have argued that it was governed by compromise between the modernist professional elite, the capitalists and the landed agrarian classes.\textsuperscript{575} This analysis does not leave space for the bazaar or the intermediate class of capitalists who consisted of “small-scale, self-employed retailers and wholesalers (traders), manufacturers, service providers and farmers, lying between the bourgeoisie and the poor, labourer and rentier simultaneously”.\textsuperscript{576} These groups were often tied together by links of kinship and community, like the Marwaris. They played the most direct role in the economic life of the average citizen. Recent scholarship has noted that bazaar/intermediate capital has been little studied in the post Independence period.\textsuperscript{577}

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Birla, who in her pioneering study examined how the deviant vernacular capitalist was transformed into a modern economic agent through the colonial legal system, seems to suggest that the process of transition appeared complete by Independence.  

This chapter shows that this bazaar class found itself excluded from the political dispensation of the new republic. As the commodity controls regime showed, this class was marked by the state as ‘economic criminals’ and their businesses faced a constant strain. These small traders and shopkeepers would later form the nucleus of support of the Bharatiya Janata Party (BJP), the chief opposition to the Congress, but would only gain electorally in the 1980s. Thus, throughout the early decades of Independence they found it almost impossible to make opposition to commodity controls an electoral issue. Most traders attempted to circumvent the control regime through various illegal practices, like cloth smuggling.

However, administrative law provided an alternative to the failed electoral route, when these merchants’ practices (like Harishankar Bagla’s) were exposed by state surveillance and they were subjected to the criminal law regime. Arguing that the extent of administrative discretion that was permissible in a colonial state was unacceptable in a democratic republic governed by a written constitution, the litigants were able to efface the figure of the ‘wily trader’ with that of the neutral citizen. The growth of a Ford Foundation-aided administrative law project helped generalize the particular problems of traders with the new commodities regime as the more general experience of individuals in a regulatory welfare state. The debates over administrative law also threw into sharp relief the emergence of the Constitution as a critical arena for defining the relationship between the state and the market.

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Chapter Three

A Constitution for the Butcher: Sacred Cows, Religious Rites and Economic Rights

“[T]he Constitution is not for the exclusive benefit of governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker”

Justice Vivian Bose, 1956

In 1966, the Shankaracharya of Puri, a leading Hindu religious figure undertook a fast unto death demanding a total ban on cow slaughter. Contemporary news reports suggest that 7,000 people across the country fasted for a day in support of the Shankaracharya. Commenting upon the agitation (which led to protest marches, demonstrations and occasional violence), S.P. Sathe, law professor at Bombay University, noted that these agitations marked the third phase of the cow slaughter controversy. The first two phases were the debate over cow slaughter in the Constituent Assembly, and the debate before the Supreme Court in the Hanif Qureshi case. The debate in the Constituent Assembly led to the incorporation of Article 48 in the Constitution, which provided that, “the State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for

579 Bidi Supply Company v. Union of India, 1956 AIR SC 479.
preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle”. The *Hanif Qureshi* case was the first constitutional challenge by Muslim petitioners to the new State laws banning cow slaughter. Unlike the Shankaracharya’s fast or the communal riots over the question in the past, Sathe noted appreciatively, in both the Constituent Assembly and before the court, the protagonists and opponents of the cow slaughter ban strictly adhered to constitutional methods. This amicable approach was lauded by Chief Justice S.R. Das, who in his judgment observed,

“[T]he controversy concerning the slaughter of cows has been raging in this country for a number of years and in the past it generated considerable ill will amongst the two major communities resulting even in riots and civil commotion in a number of places. We are, however, happy to note that several contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion, and in a rational and objective way, as a matter involving constitutional issues should be”.

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In this chapter, I investigate what it meant to ‘constitutionalize’ a debate. Cow slaughter had been a volatile political subject in the subcontinent for centuries, growing particularly contentious with the rise in communal conflict in late colonial India. How did Independence and the enactment of the Constitution change the contours of the debate? Why did the protagonist and opponents of the cow slaughter ban choose to operate through the constitutional field?

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Significantly, I ask whether the transformation of the dispute into a ‘constitutional issue’ immunized it from the “heat of communal passion”, as Chief Justice Das suggested. Most importantly, through a study of litigation, this chapter focuses on how Indians attempted to negotiate the changing moral and regulatory regimes in their everyday life. How did groups seek to impose their dietary preferences over their neighborhood? How did Muslims manage the rite of cow sacrifice during Eid? How did butchers, tanners and hide-mERCHANTS practice their occupations under an unfriendly legal regime? Finally, how did people attempt to keep at bay the violence engendered by cow slaughter agitations?

The Supreme Court, in its longest decision till then, upheld a majority of the cow slaughter laws, holding that a ban on cow slaughter did not restrict the freedom of religion or even the right to trade or profession held by the petitioners. They did rule however, for reasons discussed in this chapter, that such a ban could not be absolute and some categories of cattle such as aged bulls or unproductive cows may be slaughtered. The Qureshi decision emerged as the chief referent in every discussion over cow slaughter since the 1950s, including most recently the enactment of the Karnataka Prevention of Slaughter and Preservation of Cattle Bill, 2010.585 The Qureshi judgment has gained near-canonical status in Constitutional law, being repeatedly cited as a precedent for Article 25, the “freedom of religion”.586 It has also been mourned by progressive scholars as an example of Hindu majoritarian views being cloaked in the neutral

The Qureshi decision was an important turning point for thinking about the meanings of secularism and religious freedom in postcolonial India.

My search for the files relating to the Hanif Qureshi case led me to a dusty sub-basement in the Supreme Court of India where the writ petitions are stored. I was aware that the decision in Hanif Qureshi v. State of Bihar was given collectively in response to five different writ petitions. However, I was astonished to discover that these petitions had over 3,000 individually named petitioners. This fact had been missed by historians and legal commentators who usually worked from the main judgment. Not only were there over 3,000 petitioners, they hailed from over 90 villages and towns spread across the States of Bombay, Madhya Pradesh, Uttar Pradesh and Bihar. All the petitioners were Muslims, close to 90% identified themselves as members of the Qureshi community and several stated their professions as butchers, hide traders, gut merchants and leather workers. This Qureshi case was not only a leading case on freedom of religion, it was possibly one of the earliest class action cases in post-Independence India. Why then had this fact escaped comment by scholars? How did the 3,000 butchers disappear from the narrative?

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589 The debates over the Qureshi case highlight the stakes in how constitutional cases are labeled or categorized. The Qureshi case gets frequently cited in discussions of the freedom of religion, thus effacing the caste and professional identity of the butchers and only highlighting their religious identity. The fixation of the final reported text of the
It is similarly worth noting that the Qureshis petitioners, in challenging different State laws for cow protection, approached the Supreme Court directly – instead of approaching the State High Courts, although they too enjoyed constitutional jurisdiction. What were the implications of moving the challenge directly to Delhi?

Why was the question of cow slaughter in independent India addressed as a religious problem? Murray Edelman demonstrates that ‘problems’ themselves are ideological constructions. They are based on conditions defined by “social constructions that reflect and reinforce beliefs about the self, the other and the social setting.”590 The question of cow slaughter could have been framed as problem under the right to property, i.e. the extent of the right to enjoy one’s own property, in the case of the owner of a cow. Alternatively, it could have been determined as a question of the hierarchy between national law (including the rights to property or to practice one’s profession) and local customs, i.e. the status of a local custom of long standing, in the case of such a custom prohibiting cow slaughter. Or one could frame this as a problem of economic development, i.e. cows being necessary to strengthen the agrarian economy. This chapter uncovers the genealogy of how the ‘problem’ of cow slaughter was cast and recast in period leading up to the Qureshi case.

This chapter locates the Qureshi case as a ‘critical event’ marking the transformation from the colonial state to a republic. Veena Das’ description of a critical event, as the Introduction to this dissertation briefly discusses, is as an event where new modes of action come into being, which redefine traditional categories and can be acquired by a variety of political judgment makes it easy to ignore the number of petitioners and the geographical range they represented, aspects that are hard to miss should one look at the actual petitions in addition to the judgment.  

groups.\textsuperscript{591} As a “fundamental rights” petition under the new Constitution, the \textit{Qureshi} case marked a new strategy adopted by interest groups to negotiate state policy, and revealed shifts in shared understandings of rights and in patterns of religious regulation. The decision, one of the longest in the new court’s first decade, set several procedural precedents, being one of the first class action cases before the Supreme Court, the first to consider social science evidence and the first to invite an \textit{amicus curiae}.

The chapter charts the growing political salience of the cow from the late nineteenth century and locates its centrality to the identity of the new republic. It excavates legal and political contestations over the cow to understand how the transfer of power from the religiously ‘neutral’ colonial state to a ‘secular’ postcolonial republic transformed the regulatory order and fashioned new modes of governmentality. Historians argue that governmentality in British India was “radically discontinuous” with its counterpart in Europe, as it was obliged to develop in the absence of a liberal conception of government.\textsuperscript{592} This chapter explores how this changed with the institution of popular democracy. It does this by examining litigation over the question of cow slaughter in colonial India, efforts to protect the cow through the republican Constitution and through post-Independence legislation, and by examining litigation strategies in the new regime. Returning to the \textit{Qureshi} case, this chapter examines the organization of the petitions, the arguments made, the range of evidence offered and the strategies adopted, to understand how the Constitution changed the nature of the contestation. Finally, it seeks to recover the figure of the butcher, who was central to the narrative during the \textit{Qureshi} case but got lost in its afterlife.

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From the Queen Empress to the Gau Maharani

Why did 3,000 butchers go to court in 1956? With Independence and the institution of popular elections to legislatures, several State governments expressed their commitment to securing a ban on cow slaughter. These laws criminalized the slaughter of cattle. All of these pieces of legislation stated that they sought to meet the commitment made in Article 48 of the Constitution of India cited in the beginning of this chapter, namely that, “The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle”. But how did the cow enter the Constitution?

There is considerable debate over when and why the cow came to be considered holy for Hindus. Several generations of Sanskrit scholars have pointed to references in early Vedic texts to the sacrifice of cows and oxen and the eating of beef. Anthropologists have argued that the prohibition of cow slaughter draws from ecological and economic change, suggesting that the shift from a pastoral to an agrarian society made the cow and its labor integral to the household. There is a continuing debate about whether the prohibition evolved organically or was imposed from above, by urban states like Magadha that fostered a ban on beef to provide surpluses for the urban classes, or by Brahmins in an attempt to counter the challenge posed by the growth of Buddhism and Jainism. However, it is clearly evident that by the twelfth century the cow was emerging as a political symbol of considerable significance. Mughal emperors like Babur and Akbar attempted to reach out to their Hindu subjects and allies by imposing

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595 Paul Diener, Donald Nonini, and Eugene E. Robkin, “The Dialectics of the Sacred Cow: Ecological Adaptation Versus Political Appropriation in the Origins of India’s Cattle Complex,” Dialectical Anthropology 3.3 (1978): 221-241. It is worth noting that many of these anthropological studies on the cow in India date in the ‘60s, around the time there were violent public demonstrations being made in the favor of cow protection.
prohibitions on cow slaughter. Conversely, Hindu rulers like Shivaji who sought to challenge Mughal authority attempted to define their opposition by placing cow protection on their agenda. There were also documented cases of urban communal strife in north India, where the cow played a symbolic role, in the eighteenth and early nineteenth century.\footnote{C. A. Bayly, “The Pre-History of ‘Communalism’? Religious Conflict in India, 1700-1860,” \textit{Modern Asian Studies} 19.2 (1985): 177-203.} These conflicts often took place around the Muslim festival of Eid-ul-adha, as part of which Muslims practiced \textit{qurbani} or the sacrifice of an animal, in memory of Abraham’s sacrifice of his son. The cow, being cheaper and providing more meat than most other domesticated animals, was the most common animal to be sacrificed and Eid-ul-Adha came to be locally known as Bakr-Eid (‘Bakr’ being the Arabic for ‘cow’).

Scholarly consensus holds that the intrusion of the new colonial state through the nineteenth century changed both the nature of the cow slaughter conflict and the way it was managed.\footnote{Freitag critiques Bayly’s suggestion that the riots of the eighteenth century form a pre-history of communalism. Through a reexamination his sources and her own research, she suggests that the key difference lies in the changing meanings behind the same symbols. Sandria Freitag, \textit{Collective action and Community: Public arenas and the Emergence of Communalism in North India} (Berkeley: University of California Press, 1989), 95.} The colonial state was marked by its foreignness, unlike both its precolonial predecessor and the modern state that was taking shape in Europe. As Sandria Freitag perceptively notes, both India and Europe saw the emergence of an innovative state that intruded upon local communities; however, while the European state chose to substitute community rituals with its own, the colonial state though attempting to regulate community practices could not replace them with its own.\footnote{Ibid., 97.} The colonial state, particularly after the revolt of 1857, sought to adopt a policy of religious neutrality towards its subjects, which meant that state patronage for
collective religious activities was withdrawn. The neutrality of the British state in religious affairs after 1857 was more rhetorical than real. The state policed the boundaries of religious and secular subjects and intervened in religious affairs through legislatures and courts. However, while the state was not neutral towards religion, it sought to appear to be neutral between religions. In particular, the colonial administration consciously sought not to be seen as favoring Hindus over Muslims, or vice versa. For a survey of the debates over the colonial state’s neutrality towards religion see, Rohit De, Eleanor Newbigin and Leigh Denault, “Introduction: Personal Law, Identity Politics and Civil Society in Colonial South Asia,” Indian Economic and Social History Review 46:1 (2009): 1-4. Recent work has been exploring the effects of the colonial state’s ostensible neutrality between religious groups, see for instance Niles Green, Bombay Islam: The Religious Economy of the West Indian Ocean, 1840-1915 (New York: Cambridge University Press, 2011).

599 The neutrality of the British state in religious affairs after 1857 was more rhetorical than real. The state policed the boundaries of religious and secular subjects and intervened in religious affairs through legislatures and courts. However, while the state was not neutral towards religion, it sought to appear to be neutral between religions. In particular, the colonial administration consciously sought not to be seen as favoring Hindus over Muslims, or vice versa. For a survey of the debates over the colonial state’s neutrality towards religion see, Rohit De, Eleanor Newbigin and Leigh Denault, “Introduction: Personal Law, Identity Politics and Civil Society in Colonial South Asia,” Indian Economic and Social History Review 46:1 (2009): 1-4. Recent work has been exploring the effects of the colonial state’s ostensible neutrality between religious groups, see for instance Niles Green, Bombay Islam: The Religious Economy of the West Indian Ocean, 1840-1915 (New York: Cambridge University Press, 2011).

600 Not surprisingly, Western-educated Indians who were attempting to become modern and breaking caste taboos engaged in public consumption of beef. Raja Rammohan Roy, social reformer and the father of the ‘Bengal Renaissance’, who led the attack on what he described as “superstitions” authored a tract in defense of beef eating backed up with Hindu religious authorities. But in terms of community identity, the fact of the British Indian army being the largest consumer of beef in colonial India was prominent. The colonial state had long been resistant to the idea of banning cow slaughter. Requests by Indian rulers who allied with the British and allowed them to station troops in their states that horned cattle not be slaughtered on their territories were rejected as an “impossible requirement”. For instance in Saran, Bihar, when the police stepped in to protect the cattle being taken for the district army


commissariat, the crowd protesting their sale took up anti-British slogans. As Yang notes in his study of the Saran violence, the cow question divided not only communities that had long experience of one another (Hindu from Muslim) but also communities that were relative strangers (Hindu from British).\textsuperscript{603} Beef eating also acted as marker of caste identity, separating the upper caste Hindus who did not consume beef and the lower castes like the Chamars who engaged in the leather trade and dealt with dead cattle.\textsuperscript{604}

Cows, Community and Sovereignty

By the late nineteenth century, the cow had emerged as a powerful political symbol and was the focus of mobilization and violence through much of north India. In 1881, the ‘Arya Samaj’, a popular Hindu reform movement based in Punjab, set up the first ‘Gorakshini Sabha’ (‘Cow Protection Society’) with the aim of preventing the slaughter of cattle in India. The Sabha launched a movement that was aimed at bringing an end to cow slaughter in India. Its founder, Swami Dayanand Saraswati, authored a pamphlet titled \textit{Gaukarunanidhi} that made the case for cow protection and presented an action plan for organizing through the establishment of local societies for the “protection of cow and agriculture”.\textsuperscript{605} These societies, also called ‘Gorakshini Sabhas’ like their original, began to emerge in Punjab and the Gangetic plain. Their stated aim was to prevent cattle from “passing under any circumstances into the hands of those who will either sacrifice them or slaughter them for food”.


\textsuperscript{604} Recent scholarship, however, argues that the linkage between Chamars and leatherwork was constructed during this period and not historically accurate. Ramnarayan Rawat, \textit{Reconsidering Untouchability: Chamars and Dalit History in North India} (Indiana University Press, 2011).

Faced with the state’s reluctance to protect cattle, the movement sought to create institutions that would. They required that every local household should contribute the equivalent to the cost of a *chutki* (pinch) of their daily food. These contributions were used to build and maintain cow refuges, where rescued cows could be kept. There was a strong element of moral compulsion requiring people to participate, for instance, the rules issued by the cow protection committees stated that not contributing the *chutki* was a sin equivalent to eating the flesh of the cow. Their pamphlets detailed a list of offences which included setting a cow loose, taking a cow to the government pound, non-subscription to the local ‘sabha’, castration of an ox, and selling a female buffalo (Asian domestic water buffalo or *Bubalus bubalis*) or any cow to an unknown person. The sale of cows to butchers, or to low caste groups like the Nats, Dosabhs, Chamars and Banjaras that were engaged in the leather trade, was expressly forbidden. The movement therefore sought to project a caste-Hindu identity that was framed against the practices of the British, Muslims and Dalits.

The movement’s success was noted with alarm by the colonial government who saw this as a challenge to its authority. The Gorakshini Sabhas’ meetings were attended by thousands, and through collective action they were able to discipline the local communities. As a district magistrate from the NWFP described it,

““The whole of the Hindu population is driven into its arms by the tyranny of caste, and when once the league is established in any place, its grasp is so powerful that every man, women and

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child must openly or secretly contribute to its funds or cease to be a Hindu”.

People who breached the cow protection rules were subjected to social boycott, no services were performed for their families, their daughters were sent back from their matrimonial homes and they faced economic ruin. There were cases of physical coercion as well, especially in the case of Muslims, who often found themselves surrounded by a mob until they made an oath that they would no longer engage in cow sacrifice. Coercion could soon translate into violence. In 1893 alone, a hundred people were killed in communal violence over cow slaughter in towns as far apart Junagadh, Oudh and Rangoon.

This mobilization has been located within the teleology of early nationalism and communalism. While the Indian National Congress in this period never made cow protection an official goal, John McLane suggests that its demand for representative government, at the time when the cow protection movement demanded a legislative ban on cow slaughter, appeared to blur the distinction between the two groups. More recently, Chris Bayly has argued that it was the contradiction of Indian liberalism that it allowed even moderate secular politicians to support the ban on cow slaughter by Muslims as it was seen to interfere with Hindu ‘social rights’ i.e. rights that were enjoyed by a community.

A further blurring and contradiction arose from the fact of several Congress members being also members of cow protection societies. Meetings held for the Gorakshini Sabha often

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607 Note by D.F. McCracken, Officiating General Superintendent, Thagi and Dacoity Department, IOR:L/PJ/254/1894.
609 McLane, *Indian Nationalism and the Early Congress*, 273.
doubled up as a forum for Congress propaganda and vice versa. For instance the Nagpur Gorakshini Sabha was allowed to hold its meeting in the Congress pavilion, and government informants in Punjab reported that signatures were being collected for Congress petitions for legislative reforms on the “pretext” that it would end cow slaughter.\(^{611}\) By 1882, reports began trickling in from various government officials that there was an attempt by the Gorakshini Sabha to prepare a ‘monster petition’ for submission to the government, praying that kine killing be stopped.\(^{612}\) Memorials were circulated in the urban centers of Bombay and Calcutta, in the rural hinterland as well as the small princely protectorates.

The numbers of signatures on this ‘monster petition’ was unprecedented, for instance reports from Rajasthan suggested a particular memorial had gathered 350,000 signatures while other cities like Shimla reported gatherings of 200 people where everyone committed to sign the petition.\(^{613}\) There was also a successful subscription of funds for this movement, with Indian merchants and ruling princes contributing generously. In some towns the petitioners were successful in getting the local authorities to place a ban on cow slaughter, in others they successfully persuaded or coerced Muslims to give up the practice of sacrificing the cow. The Viceroy, Lord Lansdowne, noted that this involvement could turn the Congress from “a foolish debating society to a real power”.\(^{614}\) More recent scholarship has attempted to emphasize the contingent and local causes of some of these incidents and the autonomy of the cow protection movement from the larger narrative of nationalism or religious fanaticism. Gyan Pandey in his

\(^{611}\) Note by D.F. McCracken, Officiating General Superintendent, Thagi and Dacoity Department, IOR:L/PJ/254/1894.


\(^{613}\) Note on Agitation Regarding the Cow Question, Office of the Assistant to the IG Police, Punjab, Special Branch, IOL:L/P&J/298/1984.

study of the Bhojpur region argues that these riots were caused by lower-caste Ahirs who were attempting to claim higher status by showing their strict ritual adherence.  

Why did cow protection become such a powerful political plank? The colonial state’s ostensible religious neutrality underscored the impossibility of getting it to protect the cow for religious reasons. Conversely, attempts made by the state to regulate cow slaughter, by permitting it on the occasion of Eid, made it more visible and it became the cause of violence. The state’s refusal to protect the sacred cow both highlighted its failure to represent the interests of the community/nation and created a political role for the community to play, through petitions or through direct action. The cow came to stand in for the community, as can be seen from the various images and pamphlets that were being circulated. Popular lithographic images were widely distributed, depicting the 84 major Hindu gods inside the cow that was being threatened by a dark man with a sword. The cow thus began representing the greater Hindu community, and the demon that threatened it, believed the government, could represent Muslims or even the British.

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616 Freitag, Collective Action and Community, 150.
The Sabhas constituted tribunals which took cognizance of the offences against cows, stepping in to create a parallel regulatory order. For instance, Sita Ram Ahir was found guilty of selling a cow to a low-caste butcher. The tribunal first ordered that he buy back the cow at a loss, which he did, and then found him guilty and fined him a further Rs. 4. His refusal to pay the fine was punished with 24 days of ‘outcasting’ (being expelled from the caste/ community, being made an outcaste) and being subjected to a community boycott. Mimicking the convention of state trials, which recorded criminal cases as offences against the Queen Empress, the cases before the Gorakshini Sabhas were recorded as offences against the ‘Gau Maharani’ or the “Cow Empress”. The figure of imperial authority was replaced with that of the sacred cow.

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618 On file with author
619 Confidential Letter to Advocate General from D.J. Lyall, Secretary, Home Department, Govt. of India, IOR/L/PJ/6/376, 1894, file, 298.
620 In place of Regina v. X, we see records of these trials published as Gau Maharani v. Sita Ram Ahir, Gau Maharani v. Sheo Lochan, see id.
The literature on the cow protection movements creates a certain impression, of the popular agitation around cow slaughter having been to some extent inevitable. But was this shift – from Victoria to Cow Empress, from the government to the community, from the neutral state to the coercive and persuasive powers of pious organizations – truly unavoidable? Could the problem of cow slaughter have been managed through the colonial administration? The early anti cow slaughter activists believed it could be, and attempted to lay charges against under S.295 of the Indian Penal Code (hereinafter ‘IPC’) against those accused of cow slaughter. This particular section came under the chapter titled ‘Offences Against Religion and Caste’ and was part of the colonial government’s attempt to manage disputes between communities. Section 295 read,

“Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons, or with the knowledge that any class of persons are likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to seven years and must not be less than one year, and shall also be liable to a fine”.

While the historians of the cow protection movement all recognize that the movement grew in strength after the failure of the Allahabad High Court to protect the cow as a “sacred object”, they undervalue the importance of this ‘failure’. The Allahabad decision is seen as a turning point, from the politics of petitioning to the politics of the street. In positioning one case

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621 S.295, Indian Penal Code, 1860.
622 Robinson and Gyan Pandey both provide an incorrect date for the Allahabad High Court decision. Grove in his review of this literature is particularly scathing about a number of factual errors and incorrect emphasis in historians’ accounts of the court decisions. This is partly because most scholars of the movement have relied exclusively on state archives, which hold executive and legislative records and not examined judicial sources. Matthew Grove, “Law, Religion and Public Order in Colonial India: Contextualising the 1887 Allahabad High Court Case on ‘Sacred’ Cows,” South Asia: Journal of South Asian Studies 33, no. 1 (2010): 92.
as decisive in this fashion, historians risk neglecting an equally prominent case before the Calcutta High Court in 1890 and a continuing process of litigation, often by Muslims asserting their rights to cow slaughter, through the early twentieth century.

In 1881, Iman Ali and Amiruddin, two Muslim residents of the Tilhar municipality of the United Provinces were convicted by a Magistrate under S.295 of the IPC for the offence of killing a cow on a public highway. The Magistrate held that the accused were aware that killing a cow would be considered an insult by their Hindu fellow-subjects and fined them Rs. 25 each. The case came before the High Court in revision over the question whether the cow could be held to be a ‘sacred object’. There was considerable confusion over whether the IPC protected the cow. While the animal itself was not mentioned in the text of the law, the drafters of the code in the commentary had justified their “severe punishments” for intentional defilement and destruction of places of worship and sacred objects by noting the “tumult, sanguinary outrage or even armed insurrection” that could arise as a consequence of cow slaughter, and gave the example of a riot in Benares in 1809 after the slaughter of a sacred cow.623

The majority judgment authored by Chief Justice Edge and joined by the three other British judges struck a cautious note, holding that “sacred object” had to be read ejusdem generis with the “place of worship” and could not have been intended to apply to an animate object like the cow. Justice Brodhurst clarified that the word “destroyed” clearly applied to an inanimate object, for if the intention had been to include animals, the legislature would have used terms like “kill or maim”.624

In a concurring opinion, Justice Syed Mahmud, a Muslim and the first Indian to serve as a judge of the High Court, used more emphatic reasoning. He held that the principles of statutory

623 Thomas Macaulay, A Penal Code prepared by the Indian Law Commissioners (Calcutta, 1837), 49-51.
624 Queen Empress v. Iman Ali and Another, (1888) ILR 10 All 150.
interpretation required that words with a doubtful meaning be applied strictly so that no undeserved penalties were imposed on imperial subjects nor their liberties restricted. Justice Mahmud spelt out the real tension that existed in North India: Hindus held the cow (along with other living beings like the *peepul* tree) to be sacred, Muslims had a religious obligation to sacrifice a quadruped for Eid. Given the relative cheapness of beef, it was the only meat that could be eaten by a majority of poor Muslims.

Justice Mahmud’s judgment reveals a social consensus that was rapidly changing. But Justice Mahmud expressed genuine puzzlement as to why Hindus and Muslims, who had lived as close neighbors for centuries and were accustomed to be “considerate to one another, respected each other’s feelings and did not recklessly hurt each other’s religious prejudices” were being offensive to one another. The context for this breakdown of a social consensus, he argued, was not just Hindu-Muslim conflict, but also sectarian strife between Hindus and between Shias and Sunnis. Mahmud diagnosed this social malaise as the inability of Indians, who were used to “oppressive rule”, to accommodate themselves under the British government, which recognized “religious toleration and individual liberty”.

Justice Mahmud echoed the views of a particular class of Indian, which was close to officialdom. As an intelligence report noted, some Sikh aristocrats had told the informant that the reason for the cow protection conflicts was “‘azadi’ or liberty, which could be translated as license”. This could have been managed earlier by the upper classes through *dastur* and *riwaz* (custom).  

The problem according to Justice Mahmud was not due to any defect in the law, but to the “inconsiderate and reckless behavior of various sections of the population that do not fully appreciate the blessings of religious toleration and individual liberty which British rule by

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625 Letter by G. C Paul, 22nd December, 1893.
framing wise laws has accorded to the people of the country”. Acquitting the accused, he
expressed his amazement at the inconsiderate act of slaughtering a cow on a public street, and
“as a Muhammadan himself” confessed that he could not conceive that “the gentlemanly feelings
of any persons belonging to the better classes of the community which professes Islamism would
even on Eid-ul-zuha permit the sacrifice of the cows” in view of the prejudices of their Hindu
fellow-subjects and neighbors.

The problem was not cow slaughter, but its performance in public with intent to outrage
the feelings of Hindus. Mahmud eloquently framed the problem in terms of class, rather than
fanaticism and religious belief. In his view, under the older order community leaders were able
to keep feelings in check. It was the freedom and sense of rights under the colonial regime that
encouraged groups that lacked ‘gentlemanly sensibilities’ to make their claims.

Both the intent to offend and the public-ness of cow slaughter became recurring themes
in the legal challenges. In the same year, Justice Brodhurst acquitted some Muslims from
Pilibhit who had been arrested on the charge of creating a public nuisance by sacrificing a cow,
the nuisance being the annoyance the slaughter caused to a Hindu passerby. Given that the cow
had been killed with a religious object, before sunrise, behind the walls of a compound and was
only witnessed by a single Hindu, Justice Brodhurst set aside their convictions. He noted
however, that a man who willfully slaughters cattle in a public street, “so that the ‘groans and
blood of a poor beast were heard and seen by passersby”, would be convicted under the laws of
public nuisance.

626 Queen Empress v. Iman Ali, (1888) ILR 10 All 150.
627 Justice Syed Mahmud represented the new Muslim elite. Mahmud was the only son of Sir Syed Ahmed Khan, the
Muslim reformer and founder of the Aligarh Muslim University. Alan Guenther, Syed Mahmud and the
Transformation of Muslim Law in British India (Canada: McGill University, 2004).
628 Queen Empress v. Zakriuddin and Another, (1888) ILR 10 All 44.
629 Id.
The Allahabad High Court ruling was widely criticized by the press, and on 22 January 1888 a large meeting at the Allahabad Town Hall resolved to petition the government to bring cows within the meaning of ‘sacred objects’ in S.295. While the colonial government could not make legislative changes to accommodate the demand for cow protection, they did attempt to manage the fallout from the Allahabad High Court decision in *Iman Ali*. The following year in a similar case in Bengal when the District Magistrate acquitted two Muslims of the charges of slaughtering a sacred bull, Sir George Paul, the Advocate General, decided to appeal the judgment in the Calcutta High Court. The intervention of the Advocate General was unusual, given that the prosecution had been initiated by a private Hindu party. The Advocate General was the principal legal officer of the provincial government and represented the government in matters of supreme importance. Sir George appears to have intended to obtain from the Calcutta High Court an opinion contrary to the *Iman* judgment, thus restoring ambiguity to the protected status of the cow. High Court judgments were binding on lower courts within the province and had only persuasive value outside it, but in absence of a judgment to the contrary, the Allahabad High Court decision would have greater persuasive value as precedent across India.

Sir George’s creative arguments in the *Romesh Chunder* case failed to persuade the bench to reverse the Allahabad precedent, and the judges concurred with the rationale given by Chief Justice Edge in the *Iman* case. Justice Norris even used the mention of the Benares riot in the commentary to the Indian Penal Code to support the Calcutta High Court’s rejection of the appeal, on the ground that the ‘slaughter of the cow’ had led to riots, only because it was in a sacred city like Benares. Further, in the *Romesh Chunder* case, because the sacred bull was at liberty (freeing it being a meritorious act for Hindus), no one could be said to have had a

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630 See selections from newspapers OIOC, RNN, NWP, 1888, L/R/5/65.
631 *Romesh Chunder Sanyal v. Hiru Mondal and Another*, (1890) ILR 17 Cal 852.
proprietary interest in it. It was also found that the killing had taken place at night in a field away from the village, and was not witnessed by any Hindus. For all these reasons, the accused were acquitted. The colonial judiciary here resisted an attempt by the executive to confirm the sacred character of the cow and thereby settle the agitation.

The colonial executive had to remain publicly neutral on the question of cow slaughter and could not enact a ban without losing Muslim support. Hindu groups had become politically mobilized, but having failed to bring about legislative change, sought to create parallel enforcement mechanisms through a combination of persuasion and force. Equal access to the courts for all parties became an important arena in this contest.

The courts adjudicated complaints of cow slaughter by attempting to determine where and how the cow was slaughtered. Setting aside the conviction for nuisance against some Muslims, the Calcutta High Court held that while the slaughter of the cow might be shocking to Hindus, it could not be regarded as a nuisance, the act being performed in private. A Muslim who had to slaughter a cow that broke its leg on a public highway was acquitted because there were no Hindu witnesses to the act. The testimony of Hindus who had heard about the act later and stated before the court that their religious feelings had been wounded was dismissed as hearsay evidence. The court noted that the Hindu objection to cow slaughter was mere ‘religious feeling’ as opposed to nuisance, given that the complainant had said he had no objection to the Muslim slaughtering sheep or goats in the same area. The slaughter of a cow on an “open verandah” on the other hand would lead to conviction. The courts did not recognize

633 Abdullah v. King Emperor, 49 Ind Cas 776 (1919).
Hindu objections to cow slaughter as a religious requirement, and thus integral to their rights as British subjects, but chose to understand it through ‘nuisance’, a category of private law.\textsuperscript{635}

As late as 1936, the Allahabad High Court upheld the conviction of a Mir Chittan, who had slaughtered a cow to provide meat for a wedding feast. Since the slaughter had taken place in broad daylight in full view of the homes of Hindus, his defence that he had killed the cow for meat and not to wound the feelings of any persons was rejected\textsuperscript{636}. Motive was not to be confused with intention. Justice Allsop held that the applicant had the legal right to kill the cow, but was bound to perform the act in a manner not to injure the feelings of others, and because he failed to do so had to serve out his punishment. In response some provincial governments decided to institute rules regulating cow slaughter. The Punjab Government for instance issued a notification that slaughter of cattle and sale of beef shall not take place except subject to the rules prescribed by local government.

Meanwhile, the Allahabad and Calcutta judgments gave an impetus to the cow protection movement which now shifted their attention to local politics. Attempts to prevent cow slaughter could take the form of negotiation or coercion. When Muslims butchered a cow on Bakr-Eid on the estate of a Hindu zamindar, not only were the accused brought before the local inspector and fined Rs. 200, failure to pay this astronomical sum led to them being confined in the Cutcherry. When the High Court declared this detention wrongful confinement and ordered them to be released, the Muslim accused were beaten with shoes by local officials before they were let go.\textsuperscript{637}

\textsuperscript{635} Common law also provided a category of public nuisance, but its recognition depended on legislation and custom. See, Hendrik Hartog, “Pigs and Positivism,” Wisconsin Law Review (1985), 899-935.

\textsuperscript{636} Mir Chittan v. King Emperor, 166 Ind Cas 373.

\textsuperscript{637} Deputy Legal Remembrancer v. Kailash Chandra Ghosh, (1915) ILR 42 Cal 760.
Imperial Constitutionalism and Bovine Litigation

Most scholars of the cow protection movement suggest that this is the point where the focus moves from litigation to agitation. However this impression is a result of the literature’s almost exclusive focus on attempts by Hindus to protect the cow. Archival sources show that from the late nineteenth century there was an increase in litigation by Muslims asserting their right to slaughter the cow. This litigation came from a heightened awareness of the rights to religion that Muslims enjoyed under the British Crown. The claim to a ‘right’ to slaughter cows was not one graciously acknowledged by the administration; bureaucrats often expressed their exasperation at the insistence on ‘rights’ when a compromise ending the local practice of cow slaughter seemed a likely solution to a law and order problem. As Dennis Fitzpatrick, the Lieutenant Governor of Punjab complained, “I have had one single Mussulman after me for months, who quotes constitutional principles at me and wants to know why I won’t upset an order of the District Magistrate refusing him leave to kill cows in a place where no one else wants them to be killed”.638 Muslim voices began questioning the decisions by local magistrates to give in to the demands of the cow protection movement.

Muharram Ali Chisti, the editor of the Urdu daily Rafiq-i-Hind, attempted to analyze why cattle slaughter, which had been practiced in India for 1,300 years, was suddenly causing riots.639 In Chisti’s view, before the Raj native Hindu rulers had put down the practice with a strong hand while native Muslim rulers had allowed it, thus the weaker party always obeyed the stronger and no riots ever occurred. Why then was there agitation when the regime was under “a people who were neutral in regard to religious and race prejudices towards the people of India”? Chisti

638 Note on Agitation on the Cow Question, Office of the Assistant to the IG Police, Punjab, Special Branch, IOL:L/P&J/298/1984.
639 Note on Agitation on the Cow Question, Office of the Assistant to the IG Police, Punjab, Special Branch, IOL:L/P&J/298/1984.
argued the cause lay in the increase in the Hindus’ power and the change in their behavior arising from this consciousness of strength. The Hindus began with expressing their feelings in harmless ways, such as purchasing cows, building cow shelters and delivering speeches, but when these failed to have effect they started riots, hoping that violence would compel the government to end cow slaughter. Chisti protested the ambiguity the British had created over the situation. The Muhammadans in British India believed that according to the British constitution they had full liberty in religious matters, while the Hindus were coming to believe that the government could be compelled to frame new laws if pressure were brought to bear upon them. He pointed out an attempt by a Hindu member of the Legislative Council to ban the sale of beef in India, which had been rejected as absurd but might “owing to the altered condition of the present age” be regarded as reasonable. Chisti was remarkably prescient in his analysis.

The British administration was sympathetic to Muslim concerns. Queen Victoria herself sent a note to the Viceroy stating that “in necessity of perfect fairness, the Muhammadans do require more protection than the Hindus, and they are decidedly far more loyal”.640 However, the British government found that no steps were practicable to ensure this right. Lord Lansdowne rejected a proposal that would have granted the right to sacrifice cows to those who could establish a custom, i.e. could show that they had sacrificed cows in previous years, and could afford to do so in suitably private premises. He argued that the recognition of customary rights would be complicated, and would be a signal to Hindu neighbors to challenge the process.641

A vocal group of Muslims believed that they had a right to practice their religion, which included the rite of cow sacrifice, in British India. The assertion of the right remained a challenge, given the obvious reluctance of the government to enforce such right and the absence

640 Queen Victoria to Lord Lansdowne, 8 December 1893 in Dharampal, The British Origin of Cow-Slaughter in India, 429.
641 Lord Lansdowne’s Minutes on the Anti Kine Killing Movement, 28 December 1893, IOR\L\PJ\257\1894.
of an enforceable constitution. The civil litigation process became the natural venue for the attempt to establish such rights. As an intelligence officer noted, “People are asking themselves why should we not do this and why should our neighbors be allowed to do that, and they always find the pettifogging legal practitioners and professional agitators at their elbow to help them think out the question and some party newspaper available for discussing it”.

So what options were available to a Muslim man who wanted legal recognition of a right that he believed he had by virtue of being a British imperial subject? First, he could argue the common law right to property which guaranteed a man enjoyment of his property provided he caused no nuisance to his neighbor. Secondly, he could argue that cow killing was a customary practice protected by the promises of the British Crown. Finally, he could rely on the newly enacted Civil Procedure Code and get the court to declare his particular right and thus protect it from encroachment.

It is important to note that these rights, including the right to enjoy one’s property, were not different from rights as enshrined in classical liberal thought. Yet the right being urged under these categories by Muslim litigants – to practice cow slaughter – appeared not to be shared equally by all subjects. Instead this right was confirmed due to a particular set of circumstances and had to be proven in every individual case. For instance, one man’s success in obtaining recognition for a customary right to cow sacrifice did not guarantee the rights of Muslims in the next village.

In the early cases of this sort, the Muslim plaintiffs had to pray for the recognition of a customary right. For instance the Allahabad High Court recognized the right of a widow to offer a cow in sacrifice in the interior of her house, notwithstanding an order from the local Magistrate.

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642 Note on Agitation Regarding the Cow Question, Office of the Assistant to the IG Police, Punjab, Special Branch, IOL:L/P&J/298/1984.
prohibiting sacrifice in the locality, provided the sacrifice was in the inner quadrangle of her house and the outer doors of the house were kept closed for the duration of the sacrifice.\textsuperscript{643} Even when the courts recognized a more general right to slaughter cows, they held that no right could be claimed if the slaughter prompted riotous demonstrations or created animosities, ruling that slaughter even if it is on one’s own land could not be done in an exposed way.\textsuperscript{644}

The reliance on custom had its own pitfalls. In 1903, some Hindus from Behta Goshain village in the United Provinces had petitioned the District Magistrate to pass an order prohibiting the slaughter of cattle in the village. The Magistrate in his order prohibiting cattle slaughter noted that Hindus outnumber Muslims in the village and cow slaughter was not a practice common to the area. Several Muslims “feeling aggrieved at the prohibition of the exercise of what they conceived to be their legal rights” instituted a civil suit. The lower court initially admitted the suit, recognizing that there was a right of a substantial nature that was denied (as opposed to a right which affected mere dignity or privilege), but dismissed the suit on the ground that the Muslims had failed to establish that there was a custom of cow sacrifice in the village. In the appeal to the Allahabad High Court the Muslim plaintiffs argued that irrespective of custom, every subject had a right to perform all lawful acts upon his own property, and therefore the killing by Muhammadan subjects of their own cows on their own land could not be unlawful.\textsuperscript{645}

The Allahabad High Court held that it was indisputable that, within certain limitations, the slaughtering of cattle by Muslims was not illegal. They located this view in the legal right of every person to make use of his or her own property provided that he or she did not cause injury to others or break the law. One could not limit this right because it hurt the ‘susceptibilities of

\textsuperscript{643} Raghubar Dayal v. Ameeran Jahan, Second Appeal No.1023 of 1881, Allahabad High Court, 4 May 1882 (Justices Brodhurst and Tyrell).
\textsuperscript{644} Nanbahar Singh v. Kabir Bux, AIR 1930 All 753.
\textsuperscript{645} Shahbaz Khan and others v. Umrao Puri and Others, (1908) ILR 30 All 81.
others’. The court rejected the assumption that the burden of proof lay upon Muslims to prove the existence of a custom that allowed them to slaughter cattle. Chief Justice Stanley held that the right to property was a right they were entitled to irrespective of custom, and which could only be limited if they abuse it. The Allahabad High Court decreed that the plaintiffs had the right to slaughter cows for daily consumption, for festivals and as sacrifice, provided that in the exercise of this right they did not commit a nuisance. They also passed an injunction restraining the Hindu defendants from interfering with these rights.

The *Shahbaz Khan* decision discussed above became a valuable precedent that could check attempts by local officials to arrest Muslims for cow slaughter under S. 107 of the IPC on the ground that permitting the act to proceed would occasion a breach of peace or public tranquility. The courts held that for the provision to apply, it would have to be proved before the Magistrate that a wrongful act was being committed. They rejected the contention of the government advocates that a ‘wrongful act’ would include acts that were legal but believed to be immoral. The court explained that it would be very difficult to distinguish right and wrong from a moral standpoint, especially when dealing with communities who had different moralities.

The possibility of litigation disrupted other forms of political mobilization. The compromise agreement had emerged as the political solution to keep order between communities in a locality and was often endorsed by the local administration. In Ghazipur in 1908, some representatives of the local Hindus and Muslims signed a pact whereby Hindus undertook to stop playing musical instruments or blowing conches during festivals to avoid giving offence to Muslims, while Muslims declared that there would be no dispute regarding the slaughter of cows. Several Muslims were persuaded to make their thumb impressions on a document that

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646 *Pir Ali Kasab and Others v. King Emperor*, 56 Ind Cas 437.
stated that they would not create any quarrel, disturbance or *litigation* (emphasis mine) in connection with the sacrifice of cows.\textsuperscript{647} Though the Hindu District Magistrate held that this document restrained their right to litigate, the High Court was to rule that this was mere *nudum pactum* with no legal force. This case of *Sheikh Muhammad Yakub* arose, in fact, from several Muslims of the same locality, identified as ‘Jolahas’, implicitly repudiating the ‘pact’ by initiating a suit under proper advice declaring their right to kill cows. The court while demurring from pronouncing the right to slaughter cows, stated that the District Magistrate could not show due cause to prevent them from carrying out the act\textsuperscript{648}. Plaintiffs often contended that the compromise document was not a representative agreement.\textsuperscript{649} As a result, attempts by prominent men in the locality to resolve the issue, or coercion of community leaders into a compromise could be disrupted through the litigation process. Most protagonists were well aware of this and attempted to get people to surrender their right to litigate on the question.

In the heightened communal atmosphere of the 1920s and 1930s, litigation itself emerged as a form of political mobilization. In the absence of legislation or a constitutional right, groups of both Hindus and Muslims sought declaratory decrees from High Courts, particularly when petitioning the local administration failed. The petitioners in one such case of 1914 had made a previous application to the Deputy Commissioner for permission to sacrifice the cow. When Hindu residents filed objections, they withdrew the petition and filed a civil suit asking for a declaration of an injunction under S.42 of the Specific Relief Act.\textsuperscript{650} The court while

\textsuperscript{647} *Sheikh Muhammad Yakub* v. *Mangru Rai and Others*, 7 Ind Cas 318.
\textsuperscript{648} *Sheikh Muhammad Yakub* v. *King Emperor*, 6 Ind Cas 454.
\textsuperscript{649} *Subhan Mochi* v. *Babu Ram Singh and Others*, AIR 1930 All 121.
\textsuperscript{650} S.42, Specific Relief Act, 1877.
acknowledging the right of the plaintiffs refused them relief, stating that there had been no actual violation of the right, since the Commissioner had not denied them permission.\textsuperscript{651}

However, by the 1920s in an increasingly communally polarized atmosphere the attitude of the courts began to change.\textsuperscript{652} In 1928, Muhammad Salim, a weaver from Azamgarh sued 17 Hindu residents of the village for a declaration in particular that he and other Muslim residents of the village had a right to sacrifice the cow on festivals and Eid-ul-zuha. He wanted the court to declare that this right subsisted regardless of any rite or custom to the contrary and that the defendants had no grounds on which to make any interference.\textsuperscript{653} The suit was prompted by the defendants surrounding the plaintiff’s home the previous Eid and threatening him with murder and arson unless he refrained from cow sacrifice. The defense had argued that as there was no actual ban on cow slaughter, the plaintiff could not get specific declaratory relief. However, the court noted that the evidence showed that five to ten thousand men armed with \textit{lathis} had surrounded the Muslim area of the village after the Bakr-Eid prayers. Subsequently, the district Administration had given prizes to the local Hindu \textit{chowkidars} for ensuring that there was no cow sacrifice and no rioting. The courts held that there was ‘no doubt’ that violence and threats were an even more drastic interference to the petitioner’s rights than a counter petition to the District administration would have been.\textsuperscript{654}

Both Hindus and Muslims began to engage in a form of competitive litigation. These suits were often in the form of representative suits under Order I, Rule 8 of the Civil Procedure Code whereby a large body of persons who were interested in the matter could bring action

\textsuperscript{653} \textit{Muhammad Salim v. Ramkumar Singh and Others}, AIR 1928 All 710.
\textsuperscript{654} Id.
together as a group. In 1931, the Hindus of Rathaura village in U.P. brought a successful representative suit for a declaration that their community was entitled to worship and blow conches and ring bells.\textsuperscript{655} The following year, seven Muslims from the same village brought a representative suit for a declaration of the right of the Muslim community to slaughter cows and sell beef in the village.\textsuperscript{656} This competitive litigation caused “disturbances in the village” and several of the litigants were arrested and jailed. The administration attempted to effect a compromise whereby the Hindus would undertake to abstain from music and the Muslims promise that according to custom cows would not be slaughtered in the village. The local Munsif refused to record this compromise as a civil suit under Order 23, Rule 3 of the Civil Procedure Code since it was not one which adjusted the rights of all parties who signed. He argued that it could not affect the rights of the parties that did not sign. In subsequent litigation the majority of the High Court held that since all the parties to the suit had not signed it, the compromise agreement could not be accepted. In a concurring opinion, Chief Justice Shah Suleiman, the most senior Indian judge at the time, warned that the court was not prepared to admit “that a few individuals either posing as leaders or recognized by the executive authorities as leaders of a community can by their agreement bind the whole community to which they are members”.\textsuperscript{657} The competing Muslim voices in the litigations also challenge the monolithic idea of community that the cow protection movement sought to promote.

The colonial government sought to establish rights claims through evidence of custom and local practice, which was often determined by local power dynamics.\textsuperscript{658} Through civil litigation, an alternative rights framework was articulated. Local dominance could no longer

\textsuperscript{655} Suit No 262 of 1931, cited in \emph{Kande and Others v. Jhanjhan Lal and Others}, AIR 1936 All I.
\textsuperscript{656} Suit 443 of 1933 (registered on 30th August 1932) cited in \emph{Kande and Others v. Jhanjhan Lal and Others}, AIR 1936 All 1.
\textsuperscript{657} \emph{Kande and Others v. Jhanjhan Lal and Others}, AIR 1936 All 1.
\textsuperscript{658} \emph{Naubahar Singh and Others v. Qadir Bux and Others}, AIR 1930 All 753.
ensure control over the determination of customs or use of public spaces. As a suit from 1930 shows, rights that were traditionally rooted in ownership of land and the holding a zamindari, could be successfully challenged. The village of Shikarpur in Meerut was a majority Muslim village with about 1,500 Muslims compared to 250 Hindus. However, as the court noted, “paucity in number does not count as a factor indicating status, influence or prosperity”. The village was owned by a Hindu rani, and all the zamindars were Hindus; they received rent and bhent (tribute) from the peasants and could command forced labor from them. The court ruled that the rights of Muslim tenants to slaughter could not be affected by patterns of land ownership.

Through litigation, groups of Muslim litigants had been able to establish a reinforced and certain right to religious practice rooted in common law, property rights and imperial citizenship. However this right would stay secure only as long as the executive chose not to occupy the field. With independence, Partition, and the electoral dominance of the Congress, matters were likely to change.

**Constitutionalizing the Cow**

From the Congress’ earliest days, mobilization for this national party coincided with mobilization for the cow protection movement. It is not surprising that with the increased popular reach of the Congress under Gandhi, cow protection became a central part of the national agenda. It held significant symbolic value for Gandhi, he wrote:

“[T]he central fact of Hinduism is cow protection. Cow protection …takes the human being beyond his species. The cow to me means the entire sub-human world. Man, through the cow, is enjoined to
realize his identity with all living beings. The cow is a poem of piety”. 659

For Gandhi, cow protection was symbolically equated with the protection of the weak, the dumb and the powerless, and commitment to it an essential quality to be cultivated for swaraj. During the Khilafat and Non-Cooperation movements in 1921, Gandhi attempted to unite Hindus and Muslims on a common platform, where Hindus were encouraged to support Muslims on the Caliphate question, while Muslims were asked to refrain from cow slaughter. Each community was thus to respect the sentiments of the other. 660 Though cow protection was part of the constructive program of the Congress Party since the 1920s, the party stopped short of advocating legislation. The Congress saw itself as a big-tent party and wanted to reach out to Muslims.

Gandhi himself was insistent that cow slaughter could not be stopped by law. Cow protection was a noble sentiment that he believed “must grow by patient toil and tapasya. It cannot be imposed upon anyone”. 661 Immediately after Independence and Partition he stated, “I yield to none in my devoted worship of the cow, but this devotion could not be imposed by law”. 662 This statement was not just geared towards addressing the concerns of Muslims after Partition, but a moral position he had adopted since the 1920s. He was critical when Hindu members of a municipal board in U.P. voted for a ban on cow slaughter, despite opposition from Muslim members. If Muslims claim that Islam permits them to kill a cow, legislating to prevent them from cow killing would (according to Gandhi), amount to converting them to Hinduism by force. “Even in India, under Swaraj”, he wrote, “it would be unwise and improper for a Hindu

659 M.K Gandhi, Young India, 6 October, 1921.
661 M.K. Gandhi, Young India, 8 June 1921.
majority to coerce by legislation a Musulman minority into submission to statutory prohibition of cowslaughter”. After Partition, he was even more insistent on this position opposing cow protection by law, contrasting secular India with Pakistan. He argued, “if they can prohibit cow slaughter in India on religious grounds, why cannot the Pakistan government prohibit idol worship on similar grounds? Just as the Shariat cannot be imposed on non-Muslims, Hindu law cannot be imposed on non-Hindus”.

Given the need to define India as a secular republic, cow protection found no mention in the original draft of the Indian Constitution. The drafting committee considered and rejected the proposed clause on the subject, on the ground that it dealt with a matter of policy and not constitutional principle. Indeed, the slogan of cow protection gained little traction with the modernist impulses of leaders like Nehru and Ambedkar. However, on the eve of Independence with Partition, too, impending there was a vast popular outcry for a law on cow slaughter. Referring to the “emotional wave sweeping the country”, Gandhi told a prayer gathering that he was being flooded with telegrams, demanding that cow slaughter be stopped. He was urged to persuade Jawaharlal Nehru and Sardar Patel to enact the cow protection laws. Rajendra Prasad, the Chairman of the Constituent Assembly, reported that he had received some 50,000 postcards, and between 25,000 and 30,000 letters and many thousands of telegrams demanding the ban on cow slaughter. A typical petition by 30 concerned citizens began by stating the importance of cows for the agrarian economy, laid down the sort of penal regime that would be required to stop cow slaughter and concluded with the claim that the British allowed cow

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663 M.K. Gandhi, Young India, 29 January 1925.
664 M.K Gandhi, Harijan, 10 August 1947.
665 B. Shiva Rao, Framing the Indian Constitution, Volume IV, 56.
666 M.K Gandhi, Prarthana Pravachan, 19 July 1947, 260-263.
slaughter to keep Indians weak and the Indian government must reverse this. The petitioners were primarily from North India but ranged from schoolboys to retired judges.

To those involved in the cow protection movement for years, it seemed that their moment had come with Independence which would finally enable Indians to use the mechanisms of government to protect *Gaumata* (cow mother). An important marker of Independence would be protection of the cow, something that the British colonial regime had failed to do, and the Islamic republic of Pakistan was not going to do.

Gandhi resisted the demand for enactment of a law, stressing the pluralist character of India and the need to take constructive action to protect the cow, for instance feeding it better, making it carry lighter loads and donating to cow shelters. However, the popular sentiment in favor of legislation emboldened several Constituent Assembly members from North India to critique the draft Constitution. The cow protection lobby initially attempted to move an amendment which would have made cow protection a fundamental right that could be judicially enforced through the courts. To critics who argued that fundamental rights could only be enjoyed by human beings, R.V. Dhulekar forcefully replied,

“Is the protection of the cow a fundamental right of a human being? Or is it the fundamental right of the cow? I replied to them and tell them suppose it is a question of saving your mother or protecting your mother. Whose fundamental right is it? Is it the fundamental right of the mother? No. It is my fundamental right to protect my mother, to protect my wife, my children and my country. In

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668 Petition titled “Bharat Main Gobadh Turant Hata Deni ki Janata Ki Maang” (translation: “The Public’s Demand to Immediately End Cow Killing in India”). File 3-M/47 (Collection 1), Rajendra Prasad Papers [NAI].
669 Letter from Rameshwar Pal Dubey, Student of Class IX B, AS Inter College, Fatehpur U.P., File 3-M/47 (Collection 1), Rajendra Prasad Papers [NAI]; Letter from Kunver Sarup Saxena on 28th July 1947, File 3-M/47 (Collection 1), Rajendra Prasad Papers [NAI].
the Fundamental Rights you have said that you will give justice, equity and all these things. Why? Because you say ‘it is your fundamental right to have justice.’

What does that justice mean? It means that we shall be protected, our families shall be protected. And our Hindu society, or our Indian society, has included the cow in our fold. It is just like our mother. In fact it is more than our mother. I can declare from this platform that there are thousands of persons who will not run at a man to kill that man for their mother or wife or children, but they will run at a man if that man does not want to protect the cow or wants to kill her.”

Ambedkar persuaded the group to offer the amendment as a directive principle of state policy instead. Unlike the earlier amendments which declared an absolute ban on cow slaughter, the amendment moved by Thakur Das Bhargava on the 24 November 1948 justified the ban in terms of economic interests. The proposed Article 38-A would be added to Article 38 which in the draft Constitution provided that, “the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as its primary duties”. To this Bhargava proposed the addition of, “Article 38-A: The State shall endeavor to organize agriculture and animal husbandry on modern scientific lines and shall in particular take steps for preserving and improving the breeds of cattle and prohibit the slaughter of cow and other useful cattle, specially milch and draught cattle and their young stock”. Bhargava argued that without this amendment, Art.38 which dealt with nutrition, standard of living and public health, would be meaningless, or in his words, “a body without a soul.”

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670 R.V Dhulekar, United Provinces, Constituent Assembly Debates, Volume VIII, Wednesday, 24 November 1948.
671 Thakur Das Bhargava, East Punjab, Constituent Assembly Debates, Volume VIII, Wednesday, 24 November 1948.
The amendment consisted of three parts: the improvement of agriculture on scientific and modern lines, the improvement of cattle breeds and the ban on cow slaughter. The reference to the economic value of the cow to justify a ban on cow slaughter was not new. Pamphlets by the cow protection movement even in the late nineteenth century had emphasized the centrality of the cow to Indian agriculture and of milk to diet.672 This economic argument grew more prominent in the 1930s, as economists, scientists and planners waxed eloquent on the economic benefits of milk and milk products, cow dung, and cow urine, and stressed the need to protect cattle wealth as a national resource.673 By Independence, there was a shift in location or scale of such economic arguments, to that of the national economy. It was a shame, Bhargava declaimed, that India had to import food from abroad when she could be self sufficient. Bhargava portrayed cattle as a national resource which was being mismanaged due to indiscriminate slaughter. He drew an analogy between cattle slaughter and the other great project of Nehruvian modernity, the building of dams. To utilize water properly, the state had to construct dams and change the course of rivers. Similarly, to improve the health of humans and cattle, it was essential to check cow slaughter.674 Govind Das compared the figures of milk supply in various countries and noted that in India it was only 7 ounces per capita, as opposed to 22 ounces in Poland, 39 in Great Britain and 69 in Sweden. “What would be the state of health of people when they get only seven ounces of milk? Children are dying like dogs and cats. How can they be saved without milk”, he agonized. Thus, the establishment of a self reliant modern republic was placed on the bowed

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674 Thakurdas Bhargava (East Punjab, General) Constituent Assembly Debates, 24 Nov 1948.
shoulders of cattle. Several members noted with alarm a fall in India’s cattle population during the Second World War, making the ban on slaughter an urgent question.675

The idea of cattle as a scarce resource that had to be husbanded with care was reinforced through the use of economic and statistical data. In 1947, a few months after Independence, the Ministry of Agriculture set up the Cattle Preservation and Development Committee to consider the question of prohibiting cow slaughter by legislation and to recommend a comprehensive plan of action that could be put into effect for preserving the cattle wealth of the nation. The Committee in arriving at a decision on the prevention of cow slaughter found itself handicapped by “the want of complete and accurate statistics”.676 With the collation of statistics about cattle, the abstraction became suddenly legible. Cattle like citizens were counted in a census, their declining population and poor health were made a cause of concern and proposals were made for gosadhans or ‘cattle concentration camps’, where old and abandoned cattle could be looked after.

The Committee also resolved that the preservation and development of cattle should be a part and parcel of the ‘Grow More Food’ campaign. The ‘Grow More Food’ campaign was initiated after Independence to deal with the famine and food grain crisis caused by Partition. The aim was to achieve self sufficiency in foodgrains and staple crops by 1952. Thakurdas Bhargava, the votary of cow protection in the Constituent Assembly, also submitted a memorandum in his capacity as a member of the Grow More Food Enquiry Committee,
underlining the neglect of cattle as the cause that the country has suffered in its nutritional
standards. India’s per capita milk consumption was on the decline, and for a largely vegetarian
population the increase of milk supply was crucial.

Majoritarianism and appeals to cultural homogeneity went hand in hand with the
economic arguments. Prof. Shibban Lal Saxena asserted that the Assembly should not leave out
something “that thirty crores of the population” want incorporated merely because it also had a
religious aspect. Seth Govind Das reminded the Muslim members,

“I would like to see my country culturally unified even though we
may follow different religions. …The Muslims should come
forward to make it clear that their religion does not compulsorily
enjoin on them the slaughter of the cow”.

Perhaps most powerfully, the cow’s claim to legislative protection was
made in the name of a national culture that would separate the Indian republic
from the colonial state. Govind Das linked cow protection with the question of the
name of the country, national language, national script and the national anthem.
“Unless the Constituent Assembly decides these questions according to the wishes
of the people of the country, Swarajya would have no meaning to them”, he
asserted. Bhargava refused requests from South Indian members to address the

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678 Shibban Lal Saxena, United Provinces, CAD, 24 November 1948.
679 Seth Govind Das, United Provinces, CAD, 24 November, 1948.
680 Seth Govind Das was an influential ‘Marwari’ businessman and had served as a legislator for 32 years. His two main priorities were the adoption of Hindi as the national language and cow protection. Govind Das had raised the issue in the Council of State as early as 1927, served several terms as President of the All India Cow Protection Society and was appointed a member of the Cattle Preservation Development Committee by the Ministry of Agriculture in 1947. He would introduce a number of private member bills for a national ban on cow slaughter in the
house in English, insisting that he wanted to “speak in Hindi, which is his own language about the cow”. R. V Dhulekar pointed out that independence was not for the “loaves and fishes’ of office, for ambassadorships, premierships, ministerships or wealth; but for India to declare that today the whole human world and the animal world is free today and will be protected”. For Raghu Vira, freedom was inextricably linked to the protection of cows. He asserted,

“I think it my most bounden duty in this House to express the feelings, feelings which no words can really convey, that not a single cow shall be slaughtered in this land. These sentiments, which were expressed thousands of years ago, still ring in the hearts of tens of millions of this land. My friends tell me that it is an economic question, that Muslim kings have supported the preservation of cows and banned the killing of the cows. That is all right. But when we attain freedom, freedom to express ourselves in every form and manner – our Preamble says 'There shall be liberty of expression' – is that merely expression of thought or is that the expression of our whole being? This country evolved a civilization and in that civilization we gave prominent place to what we call Ahimsa or non-killing and non-injury, not merely of human beings but also of the animal kingdom. The entire universe was treated as one and the cow is the symbol of that oneness of life and are we not going to maintain it?”

681 The request was made by S. Nagappa, who was also one of the few backward caste members of the assembly.
682 Dr Raghu Vira, Central Provinces, CAD, 24 November 1948.
Independence for a vocal group of Hindus meant the protection of national wealth, the righting of historical injuries, the embracing of a unique civilizational ethos and a break from a foreign regime that aided, or was at best indifferent to cow slaughter.

Where did that leave the Muslim members of the house? The economic reasoning had proven powerful and led to the Assembly preferring Thakurdas Bhargava’s amendment which protected useful cattle, i.e. “milch cattle, cattle of child bearing age, young stocks and draught cattle” to Seth Govind Das’s broader definition that included “all cows, bulls, bullocks and young stock of the genus cow”. However, the ‘national economy’ angle changed the debate. As long as cow protection was demanded as a religious right of Hindus, it could be countered by the assertion of the equal religious obligation of Muslims to sacrifice the cow. These rights could then be negotiated in the local context through courts, as they had been through the colonial period. However, once it had been incorporated into the Constitution by way of amendment, the question of cow protection had been linked to the question of the national economy and accordingly had to be decided on the national scale. Therefore the entire arena for the debate had changed, and the old system of locally won rights could now be transformed.

The position of Muslim representatives in a post-Partition Constituent Assembly was fraught; there was considerable pressure to assimilate. Muslims made up 8% of the Assembly, and the Congress’s chief opposition comprised 28 members of the Muslim League who had not migrated to Pakistan. The Muslim members had their loyalties to the new state constantly questioned.\(^{683}\) Their position wasn’t helped by the fact that Chaudhary Khaliquzzaman, the leader of the Muslim League, migrated to Pakistan after taking oath in the Constituent Assembly.

of India. Despite this, the Muslim League members challenged the ambiguous rationale behind the ban on cow slaughter.\textsuperscript{684} Mohd. Saadullah, the erstwhile premier of Assam, noted that he had every sympathy for those people who want cow killing stopped for religious reasons, stating that “I therefore do not like to use my veto when my Hindu brethren want to place this matter in our Constitution from the religious point of view. I do not also want to obstruct the framers of our Constitution …if they come out in the open and say directly: ‘This is part of our religion. The cow should be protected from slaughter and therefore we want its provision either in the Fundamental Rights or in the Directive Principles’”. Saadullah however protested the economic rationale, noting that uneconomic cattle with low milk yields were actually a burden on the land and pointing to the various professions such as tanners and hide merchants, also practiced by many lower-caste Hindus, which were dependent on processing dead cattle. Allowing unproductive cattle to live would actually weaken the breed. Saadullah also protested the attempt to position Muslims as beef eaters, stating that thousands of Indian Muslims did not eat beef, and the cow was as important to Muslim agriculturists as to Hindu ones. By pointing to Hindus who ate beef and Muslims who didn’t, Saadullah argued that this was an economic question and not a cultural one. Just as many Hindus lived off the trade of dead cows and found beef a cheaper food option, Muslims often desisted from cow slaughter due to the economic value of the cows they owned. Saadullah argued,\textsuperscript{685}

“There is a lurking suspicion in the minds of many that it is
the Muslim people who are responsible for this slaughter of cows.
That is absolutely wrong… There are lakhs of Muslims who do not

\textsuperscript{684} It is surprising that none of the Congress members, like Nehru, who were otherwise opposed to or contemptuous of cow protection spoke during the debate. They were possibly involved in back room negotiations that had taken place to get the cow protection amendment moved from fundamental rights to directive principles.

\textsuperscript{685} Syed Mohammad Saadullah, (Assam: Muslim,) CAD, 24 November 1948.
eat cow's flesh. …Before the partition the Muslims were only one-fourth of the total population. They did not raise sufficient cattle to kill. It is the majority people (Hindus) who sold their cattle to the Muslims to be killed. Now the Muslims form only one-tenth of the population of the Dominion of India. Do you think that the Mussalmans can raise sufficient cattle to slaughter them? Muslims are poorer than our Hindu brethren. …. The price of mutton is so high that many poor people cannot buy it. Therefore on rare occasions they have to use the flesh of the cow. From my own knowledge, it is only the barren cows that go to the butcher.”.

Scholars are divided over whether to read the use of economic arguments as merely strategy, utilized to elide Hindu majoritarian impulses.686 While some scholars argue for such a reading of the economic rationale (as a ‘cover’), others have challenged the compartmentalization of ‘religion’ and ‘economy’. Cassie Adcock stresses the difficulty of defining the boundaries between religion and economy and argues that economic concerns were inextricably linked to the concept of dharma on which cow protection arguments were based687. The discursive intent behind the arguments is important of course, but this chapter focuses on the impact these had on the people who had to now live under the regulatory regimes such arguments legitimized. Irrespective of whether the economic argument was strategic or inextricable, it would have serious consequences.

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Framing the cow slaughter ban in economic terms caused significant confusion for Muslims. Prior to Independence, the understanding was that Queen Victoria’s Proclamation of 1858 guaranteed them the right to religious freedom, that “none be in anywise favoured, none molested or disquieted by reason of their religious faith and observances”. In a petition to the Viceroy, protesting a proposed ban on cow slaughter by the Mysore State Legislation, a delegation of Muslims had relied on this understanding to argue that such a legislation “would be a direct violation of the religious rights and traditions of the Muslim community, and opposed to the Magna Carta issued by Queen Victoria”. Post Independence, this firm reliability of a known order vanished. Thus, Zairul Hasan Lari insisted the Constituent Assembly make the cow protection provision clearer and remove “all ambiguity or doubt”, and said that if the Constitution would absolutely ban cow slaughter, then “let it be prohibited in clear, definite and unambiguous words”. His demand for clarification was based on the Indian Muslims being “under the impression that they can, without violence to the principles, which govern the State, sacrifice cows and other animals on the occasion of Bakrid”. He appealed to the assembly to “let there not linger an idea in the mind of the Muslim public that they can do one thing, though in fact they are not expected to do that”. Over decades, Muslims had come to believe that cow sacrifice on Eid was a right, and were not clear what the new order entailed. The indeterminate language of the amendment left open the possibility that the slaughter of economically useless cows was permitted, but public sentiment and the amendment’s movers would clearly object to that. As Lari pointed out, throughout U.P. during the preceding Bakr-Eid, there had been violence and arrests over cow sacrifice. He pleaded,

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688 “Protest of Mahomedans against legislation for the prevention of cow slaughter in Mysore”, FN 216/1930 [NAI].

“Let that article be there, but for God's sake, postpone the discussion of the article and bring it in clear, definite and unambiguous terms so that we may know where we stand and thereafter there should be no occasion for any misunderstanding between the two communities on this issue which does not affect religion but affects practices which obtain in the country”. 689

Thinking Nationally, Acting Locally: Municipal Management of Cow Slaughter

The cow protection amendment finally found its place as a directive principle of state policy, under Article 48 of the republican Constitution. However, the process of legislation was far more time consuming than expected. The Central government headed by Nehru made it very clear that they would not enact a national law banning cow slaughter. The official reason given was that the Central government was not competent to legislate on cow slaughter, both agriculture and animal husbandry being State subjects under the new Constitution. However, much of the resistance to the demands and proposals for national legislation came from Nehru, who in 1955 threatened to resign if a private member’s bill enacting a national ban on cow slaughter was enacted. 690

689 Z.H Lari (Muslim; United Provinces), Constituent Assembly Debates, 24 November, 1948.
Fig. 3.2 Nehru portrayed as Lord Krishna charming the cow protection lobby.  

Fig. 3.3. Nehru is shown chasing away the cow protectionists.

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691 Shankar’s Weekly, 6 September 1953.
While both Nehru’s supporters and detractors identified his motivation as his vision of secularism, nowhere does secularism or minority rights appear in his speeches against the cow slaughter ban. The chief argument he made was that on merits, a national ban would not achieve the objective of preserving the cattle wealth of the country. Instead, aging and uneconomic cattle would be expensive to maintain, reduce the quality of the breed and damage agricultural land. Nehru declaimed,

“I cannot accept that animals are more important than economies and I think human beings are more important than cows. I do not agree and am prepared to resign from prime ministership but I will not give in to this kind of …agitation”.693

Seth Govind Das’ bill was defeated but Nehru’s lack of enthusiasm was not representative of the entire Congress. It is open to question whether his beliefs were shared to the state and district Congress machinery, and to what extent.694 Purushottam Das Tandon, the President of the All India Cow Protection Society, was elected President of the Indian National Congress in 1950. The second rung of leadership consisted largely of the conservative wing of the party and included men like Rajendra Prasad, Morarji Desai and Govind Ballabh Pant, all committed to cow protection.695 Most strikingly, the Congress Party’s election symbol was of a cow suckling her calf, completing the link between the figure of the cow, the nation state and the ruling party.

692 Shankars Weekly, 10 April 1955
693 Jawaharlal Nehru (Phulpur) Lok Sabha Debates, 2 April 1955.
In their manifestos, the main opposition parties had all made a commitment to ban cow slaughter and castigated the Congress as a party of “cow killers”. The right-wing Jan Sangh manifesto accused Nehru of sacrificing national interest and “encouraging” Muslims. The socialists, under Jaiprakash Narayan, announced that banning cow slaughter was itself an affirmation of a great human value. In 1955, even the Communists joined hands with orthodox Hindu leaders. Trade union leaders and factory workers carrying hammer and sickle banners marched with Hindu priests in a New Delhi procession, shouting slogans in support of a complete ban. As the New York Times commented, most Western educated Indians who opposed the ban conceded that, if put to the test, most Indians would enthusiastically vote to ban cow slaughter. There were repeated instances of public demonstration in favor of a cow slaughter ban. In 1951 an Ahmedabad activist, Arjun Bhagat, went on a fast unto death outside the local slaughterhouse demanding that cow slaughter be banned. Bhagat was supported by 33,000 mill workers who went on strike in support of his cause, virtually shutting down the economy of the textile town.

With the Central government refusing to enact a ban on cow slaughter, the States and smaller administrative divisions became arenas for political contestation over the demand for such a ban. Cow slaughter figures showed a rapid decline from Independence onwards, well before the first cow slaughter legislations were enacted. The ‘Gosamvardhan’ Enquiry Committee (‘Cow Development/ Increase’ Enquiry Committee), looking into figures for cattle

700 Id.
slaughter, noted that the number of cattle slaughtered in the United Provinces declined from a high of 142,237 heads of cattle in 1937 to 2,708 cattle in 1951, the sharp drop after 1947 being the result of the trend in public opinion. How did cattle slaughter drop sharply in the absence of statewide legislation? In most cases, elected local government bodies such as Municipal Boards, District Boards and Notified Town Area Committees passed by-laws banning slaughter of the cow and its progeny. This was an old tactic by the cow protection movement, going back to the introduction of elected local government, on a very limited scale, in the late nineteenth century. Such lower-level legislation was difficult to achieve in many areas, since most local government bodies had a significant number of official (i.e. nominated by the British) and Muslim members. However, Independence and Partition had changed the composition of local politics, and had ensured a dominant Hindu majority in most local bodies.

A month after the coming into force of the new Constitution, Mangru Meya, a Muslim beef shop owner in Budge-Budge, near Calcutta, received a letter from the Chairman of the Budge Budge Municipality stating that, “with a view to increase the supply of milk and cattle wealth”, his license for the sale of beef or buffalo meat would be cancelled with immediate effect. Mangru Meya and his family had been running beef stalls in their neighborhood for over a hundred years, and had at all material times held licenses to do so issued by the municipality. Mangru Meya had not contravened the only ground for cancellation of a municipal license, i.e. becoming a cause of annoyance or offence or danger to persons residing in the neighborhood. His neighborhood (near the Trunk Road in Calcutta) was a predominantly poor Muslim area, and the demand for beef high enough to have led two other beef purveyors to open shop there in the

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703 Ibid.
1920s. The material change in Mangru Meya’s circumstances had been the election of Pandit Ram Chandra Awasthi as Chairman of the Municipality. Awasthi, who was a North Indian Hindu Brahmin, was instrumental in passing a resolution in February 1950 stating, “in view of the fact that due to indiscriminate slaughter there has been depletion of cattle wealth — the backbone of this country…and inasmuch acute shortage of draught animals and paucity in milk supply has brought in their wake, woes and miseries in building up a strong nation of healthy and happy inhabitants, resolved that with a view to increasing the yield of milk and cattle for the general economic uplift of the masses”, the Municipality would close down its slaughter house. It was further resolved that no licenses would be granted for slaughter or sale of beef.  

The Budge Budge Municipality allowed for exceptions to the above February resolution, but only for *bona fide* religious festivals and ceremonial occasions, which is perhaps why Mangru Meya’s representations to the President of the District Minority Board and the Chairman of the Minority Commission of West Bengal went unheeded. As the Budge-Budge Municipality had made exceptions for cow sacrifice on Eid, the ban on cow slaughter could no longer be said to compel Muslim religious beliefs. The resolution however continued to hurt the business of shopkeepers like Mangru Meya and deprived poor Muslims of a staple commodity in their diet. Mangru Meya and the two other stall holders from his neighborhood took the only option they had – they went to court.

Litigating against the cancellation of a municipal license was not new, however suits for the restoration of licenses cancelled due to cow protection were rare and not very successful. In one of the few reported cases, a hide merchant named Madran Kassab challenged the

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705 Resolution passed by municipality of Budge Budge, West Bengal on 24 February 1950 as cited in *Mangru Meya and Others v. Commissioners of the Budge Budge Municipality*, AIR 1953 Cal 333.
cancellation of his license, after he was arrested and convicted for carrying on his trade without a license under S.263 of the Bihar and Orissa Municipal Act, 1922.\footnote{Madran Kassab v. King Emperor, 86 Ind Cas 964, 18/12/1924.} Kassab’s licence had come up for renewal the day the Vice-Chairman of the municipality passed a resolution to the effect that all existing slaughter houses be closed and no new licenses granted, “in view of the fact that our country is suffering great loss and innumerable miseries by the indiscriminate slaughter of cow”. The resolution was a contentious one, and Kassab’s application for renewal was rejected by the margin of one vote on the municipal council. Kassab unsuccessfully appealed to the Additional Deputy Commissioner and the District Magistrate of Manbhum to reverse this decision using their powers under S.383 of the Bihar and Orissa Municipalities Act on the ground that the municipal resolution causes serious injury to the public or to a class of persons. Kassab then decided to flout the cancellation of his license, continued with his business and was arrested. During his trial, he attempted to challenge the cancellation of his license on the grounds that no reasons had been specified, imputing that the real motive was to prevent cattle slaughter. The courts, though sympathetic to the loss of his business, said they could not enquire into the reasons behind the decision of the municipality. This continued a trend of colonial courts being reluctant to exercise administrative review, particularly over an elected municipal board.

In the 	extit{Mangru Meya} case administrative review was never an option. The reasons of the municipality were clearly specified, and the other state agencies were in broad sympathy with it; however, he was empowered by the new Constitution to challenge the cancellation of his license and the municipal resolution authorizing it, on the ground that it violated his fundamental rights. He filed an application at the Calcutta High Court under Article 226 of the Constitution praying for a writ of mandamus directing the municipality to cancel the notice served to him and to order
the cancellation of the resolution. Meya’s lawyer, incidentally an upper-caste Bengali Hindu, contended that the only grounds on which his license could have been cancelled were if the business caused, “annoyance, offence or danger to people in their immediate neighbourhood”.707

The Budge Budge Municipality’s lawyers conceded that the reason for not renewing the license was extraneous to the reasons specified under the Bengal Municipalities Act, 1932, but argued that the municipality was merely carrying out the obligation under Article 48 of the Constitution. Article 48, as cited several times above, stated that the “state shall endeavour …to prohibit slaughter of cows and cattle”, and “the state” for this purpose would include local authorities such as the Budge Budge Municipality. The court rejected this defense, noting that Article 48 was only a directive principle of state policy, and not enforceable in the courts. In the absence of a law that was enacted for the general closing down of slaughter houses or prohibition of the sale of beef, the Bengal Municipalities Act continued to be in force and the commissioners were required to “act within the four corners of the statute, and they could not travel beyond to take shelter under Article 48 of the Constitution”. The resolution of the municipality and the notice issued under it to the petitioners, Mangru Meya and others, were cancelled by the courts, and the municipality was asked to reconsider the license renewal within the parameters of the Bengal Municipalities Act.

Further, the court also held that while petitioners like Mangru Meya had an alternative remedy in the form of appeal lying to the provincial government, this appeal did not bar the grant of a prerogative writ by the High Court. The High Court emphasized that the remedy of appealing to the elected government did not debar the jurisdiction of the courts. The order of the High Court, delivered by Justice Bose, was challenged before the full bench of the High Court.

707 S.370 (2), Bengal Municipal Act, 1932.
The Budge Budge Municipality did not this time seek the shelter of Article 48, but instead made the technical argument that the High Court could not cancel the resolution passed by a municipality. The majority of the High Court agreed with the municipality but asked them to reconsider Mangru Meya’s license within the limits of the statute. However, in a particularly sharp dissent Justice S.R Dasgupta asserted the powers of the court to issue such an order of cancelation, and noted that the impugned resolution also interfered with Mangru Meya’s fundamental rights as a citizen of India, as he was for all time prevented from carrying on his occupation, trade or business as a butcher or a seller of beef. The resolution in question was not a ‘mere resolution’, as claimed by the municipality, but it was given effect to by cancelling licenses. At the end of the day, litigation allowed Mangru Meya to reapply for his license, without fear of being rejected on the grounds of cow protection.

Similar attempts were made by butchers in Allahabad, in Uttar Pradesh, where the municipality had amended its by-laws in March of 1931 banning cow slaughter. Hakim Ahmad Raza and two others filed a representative suit under Order 1, Rule 8 of the Code of Civil Procedure, representing the butchers and hide merchants in the city of Allahabad and praying for a permanent injunction against the by-law. An individual suitor, Buddhu filed an application for a writ of mandamus under Article 226 of the Constitution against the Allahabad Municipality, contending that the new by-law was an infringement of his fundamental rights under Article 19(1)(g) of the Constitution and was repugnant to Article 14 (the right to equality) as it made a distinction between those who slaughtered goats and sheep and those who

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708 Chairman, Budge Budge Municipality v. Mangru Mian and Others, AIR 1953 Cal 433.  
709 Haji Ahmad Raza and Others v. Municipal Board, Allahabad, AIR 1952 All 1.
slaughtered cows.\textsuperscript{710} Both the representative suit and Buddhu’s writ petition asserted that the municipality had overreached its powers in attempting to ban cattle slaughter.

Haji Ahmad Raza’s civil suit failed. First, it had not met the requirement for giving adequate notice to the government. Under the U.P. Municipalities Act, 1916, no suits could be instituted against the municipal board or its members before the expiration of two months from service of written notice.\textsuperscript{711} This provision was typical of most statutory authorities in colonial India, and sought to minimize litigation against them. Secondly, the courts rejected Raza’s argument that there was a violation of an implied contract between the butchers and hide merchants and the city that there would be no interference in their trade or profession. Furthermore, Raza’s main contention that the notice period would have defeated the purpose of the suit was rejected. Although the delay of two months would inconvenience the petitioners, held the court, the object of the suit (restraining the municipality from prohibiting cattle slaughter), could still be achieved. The court did not consider the impact of two months of economic unemployment on the petitioners. Lastly, the court was not convinced of the merits of the representative suit. The petitioners had argued that the numbers of butchers and hide merchants were “so large that it would be difficult for each of them to bring a suit of damages against the municipal board”. The court examined witnesses and came to the conclusion that there were around 200 to 300 families of butchers in Allahabad and saw “no insuperable difficulty in 300 bringing separate suits for damages if the by-laws are found ultra vires”. They pointed to the thousands of writ petitions filed in response to the Zamindari Abolition Act, not noting the difference between petty traders like the butchers of Allahabad, and the dispossessed aristocrats who challenged the abolition of zamindari.

\textsuperscript{710} Buddhu v. Municipal Board, AIR 1952 All 753.
\textsuperscript{711} S.326, United Provinces Municipalities Act, 1916.
Buddhu’s writ petition was also unsuccessful, in that the majority of the court found against him. The courts reiterated an old English precedent, that

“[W]hen the court is called upon to consider the bye-laws of public representative bodies clothed with ample authority, and exercising that authority accompanied by the checks and safeguards… ought to be supported if possible …benevolently interpreted and credit ought to be given that those who administer them will see them reasonably administered”.712

Two judges, constituting the majority of the court, found the by-law a reasonable restriction on the petitioner’s fundamental rights under Article 19(1)(g) to practice his trade and profession. They highlighted the fact that the government of the State of Uttar Pradesh had expressed concern about the declining cattle wealth of the country. Unlike the High Court of Calcutta, they were convinced that the municipality was acting in furtherance of Article 48 of the Constitution. The state, as defined by Article 12 of the Constitution, included ‘local authorities’, and the directive principles cast a duty upon the state to raise the level of nutrition, to improve public health and *inter alia* provide the prohibition of cow slaughter. Justice Prasad’s sympathies with the ban became clear when he stated that it was “common knowledge” that the price of milk was high and foodgrains were scarce. The ban was an attempt to correct this situation. They also countered the petitioner’s allegations that there was no reason to prohibit the slaughter of old and infirm cattle by referring to a number of veterinary authorities that suggested that there is no fixed age after which a cow becomes useless.713 As the court quoted, “there is no data to

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712 *Kruse v. Johnson*, (1898) 2 QB 91 (Lord Russell of Killowen, Chief Justice).
713 The court cited a medical textbook and an article from a medical journal. It is unclear if these were produced as evidence before the court by the prosecutor’s or considered by the court by independently. The books used were J.B.
determine as to what is the percentage of the so called useless cows, bulls and bullocks. It is possible by exempting such cattle from protection there may be danger to even useful cows, cattle and bullocks”.

However, Buddhu’s writ petition got a more attentive hearing and saw more robust argument than did Haji Raza’s civil suit. The courts observed that the terms of Article 226 were very wide, and enabled the court to issue all manner of writs for the enforcement of rights. Justice B.B. Prasad wrote,

“[T]he fact that the constituent assembly has vested this court with vast powers imposes a heavy responsibility upon it to use them with circumspection. We must not be understood to suggest that in a suitable case this Court will be hesitant in issuing an appropriate writ, order or direction, nor must be understood to lay down that there is any universal or general principle which governs the grant and refusal of writs, directions”.

There was no requirement of notice in the case of a writ petition, and the petitioner (Buddhu) did not have to demonstrate the urgency of his case. All three judges agreed that the preliminary procedural objections to Buddhu’s suit should be dismissed. Moreover, Justice Raghuveer Dayal in his dissent invalidated the by-law on the grounds that it was beyond the competence of a municipality. He rejected the municipality’s claim that it was implementing the directive principles of state policy, stating that a municipality could implement these

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715 Justice Dayal would later be elevated to the Supreme Court of India.
principles only within its existing powers. Municipalities were given limited powers for a purpose, he argued, and do not have any general power to control people. The U.P. Municipalities Act provided that municipalities could regulate cow slaughter, and ‘regulate’ did not imply the power to prohibit completely. The municipality was within its powers in closing down slaughter houses, but could not prohibit a person from slaughtering cattle in any other place in the municipality.\textsuperscript{716} Moreover, he held that a by-law could only be a valid restriction of a fundamental right if it were for the purpose of promoting or maintaining the health and safety of the inhabitants of the municipality. The connection between the by-law and the purpose had to be immediate. Justice Dayal held that the municipality had been unable to demonstrate that its cattle slaughter tended to affect the safety or health of the inhabitants of the municipality in any direct way that was different from the slaughter of other animals. Buddhu was unsuccessful in his case, but the possibilities of a legal victory over municipal regulations clearly existed.

Justice Dayal’s minority judgment seemed to agree with the line that was taken in the few reported cases on by-law violations in Uttar Pradesh. Challenging the by-law prohibiting cow slaughter as \textit{ultra vires} the U.P. Municipalities Act appeared to become a common strategy for people arrested for violating the ban. In \textit{Balla’s} case, where several men in Saharanpur were arrested for violating the municipal by-law that prohibited cow slaughter, the High Court decided that the clause that provided the power of ‘regulating slaughter houses’ implied laying down the terms and conditions for their function, hour of operation etc., but not the power to prohibit the slaughter of a particular kind of animal.\textsuperscript{717} In another case from Meerut, ten Muslim butchers

\textsuperscript{716} S.238, Uttar Pradesh Municipalities Act, 1916.
\textsuperscript{717} \textit{Balla and Others} v. \textit{The State of Uttar Pradesh}, AIR 1956 All 335.
who were arrested for slaughtering a buffalo and selling its meat urged the by-law be declared void. 718

In the Hamid case, the Allahabad High Court noted that the Town Area Committee had passed a resolution that cattle slaughter be prohibited as the majority of inhabitants belonged to Vaish Jain, Vaish Agarwal and Brahman communities, which did not eat meat and found cow slaughter objectionable. The High Court held that the local authorities, such as the Town Area Committee, were set up to make better provision for sanitation and lighting and to improve living conditions. They were not competent to frame by-laws merely to satisfy the sentiments of the local population. 719 Moreover, the court conceded that though under special circumstances, prohibition may become necessary for the purpose of regulation, in general the power to regulate did not include the power to prohibit. The state could prohibit a trade or profession only if it were illegal, immoral or injurious to the health of the public. Justice Oak held that the profession of a butcher might be objectionable to some persons, but could not be said to be illegal or immoral in itself. The impugned by-law was invalidated, the ten accused acquitted and their fines refunded.

The High Court’s striking down of the bye-law was remarkable given that the U.P. Town Areas Committee Act expressly provided that “orders of the committee under sections 26 and 27”, under which the by-law was purportedly made, “shall be final and shall not be called into question in any court”. 720 The Court rejected the prosecution’s contention that the accused could not question the validity of the by-law, by pointing out that it was always open to the accused to

719 The Court considered the precedent of Buddhu v. Allahabad as binding in parts, but distinguished the case before them on the grounds that it dealt with a Town Area Committee set up under the Town Area Committee Act rather than a municipality set up under the U.P. Municipalities Act.
720 S.29 (1), U.P. Town Area Committee Act, 1914.
show that the order in question was not made under S.26 and S.27 and could not have been made validly by the Town Area Committee.

In this fashion, attempts at local regulation were upset through ‘low intensity’ litigation by butchers. While the arguments made by the state differed in each of the cases, the arguments made by the butchers were largely consistent. In almost every case, they initially claimed that the municipality had no power to prohibit slaughter through a by-law, and that the by-law violated Article 19(1)(g) of the Constitution.

Several butchers dealt with the new regulations by simply ignoring them. In 1952, the Gosamvardhan Committee discovered 45 unlicensed slaughter houses in just 9 districts of the State of Uttar Pradesh. Much of this illegal butchering, hide trade and sale of beef was carried out in the residences of butchers rather than in commercial premises, or in rural areas where effective policing was limited. Occasionally arrests were made for violating the by-laws but convictions were hard to secure. In Balla’s case, a number of butchers in Saharanpur had been arrested for contravening a municipal by-law which banned cow slaughter. They were arrested after a raid on their houses by a police sub-inspector, who had received information from a witness. It appeared to be a fairly routine case, in which both the witness and the sub-inspector were Muslims. The courts did not find any evidence to suggest that the accused had slaughtered a cow. The police raid recovered animal flesh in the homes of all the accused, and a kulhari (axe) and a knife in the house of one Abdul Rahman, neither of which facts led to the implication that the flesh was that of a cow, or that a cow had been slaughtered by the accused.

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722 The Sub-Inspector was A.A. Zaidi and the witness was a Tufail Ahmad.
The flesh was even sent to the police medical examiner for an autopsy but the doctor’s evidence on the origins of the flesh was inconclusive, and all the accused were acquitted.\textsuperscript{723}

Within the geography of legal orders, constitutional rights are largely located in national (and now supranational) statutes and are experienced by citizens as part of their national or supranational citizenship.\textsuperscript{724} Ordinarily, the police powers and mentalities of the liberal state tend to remain under the political radar, in part because they are largely exercised locally and often by those who are not regarded as part of the coercive apparatus of the state, but rather involved in issues of health, safety and welfare. Since the 1920s, local and municipal regulations had regulated cow slaughter which was determined by custom, local rights, and license agreements. However, by invoking constitutional principles to challenge municipal orders, the butchers were able to create a dialogue between the two orders, and to make constitutional rights local.

**The Shield of Legislation: Cow Protection in the Provincial Assembly**

As it became clear to the votaries of cow protection that local regulation was not sufficient to prevent cow slaughter, activists for the cause began bringing pressure to bear on the newly elected Central and State governments to pass legislation. The Cattle Preservation and Development Committee passed a resolution urging that cow slaughter be prohibited by law as the “prosperity of India depends on her cattle and the soul of the country can be satisfied only if cattle slaughter is banned completely”\textsuperscript{725}.

\textsuperscript{723} Balla and Others v. The State of Uttar Pradesh, AIR 1956 All 335.


\textsuperscript{725} India, *Report of the Cattle Preservation and Development Committee*, 12.
The challenge for legislation was threefold: the law could not be framed in majoritarian religious terms, it had to meet concerns for the economy, and it had to be designed to be effective.

The Central government circulated a piece of model legislation which recommended that the slaughter of cows be prohibited with exceptions made for animals over 15 years of age and those that were unable to work or breed. It also provided that all unlicensed slaughter be made a cognizable offence under law. The Central government, on the advice of the Ministry for Commerce and Industry, also warned against the indiscriminate prosecution of slaughter because of the effect it would have on the leather industry. The proposed regulatory system provided that any cow that was to be slaughtered had to have a certificate stating that it was fit for slaughter, signed by the District Veterinary Officer, a gazetted municipal government official and the President of the municipality. These officials were supposed to represent the local political authority and the technical expertise. The design of the legislation appeared ineffective. State bureaucrats noted that it would be difficult to apply in practice since it prohibited slaughter without a written certificate representing consensus between the President of the concerned municipality and the Veterinary Officer. The Bill further provided that if there was a difference of opinion between these two, then the cow could not be slaughtered. This implied that the proposed statute would not cover rural areas and thus the population’s likely response would be to relocate cattle outside municipal limits. The Chief Commissioner of Bhopal, a town with a significant Muslim population, doubted the practicability of a joint certificate between two officers, who would each be influenced by their community identity. There would in his opinion

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727 Saurastra Ordinance, Ministry of States/ L and A F.N 1 (6) L/50 [NAI]
be a perpetual difference of opinion when these officials were of different communities, leading to frequent appeals to the provincial government and resultant embarrassment.\textsuperscript{728}

The passivity of the Central government and Nehru’s resistance shifted the focus of attention to the State legislatures. The system of patchy local regulations also found disfavor with the cow protection lobby. The Gosamvardhan Committee, recommending State-wide legislation banning cow slaughter in Uttar Pradesh, noted that when local bodies had different regulations it leads to a “perpetual and fostering sore in the body politic”.\textsuperscript{729} Enacting a State-wide ban would be a “bold and decisive step” in the interests of “national harmony and national wealth”.\textsuperscript{730} Between 1949 and 1955, nine out of 14 Indian states enacted strict laws banning cow slaughter.

\textsuperscript{728} Note from N. Bonarji, Chief Commissioner, Bhopal to Under Secretary, Ministry of States, 21 November 1949, Prohibition of Cattle Slaughter – Recommendations Made by the Cattle Preservation and Development Committee, Ministry of States/ L and A F.N 1 (6) L/50 [NAI].

\textsuperscript{729} Uttar Pradesh, Gosamvardhan Enquiry Committee Report, 71.

\textsuperscript{730} Id.
Fig. 3.4. (U.P. Governor K.M Munshi’s moderate stance on cow slaughter is opposed by the bearded P.D. Tandon who is shown to be waiting in ambush with an axe.)

Perhaps the most comprehensive and controversial pieces of legislation came from Uttar Pradesh. Uttar Pradesh was India’s largest province and had for over a century been the centre of the cow protection movement. Uttar Pradesh also had the largest cattle population with over 32,763,327 cows. Leading members of the ‘cow protection’ lobby in the Constituent Assembly, like Seth Govind Das and Prof. Shibban Lal Saxena, had been elected by the U.P. provincial legislature. The ideals of the Congress Party in Uttar Pradesh differed widely from the

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731 Shankar’s Weekly, 10 May 1952.
Nehruvian vision of secularism.\textsuperscript{733} Purushottam Das Tandon, Congress President and Speaker of the U.P. Legislative Assembly, rejected Gandhi’s argument that banning cow slaughter through law would be a compulsion upon Muslims, akin to Pakistan’s banning idol-worship by Hindus. Tandon told the All India Cow Protection Conference that the country had been divided by Muslims to get a homeland of their own, and they were free to live there according to their religion, and Hindus could do likewise in India.\textsuperscript{734}

\begin{figure}[h]
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\caption{The Congress silences the Jan Sangh by enacting a cow slaughter ban} \textsuperscript{735}
\end{figure}

Uttar Pradesh, till the Partition, had been a power centre for the Muslim League, and though many of the Muslim League leaders had left for Pakistan, a substantial Muslim population remained in the State. In the aftermath of the Partition, U.P.’s Muslim political elite were anxious to integrate with the new order, and several Muslim League leaders joined the Congress party and were eager to fall in line. The U.P. Legislative Assembly set up an expert Gosamvardhan Committee to study the situation and make recommendations to the government.

\begin{footnotes}
\item[734] “Prevention of Cow Slaughter Urged”, PD Tandon Papers [NAI]
\item[735] Shankar’s Weekly, 22 May 1955
\end{footnotes}
This Committee resolved that “apart from the deep rooted religious sentiments of a very large number of the residents of U.P., it is not only desirable but imperative in the interests of national economy, national health and national goodwill to save, protect and improve the cow and her progeny... that cow slaughter should be totally banned”. The Committee considered and rejected the model Central legislation which provided for a partial ban on cow slaughter.

From a question that was settled by local custom or through administrative orders, the question of cow slaughter in independent India came to be managed through statutory law. With relatively little resistance, the U.P. Assembly enacted the Cow Protection Act in 1955. The U.P. Act provided that no person shall slaughter a cow or cause a cow to be a slaughtered at any place in Uttar Pradesh. The only exceptions were cows who were suffering from contagious diseases or animals required for medical and public health research. Most strikingly, the offence of cow slaughter was made both cognizable and non-bailable. A ‘cognizable’ offence is one for which the accused can be arrested without a warrant, and has to apply for bail before a court. It was the U.P. legislation and not the proposed Central law that became the model for laws other States. The Bihar assembly was originally considering a ban on cows below three years of age, but following the U.P. legislation, it widened the scope of the draft Bihar statute to provide for an absolute ban on cow slaughter. Similarly, the State of Madhya Pradesh enacted significant amendments to the Central Provinces and Berar Animal Preservation Act of 1951, bringing about an absolute ban on cow slaughter.

The constitutionality of the Uttar Pradesh Prevention of Cow Slaughter Act was of some concern to the Central government. The Governor of U.P. reserved the bill for the consideration

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736 Uttar Pradesh, Gosamvardhan Enquiry Committee Report, 74.  
737 S.4, Uttar Pradesh Cow Protection Act, 1950.  
738 The Bihar Preservation and Improvement of Animals Act, 1955.
of the President on the grounds of its repugnancy to the Code of Criminal Procedure. H. R. Krishnan, the Joint Secretary at the Ministry of Law, expressed doubt, from a “purely legal point of view”, whether the Supreme Court would approve of a law completely banning the slaughter of cows. Such a law he argued would be an infringement of the right to property as guaranteed under Article 19(1)(f) of the Constitution. Only reasonable restrictions could be placed on the right to property, in the interests of the general public, something that was ‘objectively ascertainable’. In order for the U.P. law to be held valid, Krishnan suggested that it categorize different types of cows and cattle and provide that certain kinds i.e. those that provide milk or draft power should not be killed. He further recommended that some kind of authority be set up to certify cattle that were outside the protected category. Alternatively, restrictions could be used to ensure that the manner of killing did not hurt ‘religious sentiments’. He was emphatic that clause 5 of the bill was poorly phrased, for instance, if beef were imported from outside the State, its sale could not be prosecuted under the proposed statute, as the State legislature did not have the power to ban the consumption of beef.

Krishnan’s opinion was supported by his immediate superior, K.Y. Bhandarkar, the Law Secretary. Bhandarkar emphasized that the Law Ministry interpreted Article 48 of the Constitution as requiring the prohibition of slaughter of useful cattle only. He insisted that a person who owns an uneconomic cow had a substantial right to kill it or “dispose of it through slaughter”, and this right was protected as part of the right to property in the Constitution. The provisions the Bill made for establishing institutions for uneconomic cows required fees to be paid by the owner. There was no provision that would allow the owner to sell the uneconomic

739 Ministry of Home Affairs: Judicial-I, File No 17/132/55-Judl (I), [NAI].
cow to the government, thus in effect the law was forcing the burden of an uneconomic cow upon the owner. Bhandarkar warned that this restriction was likely to be struck down by courts as unreasonable and not in the interest of the general public. He recommended that the President be advised to return the controversial bill for reconsideration, with the suggestions made by Krishnan incorporated; or if it were to be accepted, then the government of U.P. should be warned about the constitutional difficulties it would cause.

The advice of the two bureaucrats in the Law Ministry was overruled by the Law Minister, H.V. Pataskar, himself. Pataskar insisted that the U.P. bill was merely an attempt to carry out the goals set in Article 48 and that no “reasonable court” can regard this as a violation of a fundamental right.\textsuperscript{741} The President was advised to give his assent to the bill\textsuperscript{742}.

**Taking the Cows to the Supreme Court**

This, then – the above analysis of various maneuvers in the legislatures and the courts towards total prohibition of cow slaughter and in resistance to it – was the historical context for the *Qureshi* case that this chapter opened with. Against this backdrop, we may return to a more particular examination of this landmark litigation. In early 1956, twelve writ petitions were filed before the Supreme Court of India challenging the constitutionality of the Uttar Pradesh Cow Protection Act of 1955, the Bihar Preservation and Improvement of Animals Act of 1955 and the C.P. and Berar Animal Preservation Act of 1949. The petitioners taken altogether were 2,500 Muslim men belonging to over a hundred villages across the states of Bombay, Madhya Pradesh (both contained territories of the former Central Provinces), Uttar Pradesh and Bihar.

\textsuperscript{741} Pataskar was a long-term member of the Congress Party, had a successful legal practice before the Bombay High Court and the Supreme Court and had been a member of the Constituent Assembly.

\textsuperscript{742} The Ministry for Agriculture concurred with the Law Ministry. See ‘Memorandum from A.B. Lal, Under Secretary, Ministry of Food and Agriculture,’ 19 October 1955, Ministry of Home Affairs: Judicial-I, File No 17/132/55-Judl (I), [NAI].
The petitioners in *Hanif Qureshi* made four constitutional claims. They alleged that the Act, particularly its clauses that placed an absolute ban on cow slaughter, infringed their fundamental rights under Article 19(1)(g) of the Constitution to carry on their respective trades, as butchers, hide curers, bone and guts dealers and exporters of cattle. A total prohibition on their trades could not be a reasonable restriction in the interests of the general public as contemplated under the Constitution. They argued that the law violated the right to equality guaranteed under Article 14, as it discriminated between butchers who slaughter cows, and those that slaughter other animals. They argued that it forbade them from carrying on their legitimate trade or business, thus depriving them of their property without compensation and violating Article 31 of the Constitution. Finally, they argued that the total ban also violated the fundamental rights guaranteed to the petitioners under Article 25 of the Constitution which promised ‘freedom of belief’, by not permitting the sacrifice of a cow on the occasion of Eid-ul-Fitr.\footnote{Writ Petitions No, 136 of 1956, 128 of 1956, 144 of 1956 and 129 of 1957 [SCRR]}

**Religion versus Profession**

Of the four constitutional challenges to the proposed U.P. legislation summarized above, the first two (based on the freedom of trade and profession and the right to equality) were relatively new legal gambits that had been attempted with a limited degree of success in the cases involving municipal regulations. The argument rooted in religious freedom was possibly the most successful strategy up till this time and dated back almost a century. Litigation on the eve of Independence made it clear that Muslims believed that they enjoyed freedom of religion under the British Crown, and that this included the right to sacrifice the cow on Eid. Article 25(1) of the Indian Republican Constitution provided that “subject to public order, morality and health, all persons are equally entitled to freedom of conscience and the right to freely profess, practice
and propagate religion”. It was always expected that a challenge to cow slaughter would come from Muslims, because it affected their religious practices. As mentioned elsewhere in this chapter, Gandhi’s main argument for not bringing in the ban through legislation was that this would be a form of religious compulsion on Muslims, analogous to banning idol worship for Hindus.

However, the Qureshis, the petitioners in Hanif Qureshi gave this argument comparatively little importance. The Article 25 (freedom of religion) challenge was the last of the four challenges in their petition and took up a single paragraph (para 24). There was little attempt made by the petitioners to substantiate this claim in the petition or before the court. The Qureshis were uninterested in getting permission to sacrifice the cow once a year on the occasion of Eid, they wanted instead to ensure the continuation of their livelihood. However, it appears this was not obvious to contemporary actors, nor has it struck later commentators. Chief Justice S.R. Das expressed his exasperation at the absence of material before the court to substantiate the claim that it was the religious practice of the petitioners’ community to sacrifice the cow.

“No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah XXII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us

by any Maulana explaining the implications of those Verses or throwing any light on this problem”.

In the absence of expert evidence, the Supreme Court magnanimously delved into Islamic law itself, through Charles Hamilton’s commentary on the *Hedaya*. The Court noted that the *hadith’s* held that it was the duty of every free adult Muslim to sacrifice on Eid. The sacrifice established could be a goat per person or alternatively a cow or a camel for a group of seven. The court interpreted this to mean that Muslims had the option of sacrificing seven goats or a camel instead of a cow. Since there was an option, the sacrifice of the cow could not be said to be obligatory. The U.P. State government, represented by Harish Chandra Agrawal, the Assistant Superintendent of the Animal Husbandry Department, countered this by stating that many Muslims sacrificed other four legged animals such as sheep, goats and rams. Further, the Gosamvardhan Committee, that had recommended the absolute ban on cow slaughter, had three ‘eminent’ Muslim representatives who did not see a violation of religious practice in the prohibition of cow slaughter. The court accepted that there was wide divergence in practices of sacrifice, and noted that several Muslim rulers like the Mughal Emperors Akbar and Jahangir, the Bahmani Sultan Ahmad Shah, and Nawab Hyder Ali of Mysore had all prohibited cow slaughter in their realms.

The court recognized that while a household of seven members could afford to sacrifice a cow, perhaps they might not be able to afford a sacrifice of seven goats; however, this would be an economic compulsion and not a religious compulsion, and therefore was not protected by the Constitution.

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The court went on to hold that Article 25 of the Constitution only protected what were the ‘essential features’ of a religion and cow sacrifice could not be said to be an essential feature of Islam. Supreme Court doctrine had established that while the state may not interfere with the essential practices of a religion, it could restrict ‘extraneous factors’. That the courts were the final authority in determining the essential features of a religion, as opposed to those who practiced the faith, was a colonial inheritance dating back to the implementation of religious laws by a secular judiciary.

The court very comfortably engaged in examining Hindu religious texts in an attempt to determine the reasonableness of the restrictions upon the trade of the petitioners. Article 19(6) of the Constitution protected laws which imposed a restriction in the ‘interests of the general public’ on the right to practice one’s trade and occupation, guaranteed under Article 19(1)(g). The Supreme Court had previously held that the test for reasonableness of the restriction had “no abstract standard or general pattern” and required “the purpose of restrictions imposed, the extent and urgency of the evil sought to be remedied, and the prevailing conditions of the time”, all formed part of the judicial verdict. The court recognized that it was “inevitable that the social philosophy and scale of value of the judges would play an important part” but added that this must be limited by the “sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have in authorizing these restrictions deemed them to be reasonable”. The court noted that the impugned acts were to ensure the preservation of the cow, “a solicitude that arose out of the appreciation of the usefulness of cattle in a predominantly agricultural society”. It then

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proceeded to investigate the origins of this appreciation of cows, noting that early Vedic texts evidenced the prevalence of cow slaughter. In their narrative, the cow came to acquire a special sanctity owing to the shift from pastoralism to agriculture. The court went on to quote hymns from the Vedas in praise of the cow, for instance, Verse 29, Hymn 1 of Book X of the *Atharva Veda* states, “the slaughter of an innocent, O Kritya, is an awful deed, slay not cow, horse or man of ours”. The Court also quoted hymn 10, a “rapturous glorification” of the cow:

“The cow is heaven, the cow is earth, the cow is Vishnu, Lord of Life,

the Sadhyas and Vayus have drunk the outpourings of the cow

Both gods and mortal men depend for life and being on the cow

She hath become the Universe, all that the sun surveys is she”.

The court used these hymns to argue that even though there had been cow killing in ancient India, only barren cows were killed, and the custom was soon abolished. Finally, they went held that “there can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has even led to communal riots”. They emphasized that constitutional questions could not be decided on the grounds of mere sentiment. However, they acknowledged that sentiment had to be taken into consideration as one of the many elements relevant to determining the reasonableness of restrictions.

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750 The court resorted to amateur linguistics to argue the value of cattle. Cattle in Sanskrit were called *Pasu*, which was similar to the Latin word *pecus*, the root for the English words 'pecuniary' and 'impecunious'. According to the court’s reasoning, the Latin *pecus* was also derived from cattle and emphasized its value. The court referred to the Hindu epic the *Ramayana*, to the *Arthashastra* (the classic Mauryan treatise on political economy), and to works on Hindu law, all of which evidenced the importance of cattle.
There is little evidence to suggest that the submissions regarding Hindu beliefs in the sanctity of the cow were made by the respondents. Indeed, the only possible allusion the State made in its counter affidavit was the assertion that the impugned statutes had been enacted by democratic bodies. Some of the arguments on Hindu religious beliefs might have come from the intervener, Pandit Thakurdas Bhargava, whose submissions have not been preserved. However, it is far more likely that these were the interventions of the judges themselves. New histories of the practice of law have revealed ways in which non-European lawyers and judges in the colonies often functioned as “cultural translators and ethnographic intermediaries”, using their authority as ‘natives’ to make legible cultural and religious practices. The Supreme Court, in its early years, shared the modernizing nationalist impulses of the Nehruvian state and sought to rationalize religion. All six judges on the bench were upper-caste Hindus and at least two were noted Sanskrit scholars. A recent study of Justice Gajendragadkar, one of the judges concurring with Chief Justice Das, revealed a long history of engaging in reform projects to which he was personally attached, from the bench. That the judges were insiders to Hinduism and outsiders to Islam is clear from their use of sources. To examine Islamic law the judges turned to the Hamilton translation of the *Hedaya*. The authority of the *Hedaya* was a result of the pruning and simplification of Islamic law by British colonial courts over centuries. When the colonial courts began to administer Islamic law in the late eighteenth century, they chose to rely on the *Hedaya*, a medieval manual of Hanafi law. Compared to other medieval Hanafi *fiqh* texts, the *Hedaya* did not consistently provide the logic and reasoning behind the rules of the school.

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Instead of relying on the original Arabic text, the courts relied on Charles Hamilton’s English translation of a Persian translation of the original. This four-volume text itself was pared down in the 1870 edition in the interests of cost and utility, and the portions “more interesting to the antiquarian… than useful to the practitioner” were expunged.\(^754\)

In contrast, when considering Hindu law, apart from references to original Sanskrit sources, the court chose to rely on Das’s study of Rig Vedic culture and Pandurang Kane’s work on the \textit{Dharmasastras}\(^755\). Both were nationalist scholars who had delved into ancient Indian history with the aim, at least in part, to recapture the glory of a lost civilization.

The decision was framed around the question of denying that Muslims were required to sacrifice the cow on Eid while recognizing Hindu sentiments against such sacrificial, or any other, slaughter of cattle. This dominant theme was emphasized in contemporary commentaries in both the legal sphere and in the general media. Bombay lawyer Rafiq Zakaria wrote in his legal column in the English daily, \textit{The Times of India}, that the Supreme Court in “one of the bulkiest judgments” ever delivered, had “said that the sacrifice of the cow is not an obligatory overt act for a Mussalman to exhibit his religious belief and idea” and that the ban on cow slaughter was not a denial of Muslims rights to “freely profess, practice and propagate religion”.\(^756\) Soon after, V.K.S. Chaudhari, an Allahabad lawyer, wrote in the AIR Journal (the most popular law reporter by number of subscribers), that the judgment was “remarkable in many ways for its breadth of vision”, and had concluded that the impugned Acts did not infringe the fundamental rights of Mussalmans in respect of their religious beliefs or violate Article 25(1).


Much of the progressive critique of the judgment has also centered on this theme, arguing that the judgment cloaked majoritarian impulses and did not accommodate minority religious identity. Upendra Baxi in a masterful review of the judgment identified the first major contention of the petitioners as violating the freedom of religion. He argued that while the Court applied rigorous methods to ascertain the relevant Islamic precepts, these were not extended to the determination of the origins and history of the Hindu reverence for cows, and of the legitimacy of its claimed centrality to Hinduism. Baxi thus critiqued the judgment for its lazy assumption that Hindu reverence of cows was an “indubitable fact”. He sarcastically suggested that the only drawback in the Muslim petitioners’ case was that they had not agitated sufficiently to win judicial sympathy or “judicial cognition of their sentiment”. Similar arguments were echoed more recently by Salman Khurshid, lawyer, historian and Union Minister for Minorities.

**Economy versus Identity**

The Hanif Qureshi decision has been interpreted through the traditional lens of Hindu-Muslim conflict, in which Muslims have been deemed to have lost a significant right that they enjoyed in colonial India. Empirically, this might well be true, but what is often missed is that the 3,000 odd petitioners in the case were not invested in making and winning the argument on freedom of religion, and neither were they particularly interested in securing the right of qurbani (sacrifice) on Eid. This difference between the ‘religious conflict’ frame and the reality of the petitioners’ aims and interests is prominently visible if we compare the petitioners’ presentation

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758 Upendra Baxi, “‘The little done, the vast undone’- Some Reflections on Reading Granville Austin’s The Indian Constitution,” *Journal of the Indian Law Institute* 9 (1967): 348.
of themselves in the writ petition with the Supreme Court’s way of recognizing – ‘reading’ – such presentation and the petitioners themselves.

In the petition submitted to the Court, the petitioners “respectfully sheweth”, that they are “members of the Qureshi community and they are also citizens of India”. They identify the Qureshi community as numerous and “an important section of the Muslims of this country”. The petition then goes on to list the various professions the members of the community are engaged, i.e. the butcher’s trade and subsidiary undertakings like supply of hide and skin, tanning, curing hides, glue making, gut merchants, blood dehydrating etc. The Supreme Court in its judgment on the other hand identifies the petitions as “citizens of India, and Muslims by religion, [who] mostly belong to the Qureshi community and are generally engaged in the butcher’s trade”. The reversal of the order of phrases is crucial, since the Court sees the petitioners as Muslims first and Qureshies incidentally, whereas for the petitioners, it’s their Qureshi identity and their profession that are most significant. Their reference to their faith is only to emphasize their dominant role amongst Indian Muslims.

It is significant that the legal challenge to the cow slaughter laws came from the Qureshies and not other Muslim groups. While applications to intervene in the case were put forward by Hindu groups like the ‘Bharat Go-Sevak Samaj’ (‘India Cow Service Society’), the All India Anti-Cow Slaughter Movement Committee, the ‘Sarvadeshik Arya Pratinidhi Sabha’ (the ‘International Arya Representative Organization’) and the Madhya Pradesh ‘Gorakshan Sangh’ (‘Cow Protection Society’), no petitions were filed by other Muslim groups. The absence of religious scholars and Muslim politicians was telling. Moreover, as the respondents stated in their counter petition, the three Muslim members of the Gosamvardhan Enquiry Committee had supported the absolute ban on cow slaughter. These three members, the Nawab of Chhatri,

760 Petition, Writ Petition 144 of 1956 [SCRR].
Akhtar Hussein and Prof Mohd. Habib, all represented what could be termed as ‘leading men’ among U.P. Muslims. The Nawab of Chhatri, Ahmed Said Khan, was one of the largest landlords in the province, had been a member of the Muslim League before Independence and had served as Premier of U.P. and of the State of Hyderabad. Akhtar Hussein, was a Congress Party M.P. nominated to the Upper House of Parliament. Prof. Mohd. Habib was a politically active professor of history at Aligarh Muslim University, the intellectual home for North Indian Muslims. Habib was also a member of an illustrious family whose immediate members included leading lawyers and judges in Allahabad, the Vice-Chancellor of Jamia Millia Islamia (the other major Muslim university) and close associates of Mahatma Gandhi.

The ban on cow slaughter on Eid was inconvenient to poor Muslims, and humiliating to Muslims in general, but given the changed political dynamics in North India, traditional Muslim representatives were being accommodating. The Qureshis however could not afford the luxury of such accommodation. The ban on cow slaughter hit them most directly. When cow slaughter was banned in the Central Provinces, over 200 butchers were left without jobs. One butcher facing economic ruin reportedly killed himself by jumping into a well; others demanded alternative employment from the government.\(^{761}\) There was a great diversity among the litigants who went to court to challenge cow slaughter bans in colonial India. In almost every case filed after Independence, the petitioners self identified as butchers, were marked by their names as Qureshis or were found slaughtering the cow for food or were in the possession of beef.

The Qureshis are a caste group within South Asian Muslims that was engaged in the meat trade. They were known by slightly different names across North India. In Bihar for instance, the Anthropological Survey identified them as Kassab, a class of Sunni Muslim butchers who deal with slaughtered cattle, within which Qureshis formed a subgroup. Etymologically, Kassabs

were those who slaughter cows or buffaloes, whereas those who slaughter goats or chickens were known as *chiks* or *chikwas*. In Uttar Pradesh, those practicing the profession of were as Kasais, and were engaged in the slaughter of big animals like buffaloes and cows. The numbers of Kasiass were concentrated in the districts of Allahabad, Azamgarh, Ballia, Ghazipur, Gorakhpur, Basti, Deoria, Jaunpur, Mirzapur, Lucknow, Barabanki and Varanasi. In Western U.P., they lived in Meerut, Saharanpur, Badaun, Bulandshahr and Moradabad.\(^{762}\)

In the petition in *Hanif Qureshi*, the Qureshis identified themselves by their individual trades; though the vast majority was butchers and meat vendors, others identified as hide merchants, gut and bone merchants, tanners, and blood dehydrators. Some also identified as peasants and agriculturists. They mostly spoke ‘Bhojpuri’, a dialect of Hindi. The Qureshis were *ajlaf*’s or of common birth, unlike most Muslim political leaders who belonged to the *ashraf* (aristocratic) classes and spoke Urdu. A report from the Anthropological Survey of India in 1992 indicated that Qureshis had always had poor literacy rates, and limited access to state services like education, healthcare, drinking water and financial services. They owned few consumer goods and saw themselves as socially and educationally backward, expressing an eagerness for government benefits.\(^{763}\) By the 1990s, they were identified as part of the Other Backward Classes (OBC), a category that benefits from government affirmative action policies.\(^{764}\)

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\(^{764}\) Under Article 340 of the Constitution of India, the government is required to set up a commission to investigate the condition of socially and educationally backward classes and to take steps for their welfare. Since 1950, the Central government maintains a list of groups that it identifies as socially and educationally backward. The list is dynamic; groups and communities can be added or removed depending on their development. Among other benefits, backward classes have quotas reserved for them in public sector employment and higher education.
The Qureshis might not be represented in the hierarchy of the mainstream political parties but were very well organized. As the Anthropological Survey noted, in Bihar they were a close knit body and had their own elected *anjuman* (Panchayats) which determined internal matters. Decisions of the local *anjuman* could be appealed to a *chourasi*, which comprised *anjumans* of the neighboring districts. The Uttar Pradesh Qureshiss had local caste councils headed by a *chaudhary*. The Qureshis had also constituted themselves into a registered organization called the ‘Jamiat-ul-Quresh’. The All India Jamiat-ul-Quresh was founded in 1926 by Qureshis from Meerut and Delhi to improve the position of the community, similar to other community based organizations that were set up around the time. Unlike other caste-based or communal organizations, for the Qureshis the linkages between caste identity and livelihood were very strong, making the community active interveners in questions about the meat industry. The twelve petitions in *Hanif Qureshi* were clearly influenced by the Jamiatul-Quresh, indeed the organization is mentioned in the first paragraph of the petition, as one that looks after the interests and welfare of the community. Several office bearers of the state jamiat’s appear as individual petitioners. A year before the filing of the petition, during the course of the debates over the U.P. Cow Protection Act, the 29th All India Jamiat-ul-Quresh conference had been held in Bombay. The lead speaker, M.N. Lakhanpaul, the President of the All India Guts Manufacturers Association had addressed the 700-odd delegates on the need to redress their grievances through persuasion and a “spirit of understanding and friendliness”.  

This was despite the provocation created by members of the All India Hindu Raj Party who had barged into the conference shouting slogans and demanding the stoppage of cow slaughter. The Qureshis also underscored their backward status. Haji Akhtar Hussein, in his presidential address to the conference, said that the community deserved preferential treatment including reservation.

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of seats in the legislatures and educational institutions to speed up their progress. He appealed to
the State governments to “think twice” before imposing legislative restrictions on their
profession.766

Clearly, the desire to “redress their grievances through persuasion”, coupled with their
extraordinarily effective organization was instrumental in getting 3,000 petitioners to file before
the Supreme Court. The petitions were filed within months of a national meeting and had a wide
geographic representation. They were filed before the Supreme Court at Delhi invoking its
jurisdiction under Article 32, rather than filing it before the respective High Courts of each State,
clearly marking this as a national campaign. Writ petitions were filed by individuals to meet their
individual grievances. In Bulsara’s case, for instance, the direct remedy sought was an individual
license to drink. Attempts at representative suit by butchers under Order 1, Rule 8 of the CPC
had already been struck down by the Allahabad High Court in Ahmad Raza’s case.767 Therefore
to make a case for the harm the ban on cow slaughter caused to the community, the Qureshis had
to appear in numbers before the Supreme Court.

Their economic woes were center-stage and they spent the first half of their petition
explaining their business positions and role in the economy. They asserted that they were a very
important feature of the country’s economic and social life and played a crucial role in the
people’s food supply and meeting other essential requirements. As the petition from Rampur
noted, the butchers amongst the petitioners used to slaughter around 150 cattle per month prior to
the Act coming into force. These, they emphasized, were buffaloes, bullocks (castrated male
bulls) and old bulls and heifers. The average price of these animals ranged from Rs. 30 to Rs. 50.
It was rare for a fertile milch cow to be slaughtered as its price ranged from Rs. 300 to Rs. 500.

766 Id.
767 Haji Ahmad Raza and Others v. Municipal Board, Allahabad, AIR 1952 All 1.
They outlined the interconnectedness of transactions by noting that while the meat was sold to Muslims, the guts and hides were sold to gut and hide merchants respectively. Haji Amjad Ali, a hide merchant, explained that after buying the hides from butchers and curing them with salt, he would export them to the cities of Bombay and Madras where they would be tanned. They submitted that the impugned cow protection Acts, in particular S.3 among their provisions which banned cow slaughter absolutely, was a “hostile and discriminatory piece of legislation” directed against the Muslim community, in particular the Qureshis. The Qureshis argued that they numbered over 2,000,000 persons across the country, and depended solely upon the slaughter of cows and the buying and selling of cattle. The petitioners argued before the court that if the sale of cattle for slaughter were prohibited, they would have to acquire seven goats or sheeps to make up for each cow or buffalo they would have slaughtered. Statistics produced before Court showed that 18,93,000 cows and 6,09,000 buffaloes were slaughtered in India in 1948, which would have to be replaced by 1,75,14,000 extra goats or sheeps each year, a number that was not available in India. 768 This meat would be more expensive than beef and out of reach of most poor people, consequently reducing both the market for meat and the petitioners’ incomes. Further, goat and sheep hides and guts could not be used as effectively for the manufacture of secondary products. The petitioners argued that the Constitution permitted the state to impose reasonable restrictions upon the right to trade or profession in the interests of the general public, but these could not extend to total prohibition. As the court stated, “the contention was that the state may regulate but cannot annihilate a business which a citizen has a right to carry on”. This argument was very similar to the one successfully made in Buddhu’s case and in Mangru Meya’s case challenging the municipalities’ ability to prohibit an activity which it had the power to regulate.

768 India (Republic), Report on the Marketing of Cattle in India (Delhi: Published by the Manager of Publications, 1946).
The above argument, emphasizing economic hardship, practical concerns for the national economy, and the freedom of trade and profession, was not successful in court, as the judges were unable to understand who the Qureshis were. The judges argued that the dictionary meaning of a butcher was the “slaughterer of animals, dealer in meat”. It was a familiar occupation, they reminded the public, memorably included in the “homely phrase, the butcher, the baker and the candlestickmaker”. The profession of the butcher, they opined, could not be linked to a particular animal. Chief Justice Das drew an analogy to the retailers of clothing – some may sell indigenous cloth, others may import clothing from England or Japan. However they are all clothing merchants. A hypothetical piece of legislation in the interests of protecting the indigenous textile industry that stopped the import of foreign cloth would not prevent a clothing merchant from carrying out his business, but would merely require him to sell other items. Similarly, he continued, if the state sought to encourage khadi (home spun cotton) and banned the sale of fine muslins, it could not be said to prohibit the business of clothing retail. The analogy of cloth was particularly powerful given, given that a campaign against foreign cloth and the production of khadi had been central to the Gandhian project and the national movement, seeking to produce economic self reliance and nationalist pride.769

Chief Justice Das turned to the acts in contention and examined what they actually prohibited. In Uttar Pradesh the petitioners could freely slaughter buffaloes and if they wished could also slaughter goats and sheep, so there was no prohibition on their occupation. In Madhya Pradesh, the Act permitted the slaughter of some buffaloes under certain conditions, which could not be said to be a complete ban on the profession a butcher. Finally, in Bihar, while there was a total ban on cattle slaughter, it was still open to the butchers to slaughter goats and sheep and sell mutton. Therefore, there was no total prohibition of the rights of butchers to carry on their trade

and occupation. The courts did not seek to understand caste differences among the Qureshis, that there were differences between *kasais* who slaughtered big animals and *chikwas* who slaughtered chicken and goats. They echoed the government counter affidavit that suggested that the hide merchants could continue their trade from hides obtained from cows and bulls who died of natural causes. The Qureshis had stated in the petition that cultural taboos prevented members of the “petitioner community” from touching the carcasses or skin of animals that have not been slaughtered in the proper way according to *halal* rules. They pointed out that the collection of hides from fallen animals was usually done by untouchable Hindu groups, like the Chamars.

The court chose to treat the category of ‘butcher’ as an independent economic agent who was free to adapt his methods to the shifting contours of regulation. The court was caste blind and ignored the limits placed by economy and community which circumscribed the Qureshis’ ability to branch out to the slaughter of other animals.

**Making Economic Policy in the Supreme Court**

Although the Supreme Court in *Hanif Qureshi* seemed to have disposed of the question of fundamental rights fairly neatly, the cow slaughter laws continued as a significant cause of concern for them. This unease did not arise from the fundamental rights challenges made by the Qureshis but from the questions of policy they had raised. The Qureshis turned to the wording of Article 48 in the Constitution and argued that it consisted of three different directives. The directive that sought to prohibit the “slaughter of cows, calves and milch and draught cattle” was subordinate and ancillary to the provisions that came before it, namely, “organizing agriculture and animal husbandry on modern and scientific lines” and “preserving and improving the breeds

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of cattle”. The Qureshis argued that the complete ban on cow slaughter would be wasteful. In substantiation, they referred to a circular issued by the Central government that stated,

“[A] compulsory ban on cow slaughter would lead to a lower standard of cattle life in the country. Nearly 40 million cattle in the country do not give milk and are a drain on available fodder and other cattle food. Their maintenance entails enormous expenditure making it impossible to provide the care and nourishment to productive cattle which is required to improve their milk capacity and traction power. The result is that even productive cattle gradually deteriorate and cease to be productive”.

The petitioners thus attempted to rob the state legislation of some of its democratic sheen, by pointing out that the national Parliament had rejected by an overwhelming majority the bill moved by Seth Govind Das that advocated a complete ban on cow slaughter.

In order to demonstrate that the restriction of their rights that would result from the impugned laws would not be a restriction in the interests of the general public, the Qureshis pointed out that it deprived a large section of people a cheap source of food i.e. beef, and that these people had “suffered loss and hardship” as a consequence of the disappearance of essential articles. They argued that the measure was uneconomic given that a considerable portion of cattle served no economic purpose and were a drain on the food supply. Attacking arguments that linked cattle to milk supply, they pointed out that an increase in cattle between 1945 and 1951 due to a reduction of cow slaughter had not led to a significant increase in milk supply. The

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771 Written Reply in Union Minister for Food and Agriculture placed before the Lok Sabha, 5 December 1953, [SCRR].
number of cows had increased from 136,739,000 to 155,099,000 while the average yield of milk remained around 413 lb per annum. In fact, buffaloes accounted for 54% of the milk supply and were not protected under the Uttar Pradesh and Bihar Acts. Milk supply depended on quality of cattle and not numbers, and cows were not the main source of milk in India.

The modernization of agriculture and the introduction of tractors, both goals pursued by the government and as such a part of many development policies, were reducing the usefulness of cattle in agriculture. The total ban on cow slaughter would also damage the leather trade, given that the hide obtained from dead animals was not suitable for high quality leather goods. Further, the ban would effectively end several industries, such as gut making, glue making and blood dehydrating which were dependent on the by-products of the cow.

Finally, Mohd. Siddiq of Rampur, who identified himself as a cultivator, alleged that he was finding considerable difficulty in protecting his crops from the ravages of hoards of uneconomic and abandoned cattle that were roaming the countryside, “unclaimed by any one and which could be destroyed by no one”. He complained that he had to now make arrangements to keep a day and night watch over his fields, and pointed to several crops that had been damaged by rampaging cattle.

The Supreme Court was placed in a quandary over how to evaluate these claims. Unlike a trial court, or even the High Courts, the Supreme Court was not a court of first instance. It did not have the powers to take evidence, listen to witnesses or allow cross examination. The lawyers for the State of U.P. challenged all the contentions of the Qureshis by referring to the findings of the Gosamvardhan Enquiry Committee Report. For instance, they noted that the cow never became economically useless. The Gosamvardhan Committee had pointed out that cow
dung would be available as long as the cow was alive, and the value of a ton of dried cow dung was equivalent to 155lbs of sulphate ammonia.\textsuperscript{772} It insisted that the question of whether an absolute ban on cow slaughter hurt the quality of cattle had been settled by the Gosamvardhan Committee, which had observed that “the absence of the ban on cow slaughter had been tried for years past with no appreciable results on the improvement of the cows, nor have uneconomic cattle been lessened with the freedom to kill”.\textsuperscript{773} The committee noted that bans to prevent the killing of useful cattle during the Second World War had not yielded satisfactory results, and it was an “open secret that cows of a good breed were rendered dry by a butcher’s knife”. The Committee had warned that permitting the slaughter of uneconomic cows would be used as a loophole, and there was a possibility that healthy cows would be maimed to attract mercy or pity. An absolute ban was thus considered the best way of reaching a final decision.\textsuperscript{774} Faced with competing claims, Chief Justice Das expressed his frustration, stating “that it was difficult to find one’s way out of this labyrinth of figures and it will be futile for us to attempt to come to a figure of unserviceable animals that may even be approximately correct”.

The Court did not allow petitions from partisan groups like the ‘Bharat Go-Sevak Samaj’ (‘India Cow Service Society’), the All India Anti-Cow Slaughter Movement Committee, the ‘Sarvadeshik Arya Pratinidhi Sabha’ (‘International Arya Representative Organization’) and the Madhya Pradesh ‘Gorakshan Sangh’ (‘Cow Protection Society’), on the grounds that Order XLI, Rule 2 of the Supreme Court only permitted the Attorney General of India or the Advocate General of the States to intervene in a case involving other parties, the exception being third parties that were already involved in similar cases before other courts. The court however

\textsuperscript{772} Appendix A, Uttar Pradesh, Gosamvardhan Enquiry Committee Report, 15.
\textsuperscript{773} Ibid., 71.
\textsuperscript{774} Ibid.
decided to exercise its inherent powers and invite Thakurdas Bhargava to intervene as *amicus curiae*, given the “importance of questions involved”. An *amicus curiae*, literally a friend of the court, was someone who was not a party to a case but volunteered to assist the court in deciding the matter before it, usually by submitting a legal brief bringing to the attention of the court information not provided by the parties. Thakurdas Bhargava was a successfully lawyer based in Hissar, East Punjab, and was a member of the Indian Parliament. More significantly, as member of the Constituent Assembly, Bhargava had authored Article 48 which brought cow protection into the Constitution as a directive principle. Over the years preceding the *Hanif Qureshi* case, Bhargava had campaigned and written on the subject of cow slaughter as a legislator and as a member of the Grow-More-Food Enquiry Committee.

The Court relied on Bhargava as a guide in its investigation of the impact of the total ban on cow slaughter on the national economy. To this end they turned to a number of reports by Central and State governments, chambers of commerce, scientists and agricultural economists, from which to distill the truth. These included the Report of Cattle Marketing, 1956, the Cattle Preservation and Development Committee Report of 1958, the Gosamvardhan Enquiry Committee Report of 1955, the First and Second Five Year Plans issued by the Planning Commission, publicity documents of the governments of Uttar Pradesh and Bihar, a Memorandum prepared by the Nutrition Advisory Committee of the Indian Council of Medical Research, and a report by the Indian Council of Agricultural Research. With the exception of the Gosamvardhan Committee Report, all the other reports were prepared by bureaucrats. As Shiv Visvanathan has argued, the bureaucratic report is one of the great literary forms of the twentieth century, which in the Indian context performs the role of the detective novel, interrogating both
individuals and a system\textsuperscript{775}. These bureaucratic reports and reports from Committees of Enquiry comprise what has been described as an ‘archive of democracy’ or a conversation between the citizen and the State.\textsuperscript{776}

Amongst the most significant sources of evidence before the Supreme Court was the Gosamvardhan Committee Report. The U.P. Cow Protection Act had been enacted following the recommendations of the expert Gosamvardhan Committee. The Gosamvardhan Committee, set up by the U.P. legislature in 1953 consisted of a number of legislators, police officers, academics and bureaucrats. The Committee was asked to investigate the trends of cattle population, examine the problem of improvement and preserving the cow keeping in mind available nutrition, develop methods to address the problem of stray and wild cattle and provide for better economic utilization of old and decrepit cattle, improve cattle breeds, ensure purity in dairy products and, finally, review existing regulations on cow slaughter.\textsuperscript{777} The committee, which functioned through its own secretariat, met regularly, went on investigative field trips, toured several districts and took evidence from a wide range of stakeholders.\textsuperscript{778} The committee provided a discourse of science by examining the nutritional value of cow’s milk, examined the chemical properties of cow’s milk, and assessed the chemical composition of cow’s milk.


\textsuperscript{777} Uttar Pradesh, \textit{Gosamvardhan Enquiry Committee Report}, 2.

\textsuperscript{778} The research for this data included visits to the Central Dairy Farm (Aligarh), the College of Veterinary Science and Animal Husbandry (Mathura), the Mechanized State Far at Madhurikund, and the Dairy at the Dayal Bagh Institute in Agra to learn about new technology. The Chairman and the Nawab of Chhatris visited the hide flaying and curing centers at Bakshi-ka-Talab at Lucknow. The Committee toured several districts of Uttar Pradesh, visited gosadans and goshalas (homes for abandoned cattle), issued questionnaires to the heads of all political parties, to various religious leaders, members of Central and State legislatures, all officers of the Indian Administrative Service serving within the States, the heads of department and Vice Chancellors of all universities, and several individuals. Further, 250 witnesses were examined by the Committee including S.C. Das Gupta, the author of the earliest scientific work on the cow in India; Seth Govind Das and Thakurdas Bhargava, the votaries of cow protection in parliament; the President of the Jamiat-e-Ulema Hind (association of Indian Muslim clerics) and the head of the influential Sunni Muslim seminary in Deoband; and Mira Behn, one of Gandhi’s closest associates.
composition of cow dung and cow urine, calculated the contribution of the leather industry to the national economy, and made the question of cattle slaughter commensurable.

The Gosamvardhan Committee’s work brought up some uncomfortable facts. Drawing on the Report on the Marketing of Cattle in India issued by the Ministry of Food and Agriculture, the Supreme Court discovered that while India had the largest number of cattle in the world, it ranked amongst the lowest in milk production. The data produced by the Five Year Plans showed that the average yield of milk per cow in India was 413 pounds, which was about the lowest in the world. It also confirmed the truth of the allegation made by the Qureshis that buffaloes provided more milk than cows and that it was also richer in fat (6 to 7% compared to 4 to 5% in cow’s milk). The Memorandum of the Nutrition Advisory Committee noted that from an economic point of view there was no justification for maintaining animals yielding less than 2 pounds of milk. This would eliminate 90% of all Indian cows, and if milk yield were the only criterion, the comparatively smaller number of buffaloes who produce 54% of the milk should be given preferential treatment.

Cow protectionists had struggled with the obvious economic advantage the buffalo had over the cow. The Gosamvardhan Committee had to grapple with the view that it was wasteful to retain two species of domestic animals when one could meet the demands of both milk and draught. The Committee noted that since farmers with small holdings can’t afford to maintain both animals, they give preferential treatment to the buffalo. It argued from this that ‘natural’ economics ensured the buffalo would be maintained in any case, whereas the cow required specific intervention. The Committee attempted to explain the advantage the buffalo had in terms

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777 In comparison a cow yielded 8,000 pounds of milk in the Netherlands, 7,000 in Australia and 5,000 lbs in the USA.
of a greater yield of milk, with a higher butter fat percentage, and a better use of coarse fodder, but also asserted it was unfair to compare the pampered buffalo with the neglected cow. They quoted Gandhi, who observed,

“[W]e have a weakness, in a way it is common to all mankind but it is a special trait of Indian character that we readily take to things which are easy to get and give up things that are difficult. In khadi, village industries people seek cheapness and convenience. People relish buffalo’s milk because it is sweet and cheap”.

By comparing the buffalo with foreign cloth (the original scourge of the Indian nation) Gandhi invested protecting the uneconomic cow with the value of a moral national duty. Gandhi had even suggested that buffalo breeding be given up, and that the buffalo “liberated from human bondage”. The Committee actually attempted to downplay the quality of buffalo milk by suggesting that it was preferred by milkmen because it was easier to adulterate.

Thakurdas Bhargava played a pivotal role in convincing the court that the cow was useful for meeting the power requirements in agricultural production as well. Based on “age old experience”, most Indian farmers preferred cow bullocks to male buffaloes. Bhargava even attempted to justify the fact that cows were more numerous than buffaloes in the census on the basis of “evolutionary selection”. In the background was, of course, the fact that it was the cow that was believed to be sacred and not the buffalo.

780 Uttar Pradesh, Gosamvardhan Enquiry Committee Report, 12.
781 Gandhi, Address to Gosewa Sangh, 1930
The court spent considerable space in its judgment discussing the utility of cattle dung, the one output even old and dry cows were prolific with. The court approvingly cited the First Five Year Plan that recorded that 800,000,000 tons of dung were available per annum, and were utilized as both fuel and manure. Cattle urine was rich in nitrogen, phosphates and potash and good for the fertility of the field. Thakurdas Bhargava, as *amicus*, claimed that cow dung contributed Rs. 630,000,000 a year towards the national income. The court was convinced of the economic utility of the cow, which “sustained the health of the nation” through milk, an essential part of a “scientifically balanced diet”. Without a hint of irony they quoted British Viceroy, Lord Linlithgow’s statement, “that the cow and the bullock have on their patient backs the whole structure of Indian agriculture”.

The economic analysis of the problem brought up two other uncomfortable facts. The Court had been able to reconcile its position with the fact that the bans would in practice “cause considerable inconvenience and expense” to the Qureshis. There were already precedents for the state blocking avenues of livelihood for hundreds of citizens without any compensation, as in the case of bus transport nationalization.

The court could not ignore that beef or buffalo meat was an item of food for a large number of people. The Reports for Marketing of Cattle in India showed, contrary to the claims of the government that beef was not popularly consumed, that the annual demand for cattle for the purposes of food included 1,893,000 cows and 6,90,000 buffaloes. The court noted that beef was a common part of the diet of poorer Muslims, Christians and members of the Scheduled Castes and Tribes. Here, the cow scored higher over the buffalo, with buffalo flesh being

comparatively coarser and tougher than beef. The prices of beef were also considerably lower than goat and mutton, for instance in 1950 the price for beef in Bombay was Rs. 00.12 a pound as compared to Rs.1.30 for mutton and goat. The counsel for the Qureshis pointed out that in the case of several boarding schools, beef was the only meat the school authorities could afford to supply to meet the needs of growing children. If the Acts were to be enforced, it would preclude such children from having “even this little bit of nourishment and amenity”. The court noted that the Memorandum of Human Nutrition recommended meat as a necessity rather than a luxury, particularly for people who were too poor to afford fruit or clarified butter.

Secondly, the court confirmed the Qureshi claim that the survival of a large population of non productive cattle would burden the scarce fodder and feed resources of the nation.\(^{786}\) They even noted that the then-current estimates of available fodder, which showed shortfalls from 13% to 70%, were made on the assumption that forest resources would be fully utilized, an achievement that was administratively difficult and monsoon - dependent. The Court took seriously Mohd Nasim’s complain about rampaging hordes of wild cattle. Given the shortfall in feed, and lack of economic benefits from old cows, it was unsurprising that many cows were abandoned by their owners. The Court noted that “these old and useless animals roaming about at pleasure are a nuisance, a source of danger to the countryside ...and a menace to crop production”. The government’s proposed solutions were deemed unsatisfactory. The Gosamvardhan Committee had suggested licensing cattle in urban areas, and initiating pilot centers for capturing wild cattle.\(^{787}\) The Central government had proposed a scheme for the establishment of ‘cattle concentration camps’ for old and useless cattle, known as gosadans.

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\(^{786}\) The Gosamvardhan Committee noted that in the State of U.P., there was a deficiency of 60,000,000 tons in straw, 104,000,000 tons in green fodder and 26,520,000 tons in concentrates such as oil cakes, bran, oil seeds etc. The Court devoted considerable time to attempting to estimate the actual gap in available feed.

\(^{787}\) Uttar Pradesh, *Gosamvardhan Enquiry Committee Report*, 44.
Owners would be able to leave their old and uneconomic cattle at these *gosadans* where they would be maintained at state expense. The Supreme Court pointed out that the proposed costs for setting up and running one such camp had been estimated at around Rs. 45,000 a year in 1949, while the camp could only hope to recoup around Rs. 5,000 through the sale of cow products.\(^{788}\)

More recent studies suggested that taking into account the land required to produce the fodder, i.e. 4000 acres of land for every 2,000 cattle, the cost to the state exchequer of maintaining one head of uneconomic cattle would be Rs.12.50. These studies noted with alarm that setting up the 91 *gosadans* which the State of U.P. required would cost the state Rs. 19 per head of cattle. The Supreme Court declared that it would be shocking to spend Rs. 19 a head to preserve useless cattle, when the total national expenditure on education was Rs. 4 per person. Countering the comparative figures of milk supply, the court noted that the UK spent Rs. 104.6 per capita on education, and the USA Rs 223.7. Lacking finances and fodder, sending cattle to a *gosadan* would leave them to “a fate of slow death”.

Moreover, the Court sarcastically noted, the schemes for *gosadans* relied on cattle owners voluntarily donating their cows. For unwanted and uneconomic cows to be effectively saved from slaughter, “the responsibility had to be shared by the individual, and the local community, and not merely within the exclusive means and competence of the state”. Such an expectation was “wishful thinking” according to the court at a time when farmers, irrespective of religion, were guided by profit. The Court argued:

> “When the conscience of the individual or the community did not prevent the Hindu owner from selling his dry cow to the butcher for a paltry sum of Rs. 30 and Rs. 40 per head, when Hindu

\(^{788}\) India, *Report of the Cattle Preservation and Development Committee*, 47.
sentiment for divinity and sanctity of the cow has to be propped up by legislative compulsion, when according to its government reports the cess collected from Hindu businessmen on each commercial transaction ostensibly to benefit the cows is not made available, when Goshalas have shut down due to a want of public support, when the country cannot spend more than Rs 5 per capita on education of the people, it seems somewhat illogical and extravagant, bordering on incongruity, to frame such schemes”.

The court noted that the absolute ban on cow slaughter recommended by the Gosamvardhan Committee relied on several conditions to succeed, including public enthusiasm and support, and the ability of the state to allocate more resources to this cause. Hindu milkmen had no compunction in selling a cow for Rs. 30 when it went dry, irrespective of her age. Often, to meet the criteria for permissible slaughter, Hindus would maim or injure the cow. The Central Committee on Cattle Preservation had not recommended a total ban of the type contemplated in the impugned State laws. Additionally, the Second Five Year Plan had stated that a total ban on cow slaughter would encourage the surplus cattle to multiply and defeat the purpose of improving the breed of cattle, as set out in Article 48. The Supreme Court noted approvingly that the states of Assam, Bombay, West Bengal, Hyderabad, and Travancore-Cochin had placed only a partial ban on cattle slaughter.\footnote{The Court quoted approvingly from the Assam Cattle Protection Act, 1950; the Bombay Animal Preservation Act, 1948; the West Bengal Animal Slaughter Control Act, 1950; the Hyderabad Slaughter of Animals Act, 1950 and the Tranvancore and Cochin Notification, 1951.}

The Court was categorical in stating that maintaining useless cattle deprived useful cattle of nourishment, led to the deterioration of the breed of cattle and provided a “wasteful drain on
the nation’s cattle feed”. Further, as secondary points, they noted that such a ban would cause a serious dislocation of ‘kasais’ (butcher communities) and hide merchants, and deprive a larger section of people of their staple food and source of cheap protein.

Thus, the court held that while a total ban on the slaughter of cows and calves was reasonable, a total ban on the slaughter of female buffaloes, bulls and male cows after they ceased to be productive could not be supported as reasonable in the interests of the general public. Upon testing each impugned State legislation on this basis, they found the Bihar Act, in so far as it prohibited the slaughter of female buffaloes, bulls and working bullocks (cows and buffaloes) to infringe upon the fundamental rights of the petitioners, and therefore invalid. The U.P. and Madhya Pradesh Acts were held invalid in so far as they totally prohibited the slaughter of breeding bulls and working bullocks, without prescribing any test or requirement as to their age or usefulness.

The New Bovine Order

The Qureshi decision was immediately viewed as victory for the cow protection forces. American newspapers noted that “Indian rationalists suffered a severe setback from a decision from the Supreme Court to uphold the validity of a cow slaughter ban”.\(^{790}\) Another paper noted that the group of butchers, merchants and cattle dealers lost their appeal and the Court held that a “the ban on cow slaughter preserves the nations cattle health”.\(^{791}\) Later commentaries by politicians, lawyers and social scientists have continued to identify the Qureshis as the losers in the judgment.\(^{792}\)

\(^{790}\) “Indian Court Upholds Ban”, Calgary Herald, 26 April 1958.
\(^{791}\) “Cows Win Fight in India Court”, St Petersburg Independent, 4 May 1958.
However, even a cursory examination of the situation after the judgment shows a very different sort of regulatory order than that imagined by these spectators and commentators. For the cow slaughter bans to continue valid, the states of U.P., M.P. and Bihar were required to amend their laws to introduce a test for determining useful livestock. In almost identical moves, the State governments amended their laws providing an exception which would permit cattle over a certain age to be slaughtered, only with the concurrence of local government officials. The Bihar Preservation and Improvement of Animals (Amendment) Act, 1958 provided that cattle over 25 years may be slaughtered. Rule 3 of the Bihar Preservation and Improvement of Animal Rules, 1960 required that a certificate designating an animal fit for slaughter could only be granted with the concurrence of the veterinary office and the chairman of the local government body, and if they differed then the decision of an official in the Animal Husbandry Department would be final. The U.P. Prevention of Cow Slaughter (Amendment) Act, 1958, in a similar move, provided that only cattle over 20 years of age could be slaughtered, after a similar process of certification and the added precaution of a 20-day gap between the issue of the certificate and the actual slaughter of the animal. This U.P. legislation gave a right of appeal to any person aggrieved to challenge the grant of the certificate. The Madhya Pradesh Agricultural Cattle Preservation Act also required the animal to be at least 20 years of age, and provided a 10 day appeal period after the grant of the certificate.\footnote{S. 4(1)(b), Madhya Pradesh Agricultural Cattle Preservation Act, 1958.}

In a well orchestrated move, the Qureshis challenged all three State amendments and were represented by the same set of lawyers as in the previous case.\footnote{Writ Petitions No 15 of 1959, 14 of 1960 and 21 of 1959 [SRCC].} Once again, they identified themselves as nationals and citizens of India and listed their professions in their
petitions. They pointed out that the various amendments in the State legislations infringed the petitioners’ fundamental rights, and for all practical purposes, placed a total ban on the slaughter of female buffaloes, bulls and bullocks, even after they had ceased to be economically useful. It was pointed out, with reference to scientific authorities, that cattle seldom live beyond 15 to 16 years, and even breeding bulls cease to be productive after 12 years. By placing the age at which animals may be slaughtered at 20 to 25 years, the practical effect was that no animals could be slaughtered. The attendant regulations were arbitrary and restrictive in that they amounted to “a prohibition or destruction of the petitioners’ rights to carry out a trade or profession”.

The respective State governments attempted to argue that livestock were living longer with an improvement in feeding and management and better control of diseases. The Agriculture Ministry of Madhya Pradesh in its reply affidavit suggested that Madhya Pradesh had different conditions from other states, due to a large forest area and grasslands for pasturage. The problems of animals dying of starvation or of depriving healthy animals of feed, both concerns for the Supreme Court, were not addressed by the State. The Supreme Court went through the legislative debates over the impugned amendments in minute detail and saw no reference to these reasons being asserted before it by the States as respondents. The court agreed with the Qureshis that the amendments represented arbitrary, *mala fide*, colorable exercises of power, and repugnant to the fundamental rights of the petitioners. The court held that the ban on slaughter of cattle under the age of 20 was not a reasonable restriction in the interests of the general public, and was void since animals more than 15 years of age were of little use, and their limited utility could not offset the cost of their upkeep. The court accordingly struck down the requirement that a cow, to be legally fit for slaughter, must be infirm in addition to being old. Finally, the court

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795 For instance in Writ Petition 15, *Mohd. Jan v. State of Uttar Pradesh*, the petitioners were identified as gut merchant, cattle dealers, kasais, beef vendors and hide merchants.
found the rules regulating the slaughter to be bad in law, on the grounds that they imposed disproportionate restrictions on the rights of the petitioners. The time and money required to obtain a certificate of ‘fitness for slaughter’ in the prescribed manner made the process not worthwhile. The right of appeal granted to any party aggrieved by such a certificate of fitness was also struck down. The court held that such a right to appeal could in practice effect a total ban on slaughter.

In practice, the State governments found the cow slaughter bans difficult to enforce. Cow slaughter went underground and moved to unlicensed slaughter houses. Furthermore, apprehended offenders were hard to convict. A criminal case from U.P. in the 1960s provides a snapshot of this new regulatory order. The police constable in the town of Tivaiti had been informed that some people were going to gather in a nearby plot of waste land and slaughter cows. The constable, Deep Chand, proceeded with a number of witnesses and found a cow lying on the ground, tied up with a rope, being held down by two of the accused. A third accused stood over it with a knife, while some other Muslim men were present with a herd of some 51 cows and calves. They were all arrested and the local magistrate convicted the three people holding the cow of the offence under S.8 of the Uttar Pradesh Cow Protection Act, 1955. However, on appeal, they were acquitted on the grounds that these acts fell short of proof of an attempt to slaughter cows and amounted to nothing more than preparation. The Secretary of the ‘Gohatya Nirodh Samiti’ (‘Committee for the Prevention of Cow Murder’) of Muzaffarnagar, the local cow protection authority, appealed the acquittal. The High Court on reviewing the evidence also felt that it was unclear whether the accused were holding down the cow so as to facilitate the cutting of its throat or just tying it up. They found no suggestion that the third accused was doing anything more with a knife than merely holding it. Thus, the acts of the accused were held to fall
short of an attempt to slaughter a cow. This case reveals a world where Muslims were under surveillance, as can be seen by the information received by the police, and local political organizations were attempting to bring about compliance. Yet, cattle slaughter was clearly taking place and the accused were hard to convict.

In another case, a Hindu police officer raided the house of a Muslim in the district of Badaun and apprehended four men cutting up the carcass of a cow, and others dividing the large pieces into smaller ones. Medical evidence established the animal was killed recently and was a healthy cow. The accused were convicted and sentenced to 18 months of rigorous imprisonment by the local magistrate without any reasons given for the sentencing. On appeal, the question of the severity of the sentences was raised before the High Court. Reviewing this case, Justice James of the Allahabad High Court noted that the High Court was concerned at the punishment the subordinate courts had been “thoughtlessly inflicting; on persons found guilty of a breach of the cow slaughter act. Punishments must be as moderate as is consistent with the object to be achieved”. Justice James drew precedents from cases involving other acts that breached state objectives, which were nevertheless leniently leniently, including cases of conviction for black marketing, abusing police constables, picketing liquor shops and producing illicit liquor. Notably, all the cases used by Justice James as illustrations of leniency involved offences against an unambiguous State legislation, but several were also expressions of a different morality, for instance the case of a Gandhian activist picketing a liquor shop or nationalists abusing police constables working for the British. Since there was no evidence to

798 Emperor v. Yar Mohammad, AIR 1931 Cal 448.
799 Emperor v. Sainabai Badurddin, AIR 1931 Bom 70.
800 Emperor v. Maiku, AIR 1930 All 279.
suggest that the accused in the instant case of alleged cow slaughter were repeat offenders, the only question to be determined was whether their offence could be considered a heinous offence.

The court acknowledged its awareness that “large sections of the community deify the cow and surround it with a halo of religious veneration”, but concluded from a close reading of the Act that the objectives of the legislation were viewed as exclusively economic, and the religious and sentimental aspects of the cow were ignored. The court further noted that the Act only prohibited cow slaughter, not the possession or eating of beef. Similarly, while the sale of beef was prohibited, the gift of beef was not. Moreover, the court highlighted that the Act was a very recent piece of legislation, and beef remained the staple meat for many of India’s poor, thus making it unlikely that the act of cow slaughter was one that involved “moral turpitude”. The judge noted approvingly that the applicants did not commit slaughter to hurt the religious feelings of their fellow citizens (Hindus), by taking the cow on a procession, slaughtering it in public or exposing its flesh and blood to the public gaze. The killing was done discreetly and was for food since mutton and chicken were more expensive and they were villagers of “ordinary status”. The Court held that sentences for offences involving cow slaughter had to be moderate, at the most a fine of Rs. 50 (the price of a cow). It also acquitted the accused on the ground that there was no evidence they had actually killed the cow, and there could be no presumption that the persons found cutting the meat of a cow (that could have been killed six hours ago), must be deemed the persons who killed it. The court attempted to naturalize the situation. It was possible, they commented, that the accused only arrived at the location they were arrested from after hearing of the slaughter, and that the original killer of the cow had proposed to make a gift of it to his friends, in which event the receivers of the cow’s meat could not be said to have committed an offence.
In another case, Justice Broome of the Allahabad High Court held that the quantum of fine and sentence ought to be linked to the economic value of the animal destroyed. The accused would deserve a severe sentence for destroying a pedigreed cow, for “he has deprived the country not only of an existing economic asset but also of a potential improvement in stock that would accrue from its progeny”.801 However, the death of a useless, undersized or decrepit beast, the kind of cows most likely to be slaughtered, caused negligible damage to the economic interests of the country and called for a negligible penalty.

In 1961, a larger bench of the Allahabad High Court drew up a list of principles to limit the discretion of the lower judiciary in awarding sentences in cow slaughter cases. It held that the Act was primarily enacted to ensure a supply of milk, bullock power and cow dung to the economy. Thus, the punishment for offences under the Act should vary with the economic value of the animal killed. The burden of proving that the animal was an old one, however, lay upon the accused. The question of offending the religious sentiments of the Hindu community was not relevant, unless there was a deliberate attempt to inflame communal passions.802

The Qureshis were a minority within a minority in independent India. They were a socially and educationally backward class of Muslims who were marginalized within mainstream political leadership. After Independence, they were faced with a new moral regulatory regime that threatened to strangle their livelihood. While they had some moral support from Nehru and the Central government, they were faced with overwhelming opposition in both the State and local arenas. The Qureshis were based in North India, which had witnessed widespread communal violence during the Partition and seen an exodus of Muslims. As a consequence, they

802 Ayub v. The State of Uttar Pradesh, AIR 1962 All 141.
had limited ability to maneuver using public demonstrations or through electoral politics. It was not surprising that their leadership called for restraint; faced with violent intimidation and moral opprobrium they had few other options apart from going to court.

Unlike litigation in colonial India, litigation in postcolonial India did not centre on the right to cow sacrifice. The need to kill cows was linked to livelihood. The Qureshis learned important lessons from their early experiences of litigating against municipal orders. They were able to gain recognition of fundamental rights as superior to directive principles of state policy, to bring the language of rights to the table, and continuously frame their case as a question of the limits of governmental power. They argued that municipal governments were not empowered by their parent legislations to impose prohibitions on cow slaughter, and State governments did not have the resources to provide fodder or run homes for uneconomic cows.

It would be shortsighted to dismiss the Hanif Qureshi judgment merely as a victory for Hindu majoritarianism. It heralded a regime where uneconomic cattle of various kinds could be slaughtered with state sanction. In cases of old or useless cows being slaughtered in violation of the law, the courts demonstrated their willingness to give moderate sentences. The cow was not just an important political symbol, it was also a commodity tied to a network of production, consumption and retail. The Qureshis were able to provide evidence of the economic value of a dead cow, not just in terms of food but also of the industries they supported. For instance, hide was used for leather goods, tallow for soap, bones for crockery, blood to make iron tablets and entrains for making surgical thread.\(^{803}\)

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\(^{803}\) For a detailed ethnography of the Qureshi community in Delhi, see Zarine Ahmad, “Taleem, Tanzeem and Tijarat: The Changing Role of the All India Jamaat Ul Quresh,” in Vinod Jairath ed., \textit{Frontiers of the Embedded Muslim Communities in India} (New Delhi: Routledge, 2011) 158-173, 165.
The cow protection lobby was aware of the shortcomings in their case, and yet continued to push for a national ban on cow slaughter and an absolute ban on cow slaughter in the States. The *Qureshi* judgment was printed in pamphlet form by the Gohatya Nirodh Samiti (‘Committee for Prevention of Cow Slaughter’) and circulated among cow protectionists, including to Congress party notables like P.D. Tandon.\(^\text{804}\) The judgment was not regarded with approbation: Lala Hardev Sahai, the President of the Gohatya Nirodh Samiti, fulminated against both against the Supreme Court and “western educated animal experts” for acceding only to a partial ban.\(^\text{805}\) He made a two-pronged attack on the idea that unproductive cows could be killed. First, he challenged the credentials of the animal husbandry experts who claimed cows became unproductive after a particular age, pointing again to the benefits of dung. Secondly, he argued that to sell cattle, which had worked tirelessly “to fill our stomachs” to “any Musla” (a derogatory slang term for Muslims) was against Indian tradition and sense of obligation. Dubbing the partial ban a betrayal that would ensure that healthy cows continued to be killed, he appealed to those who cared for the national interest not to rely on the Supreme Court decision but to lead an agitation.\(^\text{806}\)

Cow protectionists largely resorted to ‘unconstitutional means’, be they violent demonstrations or the hunger strikes discussed in the beginning of this chapter. In the course of time, 23 of the 28 Indian States achieved bans on cow slaughter, but the *Qureshi* judgment ensured that despite the cow being sacralized in the Constitution, and cow slaughter being

\(^{804}\) Copy of SC Judgment printed by Hardev Sahai, Gohatya Nirodh Samiti, Purushottam Das Tandon Papers, File 277 [NAI].

\(^{805}\) Lala Hardev Sahai., “Sarvachya Nyayalaya ka nirnay godhan ko katal se naheen bacha saka: Pashu visheshagyon ka safal shadyantra” (trans. Supreme Court Decision could not save cows from slaughter: Animal experts’ successful conspiracy), Purushottam Das Tandon Papers, File 277 [NAI].

\(^{806}\) *Id.*
banned in 90% of Indian States, India continued to produce and consume more beef than chicken or mutton. 807

The litigation on the cow protection issue also reveals the tensions between different levels of government. Independence and the coming into force of the Constitution had created a new political geography. Nehru had attempted to defuse the political crisis of cow slaughter by referring it to the States; however, the Qureshis chose to bring their challenges directly to Delhi, thus returning the question to the ‘national level’. Not only could they pool their resources and win a more comprehensive victory, they could also present themselves as a national community and not a local group.

The question of caste was rendered invisible in the litigation before the Supreme Court. It was uncritically assumed by the court that all Hindus venerated the cow, ignoring the practices of many Dalit and lower caste groups. Secondly, caste was not recognized for Muslims, and the Qureshi self presentation as a distinct ascriptive community was often ignored.

This episode of litigation reveals yet another aspect of the use of law to bring about social and moral change. From the late nineteenth century onwards, the cow protection movement had been able to create tremendous popular enthusiasm for a ban on cow slaughter, and had generated a large variety of popular practices. This chapter evidences that this momentum remained strong even after Independence, with the added expectation that, now that the government was finally a representative one, the people’s (i.e. the majority’s) agenda would be implemented. However, the constitutional framework of developmentalism and secularism was a tighter constraint than people cherishing this expectation had imagined. The cow protection

lobby had to continuously perform rhetorical cartwheels to show why the cow was economically important, and finally, it was this economic argument that led to the loss of their battle for an absolute ban on cow slaughter.
Chapter Four

Husna Bai’s Profession: Sex, Work and Freedom in the Indian Constitution

The High Court at Allahabad exercises jurisdiction over Uttar Pradesh, the largest state in India. Housed in an elegant nineteenth-century neo-Romanesque building, the court has always been a hive of activity. However, even frequent visitors would agree, that on 1 May 1958 unusually large crowds had gathered in the courtroom of Justice Jagdish Sahai. The crowds were drawn there by the rare presence of a young female petitioner in the overwhelmingly masculine courtroom.

Adding to the notoriety of the case, the petitioner, a twenty-four year old Muslim woman, Husna Bai (literally ‘the beautiful one’), had openly stated that her profession was prostitution. Husna Bai’s writ petition, filed under Article 226 of the Constitution, challenged the validity of the recently enforced Suppression of Immoral Traffic in Women and Girls Act, 1956 (hereinafter the ‘SITA’). She demanded that the new law, enacted to meet the constitutional promise to ban trafficking in human beings, be declared *ultra vires* as it violated her fundamental right to practice her profession as a prostitute, which was guaranteed to her under Article 19 of the Constitution. She argued that by striking at her means of livelihood, the SITA “frustrated the purpose of the welfare state established by the Constitution in the country”.

Across India, Husna Bai’s petition compelled attention quite out of proportion to the legal or practical significance of her case. In the event, her petition was dismissed within a month on technical grounds. However, the case was covered extensively by newspapers in Delhi, Bombay and Calcutta. The newly formed Dancing Girls Union of Allahabad came out in support

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of it, as did prostitutes’ associations as distant as Calcutta. Most significantly, her petition generated a series of anxious communications between bureaucrats and politicians in Delhi that left behind a voluminous paper trail. The existence of a extensive correspondence over a minor petition in a provincial High Court is very surprising because even Supreme Court cases which had a greater impact on the government’s fortunes did not generate this volume of bureaucratic correspondence. The Home Ministry and the officials of the police both expressed their concern over the implications of such a petition, but the strongest condemnation came from female parliamentarians and social workers who had been leading the campaign for legislation against “immoral traffic”.

These critics of Husna Bai’s petition were particularly aghast at the invocation of constitutional principles by prostitutes, especially since similar petitions were brought by other prostitutes before the High Courts of Delhi and Bombay soon followed. The fundamental-rights implications of the fight against prostitution had been brought home to legislators a few years before. In September 1954, almost four years before the first petition, Durgabai Deshmukh, the Chairperson of the Central Social Welfare Board and one of India’s first women lawyers, had written to Prime Minister Nehru with some dismay on the findings of a survey of “social and moral hygiene” in India, noting that,

“It was painful to social workers to hear an attempt made to invoke fundamental rights in argument to uphold the right to carry on prostitute or the business of brothel keeping…” the Constitution

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must be reworded and our notions of freedom undergo a change”. 811

As a member of the Constituent Assembly, and as a campaigner against prostitution of over two decades’ standing, Durgabai had been instrumental in having prohibitions enacted on human trafficking and forced labor. An advocate for greater civil liberties, she had played an active role in drafting the fundamental rights clauses. 812 For Durgabai and her colleagues, the Constitution represented an opportunity for women to take their places as equal citizens in free India. This would be achieved both through the institution of equal fundamental rights and a constitutional commitment to social reform. Article 20 of the Constitution, formally abolishing trafficking in human beings, was to these campaigners the symbol and instrument of their success.

Husna Bai’s petition and the similar petitions that followed it were seen as an attack on the progressive agenda of the new republic. It was unimaginable to the authors of Article 20 that the very women, whom the Constitutional Assembly sought to free from the profession of prostitution, would assert their fundamental right to ply their trade and continue a “life of degradation”. It particularly astonished commentators that poor Muslim prostitutes, a group believed to be exploited several times over, would not only choose to continue their vocation in the face of the remarkable progress offered them in the new Constitution, but would also use the

811 Letter from Durgabai to Nehru, 7 September 1954, Durgabai Deshmukh Papers, Nehru Memorial Museum and Library (hereinafter NMML).
812 Durgabai Deshmukh had been active in social work and nationalist politics since her teenage years, rising to prominence during the Civil Disobedience Movement of 1932. She was one of India’s first women lawyers and had built up a considerable criminal law practice in Madras by the mid 1940s. She was the first woman advocate before the Federal Court at Delhi. She was elected a member of the Constituent Assembly in 1946 and played a prominent role in the processes both of drafting and debating. After Independence, she was appointed a member of the Planning Commission and later became the Chairperson of the Central Social Welfare Board. See, Durgabai Deshmukh, Chintaman and I (New Delhi: Allied, 1980).
same constitutional system to accomplish their aim. This challenges contemporary theorizing and historical accounts of prostitution, which hold as ‘commonplace knowledge’ that the everyday practices of citizenship in India excluded the prostitutes from the domain of civil society.

This chapter examines how constitutional law became the ground for contestation between prostitutes, social workers, feminists and state agencies in the 1950s’ campaign to suppress immoral traffic. The chapter considers the question of prostitution as central to the construction of the public role of the female citizen in the Indian republic.

There is a substantial body of literature that examines the intersection between gender and citizenship after Independence, but it surprisingly ignores the question of prostitution. Instead scholars have thus far focused almost exclusively on the role of the state in transforming the position of women in the private domain. Current scholarship is largely confined to the debates over Hindu family law reform, and the recovery of women abducted during the Partition. The literature on family law reform focuses on efforts to reconcile the equal status of women under the Constitution with their unequal position under personal laws. The literature on the

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813 The Constituent Assembly had already foreseen that the fundamental rights could come into conflict with some parts of the government’s plan to bring about economic and social change. Assembly debates indicate that they imagined these challenges would come from vested interests representing the old order. Discussion mostly revolved around the possibility of the landed aristocracy challenging the proposed land reforms through the right to property. Additionally, the religious orthodoxy could challenge social reforms through the right to religion. In an attempt to stave off these challenges, both the right to property and the right to practice one’s religion were accordingly circumscribed in the very text of the Constitution.


815 I acknowledge that the terms “sex worker” and “commercial sex worker” acknowledge the dignity of the subjects of the chapter, but intentionally use the term ‘prostitute’ in order to better represent the historical context.

Partition examines the problem of fixing a nationality to female refugees and of recovering ‘abducted women’ and the consequent refashioning of family ties.\textsuperscript{817} The discussion of sexuality in postcolonial India, like the literature on colonial India, is overwhelming concerned with the implications of sexuality for property transmission through the patriarchal household.\textsuperscript{818} Thus, the home becomes the site for studying the impact of Independence on women, ignoring the woman ‘on the street’.

This invisibilization of the woman outside the home is noticeable, given that the regulation of prostitution had been central to the historical scholarship on gender and nationalism in the nineteenth century, which emphasized the formation of the figure of the ideal Indian woman in juxtaposition to that of the prostitute.\textsuperscript{819} The chapter excavates the inflection of debates over women in the private domain with the aim, anxieties and methods of the state in dealing with prostitution, by looking closely at women outside the patriarchal family.

The regulation of prostitution in postcolonial India emerges as important terrain for understanding the transformation from the colonial state to the independent republic. The historical literature on the regulation of prostitution in colonial India has been dominated by two phases, the debates over the Contagious Diseases Acts in the 1890s and the campaign against the


The devadasi system in the early twentieth century. Relatively little attention has been directed to the regulation of prostitution in the interwar period, which was transformed both by nationalist politics and by the international supervision of the League of Nations. Concerns of race, whether centered on the protection of the health of British soldiers or on traffic in European prostitutes, dominate much of the debate over colonial regulation of prostitution, their importance often disproportionate to the actual numbers of British soldiers or European prostitutes.

Historically grounded research on the regulation of prostitution immediately after Independence is absent. There is thus an unformulated question, namely ‘What happens to the prostitution, when questions of race become less relevant’? This chapter situates the impact of India’s becoming an independent constitutional republic on the regulation of sex work, and provides a pre-history for the robust political engagement by sex workers in recent times.

This chapter does not move chronologically, it begins with the period of constitution making, then moves back to the 19th century to examine a longer history of prostitutes engagement with law, and then returns to Husna Bai’s petition in 1958.
Constituting Women in the New Republic

In 1950, the hundreds of thousands of Indians who flocked to the cinema every week were treated to a compulsory screening of a state produced documentary or newsreel before the start of any feature film. These films, produced by the Films Division of India, were part of the state’s pedagogic project to train its citizens. Cinemagoers in early 1950 would have watched “Our Constitution” which sought to explain to the “common man of India, what the words of the constitution signified”. The anglicized voiceover in the film outlined, with accompanying visuals, the new rights that the Constitution conferred upon citizens. However, moments after a shot of a policeman arresting a burglar (an illustration of the protection of life and liberty), the camera panned to a visual of an expensively dressed young woman, eyes downcast, leaning against a street pillar while the voiceover announced that the state had abolished traffic in human beings.

The abolition of trafficking and the emancipation of prostitutes were central to the imagination of freedom under the new Constitution. This becomes evident in the film as the image of the prostitute is succeeded by images of a worker in a coal mine and a man being refused entrance to a temple, representing the two other categories of abolished acts of forms of oppression, forced labor and untouchability. Freedom was to be achieved not merely through self rule by Indians, but also by ensuring freedom to specific “unfree” populations i.e. prostitutes, untouchables and bonded labor. Thus, the Constitution was also an emancipation edict for millions of its citizens.

\[824\] Srirupa Roy, Beyond Belief, 33.
While questions of slavery (in the form of forced labor) had arisen during moments of Constitution making in other countries, the inclusion of prostitutes as a category is fairly unique to the framing of the Indian Constitution. Unlike prohibition of alcohol, abolition of untouchability, abolition of cow slaughter, and imposition of economic planning, the regulation of prostitution was not a central plank of the Congress Party’s agenda. Yet, Article 23 enshrined

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the ban on human trafficking as a fundamental right, while prohibition, cow slaughter and planning were only included as directive principles of state policy. How did the prostitute make the journey into the heart of the Constitution?

Her prominence came from that fact the prostitute played a particularly charged dual role in Indian public debates, as a discursive figure and as empirical reality. The ‘prostitute’ in colonial India was entirely a creation of colonial law. While both ancient Indian texts and medieval sources referred to a class of prostitutes, the term became invested with legal consequences under the colonial state. Through the nineteenth century, women ranging from temple dancers, aristocratic concubines, courtesans, classical musicians and dancers, to widows, vagrant women and the more conventional sex workers found in the town bazaars, came to be categorized as prostitutes, and thus subject to state regulation and violence and marked as sources of immorality and disease.826

As Janaki Nair points out, the dissolution of old forms of power and authority centered on the courts and temples, and the emergence of the bureaucratic colonial state saw the transformation of notions of ‘respectable’ and ‘disreputable’ sexuality.827 For both the colonial state and the new Indian elite, sexuality could only be accepted within a heterosexual household. For the colonial state, the prostitute became the focus of concerns about venereal disease and racial intermixing, while for Indian nationalists she appeared as a threat to a national culture based on the ideal of middle class domesticity.

The differences between anti-prostitution laws of the colonial period and the debates over the regulation of prostitution at the time of Independence reveal their divergent concerns. Ashwini Tambe divides anti-prostitution laws into three phases: regulationist (late nineteenth

826 For an overview, see Wald (2009) and Tambe (2008).
827 Janaki Nair, 148.
century), anti-trafficking (early twentieth century) and abolitionist (1920s and ‘30s).\(^{828}\) In the first (regulationist) phase, the laws were enacted on the basis of concern over the spread of venereal disease amongst soldiers, and sought to closely monitor brothels and supervise military prostitutes. In the second (anti-trafficking) phase, the state was driven by internationalist anxieties of white slavery and miscegenation and therefore focused on the presence of European prostitutes in the colony. The final abolitionist phase was a product of the growing influence of Indian reformers and nationalists who saw prostitution as a threat to respectable public morals. Common to all three phases was a concern with the effect of prostitution on the public, and not with the prostitute herself. As a study commissioned by the Association of Social and Moral Hygiene noted,

“…[W]hile the prostitute became the central figure in explaining the problem, the relief sought was one of protecting her customers …this approach failed to look at her with the same consideration with which it viewed her patrons.”\(^{829}\)

In contrast to the above observation of denial of sympathetic attention to the prostitute, the concerns voiced in the Constituent Assembly debates were framed as stemming from just such a concern for the prostitutes themselves, and were not dominated by discourses of disease or public morals. These debates took place due to the significant presence of women members in the Assembly, making the Indian Constitution possibly the first in the world to have founding mothers.\(^{830}\) In determining nominations to the Constituent Assembly, the Congress leadership

\(^{828}\) Ashwini Tambe, *Codes of Misconduct : Regulating Prostitution in Late Colonial Bombay* (Minneapolis: University of Minnesota Press, 2009) xxvi.


\(^{830}\) The constituent assembly of Pakistan, established in 1947, also had two women members, Begum Jahanara Shahnawaz and Shaista Suhrawardy Ikramullah, representing the two largest provinces of the country, Punjab and Bengal. However, both resigned by the early 1950s and the assembly itself was dismissed by the Governor General
had considered candidates on the basis of their long history of association with the Congress Party, the need to ensure representation to various communities, and the need for members who could offer special expertise, and the fifteen women nominated fulfilled all the above requirements.831

How did women gain a substantial presence in the Constitutional Assembly? Indian women participated in nationalist politics in large numbers, especially compared to other twentieth-century independence movements. Thousands of women had been mobilized by Gandhi and his methods, with an emphasis on non-violent tactics and constructive work.832 Moreover for Gandhi, at an ideological level, women represented a certain superior moral force that was a source of strength for Indian society. He was unequivocal in his insistence on the respect due to the personal dignity of women and the importance of preserving their autonomy within the family and society. Social reform was the bedrock of Swaraj, and customs that were degrading to women had to go. He told Congressmen if they believed that “freedom was the birthright of every nation and individual”, they should first liberate their women from evil customs and conventions.833 By the 1930s, the colonial state was increasingly seen by Indian reformers as an obstacle to social reform and as developing greater alliances with the

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831 These included Ammu Swaminathan, Durgabai Deshmukh and Dakshayani Velayudhan (Madras), Sarojini Naidu (Bihar), Rajkumari Amrit Kaur (Central Provinces), Hansa Mehta (Bombay), Malati Chaudhary (Orissa), Leela Nag and Renuka Ray (Bengal), Purnima Banerjee, Vijayalakshmi Pandit, Begum Aizaz Rasul and Kamala Chaudhary (United Provinces) and Annie Mascarene (Travancore-Cochin). There were 17 women elected to the Assembly. Two of the Muslim League members, Begum Jahanara Shahnawaz and Shaista Ikramullah did not, like many of their party, take up their seats in the Indian assembly. The women members of the Assembly reflected its diversity in religion and caste -- they included two Christians, a Muslim and a member of the scheduled castes -- but were less diverse than the male members in terms of their class backgrounds.


conservative elements in Indian society. Several campaigns were launched to demand legislation for social reform.\(^{834}\)

The world over, campaigns against prostitution and human trafficking have been one of the earliest fields of political action entered by middle class women. Josephine Butler’s campaign against the Contagious Diseases Act in Britain and colonial India is a case in point.\(^{835}\) Dr Muthulakshmi Reddi, the first elected woman legislator in India focused her efforts on abolishing the *devadasi* system in Madras.\(^{836}\) Women’s organizations emerged as the dominant voices in the debate over regulating prostitution, in part due to the failure of the Congress and other political agencies to take up this question. The relative lack of attention to combating trafficking was partly due to lack of concern for an issue that was seen as affecting primarily women, but also because of Gandhi’s reluctance to take up the question. Gandhi remained concerned that placing prostitution on the national agenda would contaminate the chaste space of nationalism. He was unsure of the motives of men who sought to liberate prostitutes, therefore in his view the question of prostitution was not one that men could tackle and “work among the unfortunate sisters must be left to experts”, namely, women.

While Gandhi was instrumental in bringing women into the national movement in large numbers, Congresswomen determined their own agenda themselves. Several prominent women leaders built their political careers upon their experience in advocacy and organization, gained as members of women’s organizations, such as the All India Women’s Conference (hereinafter the ‘AIWC’) or the National Council for Women in India, which had actively campaigned for a

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higher age of consent for girls, reform of family law and for extending women’s franchise. In 1931, in its Karachi Session, the Congress committed itself to the cause of political equality for women, well before most European nations had explicitly avowed such an aim. Women vocally demanded their share in political decision making; for instance, veteran women’s rights activist and social reformer, Saraladevi Chaudhurani, chided the Congress in 1931 for “assigning women the task of law breakers and not law makers”.

As Independence approached, women’s activists harbored few illusions about their accommodation in the political system and the inclusion of issues important to them onto the legislative agenda. While the provincial elections of 1937 had seen an increase in women’s representation, women had also faced difficulties in getting tickets for the election and in enacting social reform had faced resistance from men within the legislatures. Gandhi himself had not been supportive of women’s demands for legislative representation; by the 1940s he had come to view the political sphere as a dirty arena, and to envision ‘swaraj’ as the reconstruction of the social. The role for women in public life, in his altered view, was to be selfless, devoted social workers.

Women formed a lobby cutting across organizational and ideological preferences. Rajkumari Amrit Kaur, a member of the Congress Working Committee asked Hansa Mehta, then President of the AIWC, to write a letter to the Congress leadership reminding them that they must be true to the ideal of representing every class. She also suggested putting forward a panel of names of women representing each province, who would “put up a good show”. The AIWC

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840 Kishwar, “Gandhi on Women,” 1701.
proposed a list of 14 women which included the heads of other women’s organizations, socialists and women who were not connected to the Congress.\textsuperscript{841} These were all women who had significant legislative or organizational experience. Half of this panel was elected to the Constituent Assembly.\textsuperscript{842} The caucus of women members acted in a coordinated fashion, maintained certain questions at the centre of the agenda, and pushed for the nomination of women to powerful committees.\textsuperscript{843} Thus, as an interest group, the women’s caucus was more unified and organized than other minorities like Muslims, tribals and Dalits.

Well before the proceedings of the Constituent Assembly began, its women members seized the initiative to present a comprehensive plan for women in the Indian republic. In December 1945, the AIWC President Hansa Mehta, reminded members that for Indian women, post-war reconstruction was not just a question of mere adjustments here and there, but of reconstruction of “our entire national life”.\textsuperscript{844} Members were instructed to collect the relevant clauses dealing with women’s rights from various constitutions.\textsuperscript{845} In 1946, the AIWC adopted a ‘Charter of Rights of and Duties for Indian Women’ (hereinafter the ‘AIWC Charter’) and forwarded it to the Central and provincial governments, strongly urging that the fundamental rights and economic and social directives embodied in this Charter form “an integral part of the Constitution”.\textsuperscript{846}

The drafters of the AIWC Charter reminded the governments that the AIWC had worked to improve the status of the Indian women for the past 18 years, and their resolutions were now

\textsuperscript{841} Letter from Rajkumari Amrit Kaur to Mrs Hansa Mehta, 12 June 1946, File 6, Hansa Mehta Papers [NMML].
\textsuperscript{842} Both Kamaladevi and Aruna Asaf Ali would have been elected as well, but for the decision of the Congress Socialists to boycott the Constituent Assembly.
\textsuperscript{843} Letter to Congress President from Dakshayani Velayudhan, All India Congress Committee Papers, CL 3, Pt I and II, 1946-47[NMML].
\textsuperscript{844} Bulletin of the Indian Women’s Movement, January 1946, Printed Material, File No 7, Hansa Mehta Papers [NMML].
\textsuperscript{845} Letter from Lakshmi N. Menon to Hansa Mehta, 11 October 1946, File 6, Hansa Mehta Papers [NMML].
\textsuperscript{846} Draft Charter of Rights and Duties for Indian Women, Printed Material, File 9-A, Hansa Mehta Papers [NMML].
crystallized in the AIWC Charter with the objective of forming the basis for future legislation, and to create opportunities for women to serve the nation. The AIWC emphasized their belief in women’s rights to freedom and equality, and linked the backwardness of women to the backwardness of society and the nation. Apart from their central demand of complete civic and political equality, they sought to expand the welfare functions of the state to include provision of better access to health, education and sanitary services. They sought equality for women within the domestic sphere as well, demanding recognition for the housewife, protection for her right to her husband’s income, access to government social insurance schemes and equal rights for women in guardianship and adoption, to own and inherit property, and to initiate divorce. The AIWC insisted that in a democratic state the right to work was among the fundamental rights of all individuals, and therefore no disability should attach to women on the ground of sex alone, with regard to employment, public office or exercise of any trade or calling. They campaigned for women workers to be given the benefit of maternity leave, crèches and milk canteens for their children, and comfortable work conditions.

The AIWC recognized that, in order to achieve the goals recounted above, total mobilization of the human and material resources of the nation was necessary, which could only be achieved through a network of specialized social service ministries. These ministries would be required to mobilize all available human resources to supplement the existing health, education and welfare services, and to this end would train teachers, doctors, nursing staff and social workers.847

Thus, in the vision of the AIWC, state instrumentalities would be harnessed for the purpose of social welfare, to assure the Indian woman her rightful place in society. Conversely,

847 AIWC Memorandum to Central and Provincial Governments, Printed Material, File No 7, Hansa Mehta Papers [NMML].
social welfare was also to cast as a special responsibility of women. Purnima Banerjee complained of the replacement of women members of the Constituent Assembly, on their deaths and resignations, by men; pointing out that “since the entire basis of the State has changed and it is no longer a police state, certain social functions such as education and health now feature among the major items of the State's development which made the association of women in the field of politics indispensable”.  

Freedom thus held a distinct meaning for the women in the Constituent Assembly. Freedom in their view would not only mean formal equality between men and women, but include an active duty cast upon the state to intervene to bring about substantive equality. Article 15 of the Constitution, which guaranteed non-discrimination on the grounds of sex, race, caste, religion, or place of birth, also contained a proviso which provided that this would not restrain the state for making special provision for women and children. Action in the space protected by this proviso would require the creation of a welfare state apparatus directed towards the needs of women. It was natural in these circumstances that the state would feel impelled to intervene significantly to emancipate prostitutes. As a prominent leader of a nationalist women’s organization was to reminisce, “democratic India, which upholds, the highest spiritual and moral values and looks at its women as the symbol of purity and unselfish love, cannot go on tolerating a section of its daughters being exploited and degraded through prostitution”. The goal of women’s organizations after Independence was to “end such exploitation and to restore

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848 Sarojini Naidu died in 1949. Vijaylakshmi Pandit was appointed Ambassador to the USSR and then the UK, and Malati Choudhary resigned to engage in constructive work in Orissa. Purnima Banerjee (United Provinces), Constituent Assembly Debates, 11 October 1949, Volume 10, Page 4.
to the victims of such exploitation an honorable place as useful citizens with dignity and self
confidence as the women and workers of a free India.”

The questions of regulation of prostitution and prevention of trafficking were pressing
concerns for the women members of the Constituent Assembly and formed a significant part of
their agenda. Article VI of the AIWC Charter had highlighted the role of women in maintaining
moral standards. It had also noted with concern that poor social conditions and economic distress
has led to helpless and destitute women being enticed into immoral activities, and emphasized
the need for laws to prevent trafficking. The AIWC demanded an equal moral standard for men
and women and that the role of men in prostitution also be criminalized. Moreover, they wanted
rescue homes to be established to rehabilitate women, which would be closely supervised by a
government agency.

The new approach to prostitution was dominated by the question, how did prostitutes
come to be prostitutes? Women’s organizations commissioned studies which would explain the
problem in terms of external conditions prevailing in the society, which would push women into
prostitution. The two other major concerns of women’s organizations that have been central to
the scholarship on gender and postcolonial citizenship, namely questions of family law reform
and the protection and recovery of women abducted during the Partition riots, were also
identified as causes of prostitution.

It is significant to note that while earlier campaigns against the devadasi system had
framed its efforts as a challenge to “rotting traditions”, by the 1940s the emphasis was on
economic causes. The AIWC Charter insisted that steps to improve social and economic

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850 Id.
851 Draft Charter of Rights and Duties for Indian Women, Printed Material, File 9-A, Hansa Mehta Papers [NMML]
conditions of women were a necessary precursor to ending prostitution. The AIWC report in 1946 noted that traffic in women and children had increased during the Bengal famine, with the number of estimated prostitutes in Calcutta rising from 25,000 in 1938 about 40,000 at the time of the Report. The AIWC was critical of the government’s lack of commitment to the problem. It conducted a series of visits in the 1940s discovering that rescue homes and rehabilitation centers were badly managed and often served as brothels themselves. In the view of the AIWC, these studies and surveys demonstrated that the abolition of trafficking was tied to the creation of a welfare state that would “uplift women”, and to greater state scrutiny and better management of rescue homes.

Women’s groups recognized the family as a site of oppression that could lead or force a woman into prostitution. Women’s groups recognized that several women entered prostitution due to circumstances that pushed them outside the regular family home. A study commissioned by the Association of Social and Moral Hygiene (hereinafter the ‘ASMH’) found that, barring cases of direct kidnapping, family situations were the major predisposing cause for prostitution. These situations included desertion by husbands, cruelty by husbands or in-laws, neglect by parents and unhappy marriages. Veteran social worker Romola Sinha observed that outdated customs and laws, such as the prejudice against widow remarriage and inter-caste marriage, and customs such as dowry, drove women to prostitution. Given the prevalence of these circumstances that compelled women to become prostitution, and the facilitation and legitimization of the circumstances by traditional domesticity, family law would have to be reformed before women could secure greater rights within the family. The Hindu Adoptions and

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853 Hansa Mehta Papers, [NMML]
Maintenance Act, 1956 was enacted to provide that wives and widows continued to be entitled to maintenance after desertion or death.

The Partition and its aftermath figured prominently in debates about prostitution, as it led to the mass-scale disintegration of family life and left large numbers of women vulnerable to exploitation. Sexual violence was rife during Partition and several thousand women were abducted by men from rival communities. Women who had been abducted and destitute refugee women were both categories seen as particularly at risk. As Rameshwari Nehru agitatedly asked, “We have this problem of refugee women …Their living conditions are worse than those of animals, can we expect them and other women placed in similar situations to become normal citizens?” Alarmist newspaper articles warned of deteriorating moral conditions in cities due to the presence of refugee women. Newspapers in Delhi attributed the growth in the number of brothels in Delhi, particularly in the Hauz Kazi area, to the influx of refugee women and abducted women who were now left with no alternative to prostitution as a livelihood.

Several women leaders and women’s organizations in this period worked closely with the government to rehabilitate refugees and recover women who had been abducted. The vocabulary of recovery, rescue and rehabilitation was almost identical to the one that was developed to deal with prostitution. Questions of consent of the woman being recovered or rescued were not considered important.

As briefly discussed in the introductory passages of this chapter, the Constituent Assembly addressed the problem of prostitution through Article 20, which prohibited traffic in human beings and begar (forced labor). Though all the members of the Assembly agreed that

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855 H.C. Mookherjee, Inaugural Address, Second All India Conference of ASMH, 1951, p. 37.
856 “Controlling Traffic in Sex: Delhi Conference Discussions,” The Times of India, 21 October 1950, p. 3.
857 Ela Sen, “Refugees are a Frankenstein to Calcutta,” The Times of India, 14 July 1957.
859 Ritu Menon and Kamala Bhasin (2001), 68.
prostitution was a “social evil”, “a heinous practice” and degrading to women, some were wary about including it in the constitutional domain. T.T. Krishnamachari, the Finance Minister, cautioned against social reform questions being “imported into fundamental rights”. In the eyes of this more section of the Assembly, prostitution in particular was a practice which would gradually disappear by legislation over the course of time, whereas incorporating it permanently into the Constitution would put “a blot on the fair name of India”. Several members rose to counter Krishnamachari, and Bishwanath Das asked the Assembly not to be prudish and to “confess and admit that there existed a traffic in women for which men are responsible”. The members of the Assembly made it clear that prostitution had no place in the new republic. While the inclusion of the Article 20 provision was relatively uncontroversial, as I will examine in the next section, it would take another six years before the women’s lobby would convince the Central government to enact a law enforcing it.

How do we read the incorporation of Article 23 into the Constitution, especially given that it only came into operation with the enactment of the SITA in 1956, and was clearly unsuccessful in eradicating trafficking and emancipating prostitutes?

The suppression of prostitution in postcolonial India was framed in terms of granting freedom to female citizens. As Gyan Prakash reminds us, freedom is never an innate human condition, but created through a range of historical practices. The common prostitute, like the bonded laborer, emerged in the nineteenth century through the reconstitution of a variety of women who fell outside the heterosexual family. Daniel Botsman has persuasively argued, in his work on the emancipation of Japanese prostitutes, that freedom needs to be understood as “an idea that has in modern times been used to reorder social relationships and constitute new

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frameworks for their management”. In making this argument, Botsman builds upon the idea of freedom as an integral part of the “reorganizing project of modern power”. The insertion of Article 23 into the Constitution needs to be understood as facilitating the democratic state’s regulation of the sexuality of marginal women, the reimagining of prostitution as an economic problem central to the nation’s development, the replacement of the discourse of penalization with that of rehabilitation, and the legitimization of the role of welfare agencies and women social workers in the process.

The Birth of the SITA: The Making of a Postcolonial Prostitution Law

The Suppression of Immoral Traffic in Women and Girls Act that Husna Bai challenged was enacted in 1956 but came into force only in 1958, several years after the commitment to end trafficking had been enshrined in the Constitution as a fundamental right. Unlike the case of cow slaughter, where the lack of governmental enthusiasm arose from Nehru’s commitment to secularism and political compulsions, the delay in acting on Article 23 reflected the political disinterest of the Central government. “Prevention of Cow Slaughter” was only a directive principle of state policy, but abolition of trafficking was under the fundamental rights section, and the Constitution gave the Central government power to enforce Art 23 with legislation. The traditional narrative of the SITA is that it was enacted to meet India’s international legal obligations. The preamble of the SITA baldly states that the Act is “to provide in pursuance of the International Convention signed at New York on the 9th of May, 1950, for the suppression of immoral traffic in women and girls”.

861 Botsman, 1344.
863 Article 35 of the Constitution of India.
864 Statements of Objects and Reasons, SITA, 1956.
Using new archival sources, I will show that the SITA was not an ordinary legislation but a product of sustained lobbying by women’s organizations, and reflected new conceptions of the state and of social welfare. Unlike the existing provincial SITA’s that were concerned with regulation of proscribed acts and punishment of offences, the SITA 1956 provided an elaborate government program for the rescue and rehabilitation of prostitutes, attempted to set up safeguards against police excesses and laid the basis for a bureaucracy of social welfare staffed by women.

The role played by both Indian and international women’s organizations in campaigns for social reform in colonial India is well documented. Women’s groups played an influential role in reframing the terms of debate and pushing for legislative change over the questions of age of consent and family law reform. However, in colonial India, women’s organizations remained external to the state which treated them as representatives of a particular interest group, akin to the laboring class or the Anglo-Indian community. In postcolonial India, feminists and women’s organizations found greater accommodation within the state and were able to play a more active role in crafting state policy.

This repositioning of women’s groups, and thus of the women’s interests they represented, was the result of several factors. Women had participated in large numbers in the nationalist movements and women leaders had played a prominent role, granting greater legitimacy both to women’s issues and women leaders. Secondly, several prominent individuals simultaneously held governmental office and positions of leadership in women’s organizations, and were able to define the agenda of the former position to accommodate the aims of the latter. Durgabai Deshmukh, a leading campaigner against trafficking and prostitution, is an example of

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such access to effective power, being also the only woman on the Planning Commission. Under her influence, the Planning Commission designated funds setting up the Central Social Welfare Board, which funded women’s organizations and commissioned a national survey on social and moral hygiene that became the basis for SITA.\textsuperscript{866}

The most significant factor in the marked difference between the position of women’s groups and interests before and after Independence was the centrality of the “women’s question” to the identity of the Indian republic. As Partha Chatterjee demonstrates, Indian nationalist thought had divided culture into the spheres of the material and the spiritual. The outer or material sphere was one of politics, economics and technology where the West dominated, while the inner spiritual sphere contained the domain of home and the self. The West’s methods were to be learnt in order to arm oneself to combat them in the material sphere. However, Western influence was to be resisted in the spiritual sphere as it was this that set India apart as a nation. Women were increasingly viewed as the representatives of the inner domain of the spiritual and as repositories of Indian culture. As the political corollary of this belief, social reform by the colonial state was to be resisted; change would have to be generated from within.\textsuperscript{867} However, post Independence, the state was no longer alien and acquired the legitimacy to enact reform through legislative enactments.

These processes of making and interpreting the ‘national’ imaginary, through which the alien and the domestic state apparatuses were given different locations and status, can be better understood by examining the pivotal role played by the ASMH in the framing and enactment of the SITA. The ASMH was a leading abolitionist organization in London that had emerged in


1914 out of the Ladies’ National Association for the Repeal of the Contagious Diseases Acts (‘LNA’), headed by Josephine Butler, and the British branch of the International Abolitionist Federation. With the repeal of the Contagious Diseases Act in Britain, the ASHM turned their gaze to the British colonies and to Continental Europe.\textsuperscript{868} In 1928, the ASHM appointed Meliscent Shephard as its representative in India, with the mandate to campaign for the closure of public brothels. Melicent Shephard investigated red light areas and was successful in closing down several military brothels that were being run in breach of government policy, in effect forcing the relatively autonomous military to conform to the government’s sanitary policies.\textsuperscript{869} After a decade in India, she was able to meet with high ranking colonial officials and gain the patronage of the Vicereine. However, the ASMH did not seek to mobilize popular public opinion and was increasingly viewed with suspicion by nationalist organizations. As Sushila Nayar, Minister for Health in Nehru’s cabinet, would reminisce, an organization run by the wives of officials was unappealing, but the organization “was brought down to the level of the common people after independence”.\textsuperscript{870}

On Independence, Rameshwari Nehru was appointed President of the ASMH. Rameshwari Nehru, a little-known figure today, was a prominent Gandhian social worker at the time of Independence. She was the founder of the \textit{Stree Darpan}, a leading Hindi women’s journal; established and ran several social work organizations like the ‘Mahila Samiti’ and the Delhi Women’s League and had been president of the AIWC. She had considerable experience of working with the government. She was the only Indian woman appointed to the ‘Age of

\textsuperscript{870} Dr Sushila Nayar, “Inaugural Address to the Eleventh All India Conference of the ASMH, 1966” in \textit{ASMH Memorial}, p.128.
Consent Committee’ whose report was the foundation of the Child Marriage Restraint Act of 1929. In 1946 she had been elected a representative to the Punjab State Assembly, and upon Independence was appointed Advisor to the Ministry of Relief and Rehabilitation, supervising the recovery and rehabilitated of abducted women. Critically, she was also a member of the politically influential Nehru family, and a cousin of the Prime Minister. Her stature, connections and experience placed considerable resources at the disposal of the ASMH, which began with these advantages to transform itself into a national body engaged in both research and advocacy.

The ASMH went on a membership drive, and from a presence in two cities, developed to the extent of establishing branches in all State capitals and in over a hundred and forty districts. The ASHM had a secretariat, and appointed Leonor Riberio, a graduate in Social Work from Columbia University, as the Executive Secretary. The ranks of its members swelled, and following the trajectory of national organizations like the Indian National Congress, the ASMH began to hold annual meetings at different cities each year. The President of India presided over the inaugural session, and the following meetings saw keynote addresses being delivered by public officials, including every woman to have held ministerial office in Nehru’s cabinet as well as the women who became presidents of the ruling Congress Party and the socialist opposition. Each session saw presentations by social workers, social scientists, police officers and bureaucrats and ended with a set of recommendations for legislative and policy change.

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873 The list of distinguished presidents included Rajkumari Amrit Kaur (Health), Violet Alva (Home Affairs), Sushila Nayar (Health), Lakshmi N. Menon (External Affairs), Durgabai Deshmukh (Chairman, Central Social Welfare Board), Indira Gandhi (President, Indian National Congress, 1959) and Kamala Devi Chattopadhya (General Secretary, Praja Socialist Party).
Institutionally, from being an organization funded by charitable subscriptions in London, the ASMH became one receiving a majority of its funding from the Central Social Welfare Board. The CSWB itself was the brainchild of Durgabai Deshmukh, an ASMH associate. As a member of the Planning Commission, Deshmukh had argued for greater governmental involvement in the field of welfare services. Individual voluntary organizations could merely provide ‘fire-fighting’ measures, to tackle deprivation in the absence of a social welfare infrastructure. The CWSB was set up to coordinate and fund the activities of welfare organizations. Indira Gandhi held the chair of the CWSB till 1957, when she was elected the President of the Indian National Congress. As Durgabai Deshmukh reminded the ASMH, the Constitution enjoined on the state the active pursuit and promotion of welfare in all fields of “national life”. The promotion of welfare services was no longer the sole concern of unregulated private philanthropy, but was a chief concern of the welfare state.  

In 1954, pursuant to a resolution of the Chandigarh Session of the ASMH, the CSWB set up a high level committee to investigate all the aspects of immoral traffic in women and girls and to recommend measures to suppress these evils and minimize prostitution. Headed by Lady Dhanvanti Rama Rau, a distinguished women’s health activist who had served as President of the International Planned Parenthood Foundation, the committee resolved to study the demand and supply aspects of prostitution, visit welfare institutions for women, examine the implementation of immoral traffic laws in the States where they existed and solicit public opinion in favor of such legislation in States where it did not exist. Over two years, the committee travelled to almost every State in India, visited 86 towns, inspected over a hundred

875 Durgabai Deshmukh, Presidential Address, 1956, 5th All India Conference of the ASMH, ASMH Memorial, 72.
institutions and engaged with over four hundred officials including lawyers, magistrates, police
officers, social workers and doctors and over a thousand non officials. They surveyed fifty two
‘vice’ areas and interviewed hundreds of prostitutes and brothel keepers. The ASMH Committee
Report was presented to the Home Minister in 1955. Editorials in twenty five newspapers
endorsed its findings.  

Surveying the state of events, the ASMH high-level committee said it was “abundantly
clear” that the state would have to lay down an entirely new policy to deal with prostitution. Parliament, they argued, needed to take the lead and frame an uniform laws across the country. The individual freedom of movement guaranteed in the Constitution complicated the state’s plans, and the mobility of people across jurisdictions rendered the state powerless to deal with problems like immoral traffic. 

State level legislations were seen as ineffective. A number of States had passed laws to suppress immoral traffic in the early 1930s, and after Independence the ASMH put pressure on other State governments to enact the same. By 1954 a majority of Indian provinces had some form of legislation dealing with immoral traffic; however, these were rarely implemented or enforced. Studies indicated that the UP SITA, 1933 had never been enforced.

878 Durgabai Deshmukh, President Address, 5th Annual Meeting of the ASMH, 1956, ASMH Memorial 77.
880 Letter from Durgabai to Nehru, 7 September 1954, Durgabai Deshmukh Papers, (NMML).
881 The Bombay Prevention of Prostitution Act, XI of 1923; The Madras Suppression of Immoral Traffic Act, V of
1930; The Bengal Suppression of Immoral Traffic Act, VI of 1933; The UP Suppression of Immoral Traffic Act,
VII of 1933; The Punjab Suppression of Immoral Traffic Act, 1935; the Madhya Pradesh Suppression of Immoral
Traffic Act of 1953; the Bihar Suppression of Immoral Traffic Act, 1948; the Mysore Suppression of Immoral
Traffic Act, 1936; the Travancore-Cochin Suppression of Immoral Traffic Act, 1952; the Hyderabad Suppression of
Immoral Traffic Act 1952; the Ajmer Prevention of Prostitution Act, 1953; Patiala Suppression of Immoral Traffic
Act, 1940; and the Suppression of Immoral Traffic (Jammu and Kashmir) Act, 1934. The Bombay Devadasi
Protection Act, 1934 and the Madras Devadasi Prevention of Dedication Act, 1938 were special statutes enacted to
invalidate the dedication of women to temples. Finally, to check the practice of training minor girls in prostitution,
the UP Naik Girls Protection Act, 1929 authorized the Magistrate to receive particulars for all girls under 18 years of
age and restrict and regulate their movements.
882 A.S Mathur and B.L Gupta, Prostitutes and Prostitution (Agra: Ram Prasad and Sons, 1965), 63.
The ASMH high-level committee advised the government that the while the law must be harsh to prostitution, “it must show a concern – nay – a tenderness to the prostitute”. The law needed to aim at closing the entrances to the profession and opening several exits from it. The committee noted that in the course of their survey many people expressed a belief that prostitution could not be directly touched, as the Constitution of India recognized the fundamental right of a person to practice any profession. However, it argued that by destroying the machinery that sustained prostitution, i.e. the network of procurers, pimps, brothel keepers, rent laws and the regulation of public spaces, prostitution could be eradicated.

The ASMH high-level committee’s approach to legislation differed from the existing laws addressing prostitution in two significant ways: it placed equal emphasis on rescue and rehabilitation, and it demanded that the state create a special bureaucracy which would be staffed by specialists and women social workers to deal with the problem.

The committee asserted that it would be wrong to treat the prostitute as a criminal, given that she was a victim of circumstances beyond her control. The report described the existing system as a violation of all principles of justice, being one that punished and degraded the unfortunate woman who was only a helpless unwilling subject while absolving the male participant. They were critical of fines and imprisonment as punishments, but this disagreement with the existing penalties was not motivated out of any liberal notion of the prostitute’s rights. They argued that detention for women in rescue homes was more effective in rehabilitating them than a short term in prison, after which they would return to their old life. They accordingly recommended that the courts should deny bail in most circumstances, on the assumption that the persons bailing the woman out were likely to be involved in the sex trade.

884 ASMH Report, 37.
They proposed a new criminal system that would place the burden of proof on the accused, and would provide for a speedy trial in camera. According to the committee, this modified legal process would be more humane to the woman arrested, and ensure her cooperation with the police, enabling them to capture the others involved in the case. Detention in a home would be compulsory for a woman found guilty, and only those ‘hardened cases’ who were likely to be ‘an evil influence’ would be sent to prison.

The ASMH high-level committee were severely critical of the institutes for distressed women that they had studied, which included orphanages, widows’ homes, homes for fallen women, church-run homes and Hindu ashrams. They provided a moving description of the abject conditions in these institutions and condemned most as being run by unscrupulous individuals who were profiting off the women housed there. They exposed a racket where several rescue homes run by Hindu religious trusts sold the women who had taken shelter with them to the highest bidder, on the marriage market. Ostensibly, such marriages were intended to rehabilitate the women, but the homes would charge a large fee to facilitate the process. Further, there was no system of following up the women’s welfare after their marriages, and many of them were found by the committee to have been trafficked back into prostitution. Rescue homes would be of critical importance under the new law, but to implement standards of probity and effectiveness, a state-run impartial system of inspection, licensing and supervision would be required.

Given past experience, the ASMH high-level committee was not sanguine about the priority state authorities would allow to the need for a new legal regime, supported by a state-licensed network of rescue homes. A significant amount of discretion was granted under the

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885 ASMH Report, 23.
subsisting system to officials who had neither the expertise nor the inclination to take effective action. The ASMH recommended a larger role for public spirited women social workers. For instance, it suggested that the magistrates trying cases under the prostitution laws should empanel a jury of five social workers, a majority of whom should be women.\textsuperscript{887} They also suggested that a special police squad be created for the enforcement of the anti-prostitution laws, consisting partly of police officers and partly of local social workers. They were insistent that a large number of the police should be women, not merely a few token women constables. This police force, in the committee’s plans, would keep watch over the regular haunts of prostitution and maintain observation over dangerous sites of immorality such as railway stations and marketplaces.

The state had the responsibility for establishing suitable centers for women engaged in prostitution, and for providing them with care and training so that they would be fit to earn an ‘honest living’ in the future. To this end, the ASMH high-level committee recommended the creation of a network of institutions starting from the district level. These ‘Vigilance Shelters’ would house not only women arrested and punished under the anti-prostitution law, but also women who were in moral danger. These women who were likely to be led into prostitution, including the destitute, women in unhappy marriages, young widows considered a burden by their families, were to be referred to these Vigilance Shelters, where they would be permitted to stay for six months and receive free board, lodging and training. These shelters would feed into a network of regional women’s institutes where women could be trained in useful vocational skills. At the national level this network would be capped by a Central Directorate for the Welfare of Women and Children established as part of a new Ministry for Social Welfare. In their report, the ASMH committee laid out a very detailed schema for these institutions, listing their personnel,\textsuperscript{887}

\textsuperscript{887} ASMH Report, 35.
infrastructure and the costs that would be incurred. Thus, for the ASMH, the problem of immoral traffic could only be addressed by restructuring the state through a new social welfare bureaucracy manned by trained women professionals.

An aspect of the ASMH high-level committee’s recommendations deserves some separate scrutiny, in its larger context of ideas of law in Independent India. This is the ASMH’s creation of a category of women ‘likely’ to become prostitutes, as subjects for its recommended laws and for housing in the proposed Vigilance Shelters. The concern with apprehending potential victims/criminals before the commission of crime dominated law in postcolonial India, exemplified by the preventive detention laws which permitted the police to detain people without trial for a certain period of time, on the ground of the state’s belief that they were likely to commit a crime.\(^888\) The Evacuee Property Act, 1950 enacted to allow the state to redistribute property left behind by people who had gone to Pakistan, also allowed the state to appropriate property from ‘intending evacuees’, or those who were likely to go.\(^889\) In another early instance of this belief, preventive action had been attempted by the legislature in the United Provinces in the UP Naik Girl’s Protection Act of 1937, which sought to check the practice of training young girls of the Naik community for prostitution. This Act empowered the magistrate to call for particulars of any Naik girls in his jurisdiction, restrict and regulate their movements and even remove from their homes minor girls who were believed to be in danger, and detain them till suitable guardians were found\(^890\).

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889 Both the Evacuee Property Act, 1950 and preventive detention laws were subject to constitutional challenges. See Rohit De, “Taming of the Custodian: Evacuee Property and the Making of Administrative Law in India and Pakistan (2013, forthcoming)

890 United Provinces Naik Girl Protection Act, 1937.
Preventive actions were seen as more necessary than curative ones in the postcolonial republic. Many members of the Constituent Assembly, having had been arrested by colonial preventive detention laws had expressed reservations on their continuation. However, the principle persisted, because the leaders of the assembly felt it was necessary to ensure law and order at a time when the state was quite fragile. 891

Their goal of feminizing the state set apart the ASMH and its associates from their contemporaries in the West. In her study of American reformers dealing with ‘fallen women’, Regina Kuenzel argues, that the professionalization of social work involved the ‘masculinization’ of an older ethic of female values. American social workers in the 1920s and ‘30s sought to encourage a greater male presence in positions of authority dealing with unmarried women, and specifically invited male speakers to conferences and appointed male advisors to rescue homes to reduce the femininity in the program. 892 The Indian reformers on the other hand were suspicious of male functionaries and campaigned for a greater deployment of women at every level of administration from the police to the judiciary. The emphasis here was not on feminine qualities, but on representativeness i.e. the belief that as women, the desired inductees into the state would better represent women and understand women’s needs.

Kuenzel argues that women’s activists sought to involve male leaders as they had ceded the area to women, making it in some ways less important. The contrast is more striking, because in India too, Gandhi had asked the Congress Party to not get involved in the question of prostitution. Indian women activists sought to claim this position and to expand it into other domains. Social work in India was not separated from political activity. Indian women activists, like their contemporaries in Western nations, largely belonged to the upper classes. However, unlike their peers in Europe and

891 For an account, see Austin (1966) 112.
America who were largely engaged in social work, the Indian women leaders had active political careers and several held elected office. With Independence, they saw their role transform from advocates of reform to those implementing it. Durgabai Deshmukh told a gathering of leading women’s activists that they had moved from “an era of agitation to one of endeavor”, and that the opportunities that had been sought for decades were now open to them.  

These new opportunities enabled Indian women activists to press the government to action. Sucheta Kripalani was India’s delegate to the Social Committee of the UN, tasked with drafting the 1950 convention on the suppression of traffic in persons. Mrs Kripalani supported an amendment that adopted the principle that exploitation of prostitution ought to be punishable irrespective of whether “gain” was involved. She argued that it was difficult enough to prove the crime itself, without the additional onus of establishing a motive.

In 1953, the ASMH sent a memorandum on the subject, and a draft bill, to the Minister for Home Affairs. The ministry then circulated it to the States for their comments, which were incorporated into the final draft. Frustrated by the Minister for Home Affairs’ delay in introducing a new law, the ASMH contacted the women members of Parliament and formed a lobby led by Uma Nehru of the Congress Party and Parvathi Krishnan of the Communist Party.

Two women members of Parliament introduced the draft law as private member bills in both the Lok Sabha and the Rajya Sabha. They also introduced a separate bill for licensing

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893 Durgabai Deshmukh, President’s Address, 5th Annual Meeting of the ASMH, 1956.
894 “Suppression of Prostitution: UN Body’s Discussion,” The Times of India, 3 October 1949, p. 5.
protective homes for women and children. During a debate, they castigated the government for its failure to legislate, prompting the Minister for Home Affairs to make a commitment to bring in a Central legislation. Durgabai Deshmukh and Rameshwari Nehru made frequent visits to the Prime Minister and the Home Minister, which expedited the work of legislation at the Home Ministry. Finally, the SITA was enacted in December 1956.

**The Schema of SITA**

As a commentator noted, though the ‘normal expectation’ from the SITA was that it would totally ban prostitution, the provisions of the statute do not declare the act of prostitution an offence. Parliament sought instead to curb prostitution as an organized means of life, through this legislation.

The SITA had three broad sections, dealing with restrictive and punitive measures; executive and procedural questions; and reform and rehabilitation; respectively. The SITA did not seek to ban the practice of prostitution by an individual woman, but sought to suppress activities connected with prostitution, particularly brothel keeping, pimping and kidnapping. The first few sections made it an offence to keep a brothel or to live off a woman’s earnings from prostitution, and the second set of penal provisions sought to prohibit the kidnapping and detention of women, and inducing a woman to take up the profession of prostitution.

While not prohibiting prostitution outright, the SITA made it a criminal offence to practice prostitution within 200 yards of a place of religious worship, educational institution, hostel, hospital, nursing home or any other area notified by the police or a magistrate. It also

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899 It is notable that the Home Ministry’s files on the SITA seem to have moved only before an impending visit by Mrs Nehru or Mrs Deshmukh. See for instance, Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].
901 S.5, SITA, 1956.
criminalized public soliciting for sex, i.e. by a person in a public place or within sight of a public place, through the use of words, gesture or “willful exposure of her person”.

The procedural sections of the SITA authorized the court to detain a person convicted of an offence under this statute in a protective home for a period between two to five years. The courts did not have the discretion to release such offenders on probation. The SITA empowered magistrates to evict women their homes if they violated the 200 yard rule, as well as granting the magistrate wide powers to extern from his district any woman who the magistrate considered a danger to public morals.

The ASMH was convinced that the problem of prostitution could not be addressed through routine police administration, and accordingly inserted into the SITA a provision for appointment of a special police officer by the State government. This officer would be assisted by women police officers and a non-official advisory body comprising leading social welfare workers, preferably women. These officers would have powers to arrest without warrant. He could also search premises without a warrant if he suspected they were being used for an offence, though he would have to be accompanied by two respectable witnesses, at least one of whom was a woman.

Finally, the SITA provided that the state would establish protective homes under the statute. It also provided that no other authority, including charitable organizations, could maintain a protective home unless licensed for the purpose by the state. The SITA was also accompanied by The Women and Children’s Institutions (Licensing Act), 1956, drafted by ASMH member Dr Seeta Parmanand, which laid down extensive guidelines for state licensing of 

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902 S.8, SITA, 1956.
903 S.10(1)(a), SITA, 1956.
private institutions. It was the rehabilitative sections that really set the 1956 SITA apart from its provincial predecessors.

Women’s organizations were largely optimistic about the new legislation, though they expressed dissatisfaction with some loopholes. They were particularly critical of the fact that there was nothing in the bill to publish the male client, who in their eyes bore equal if not greater moral responsibility for the traffic of prostitution. Mithan J. Lam, India’s first woman lawyer and legal advisor to a number of women’s organizations, recommended that a presumption be added to the SITA that any man found in a brothel in a raid would be guilty unless he could prove otherwise.

Mithan J. Lam pointed out that the bill was more lenient than the one that had been proposed, specifically in providing the option of probation to first time offenders. She was also uncomfortable with the sweeping powers that were given to the police, who had not yet been trained to deal with immoral offences. The AIWC recommended that the powers to inspect be given to reputed members of the public or to a women’s association, like the ASMH. They were appreciative of the clauses requiring protective homes to be run and licensed by the state and wanted to increase the power of the state to intervene in homes established under trusts and wills, and to replace trustees with the state’s own nominees. The ASMH and the AIWC offered the services of its own members for such nomination. Further, Mithan J. Lam was critical of there being no qualifications required to run such a home, and suggested that appropriately qualified women were needed to administer these positions.904

Every year, the ASMH in its annual meeting would review the working of the SITA and make recommendations for amendments to it. These included the suggestions that a summary

904 AIWC Opinion of Mrs Mithan J. Lam (Bill No 58 of 1954), File No 138, All India Women’s Conference Papers, IV Installment [NMML].
trial procedure be adopted to reduce delay; that the offences be made non-bailable; and that every case be heard by a panel that included honorary lady magistrates.\textsuperscript{905} Women were slowly drawn into the system of administration of the SITA. By 1962, the government of Delhi had appointed 18 members of the ASMH as assessors in its criminal courts.\textsuperscript{906}

**Living with Regulations: Alternatives to Constitutional Litigation**

To understand the radical nature of Husna Bai’s challenge to SITA, it is useful to examine what alternatives to constitutional litigation existed. Prostitutes had been bearing the brunt of a regulatory state and an intrusive police for decades before the enactment of the Constitution and in consequence had developed several strategies of negotiation. The preemptive challenge in court was a radical break from their usual alternatives. How did prostitutes learn to live with repressive legislation prior to the SITA?

There were several methods they used, often simultaneously; these included practices that evaded the law altogether, like bribing policemen and escaping physical surveillance; as well as practices that sought to engage with the legal system, like petitioning through political networks and evading legal categorization.

That anti-prostitution laws generate economies of corruption is well documented.\textsuperscript{907} Before the enactment of the SITA, prostitutes in India bought protection from policemen and state officials by paying bribes in cash or kind. Evidence of this practice dates back to the nineteenth century, when the Indian Contagious Diseases Act was passed in 1868. Prostitutes are known to have paid bribes to evade the medical examination mandated by this statute.\textsuperscript{908}

\textsuperscript{905} Recommendations of the 7th Annual Meeting of the ASMH, 1958, File 31, Rameshwari Nehru Papers [NMML].

\textsuperscript{906} Social Health, 3.


\textsuperscript{908} Tambe, Codes of Miscondcut (2009), 39.
Evasion of the subsisting laws through bribery was a practice that continued well after Independence. A 1962 social science study of the red light areas of Bombay noted that a majority of prostitutes described their relations with the police as very good, due in large part to cash bribes. The amount paid as a weekly bribe or *hafta* varied between two and five rupees a week, and was often in return for concessions by the police.\(^\text{909}\) Due to this economy of purchasing official favor with money, only twenty two of the three hundred and fifty women interviewed had been arrested, and in a remarkably candid admission, the only respondent who had had multiple arrests stated that this was because she had persistently refused to bribe a local policeman.\(^\text{910}\) Economic efficiency supported a culture of bribery, given that prostitutes could be fined amounts up to ten rupees or imprisoned upon arrest.

The enactment of colonial anti-prostitution laws and increased surveillance after various moral panics led to several prostitutes trying to evade the gaze of the state. As Ashwini Tambe notes in her analysis of the colonial census, the recorded number of prostitutes drops with the enactment of repressive legislation like the Contagious Diseases Act and increases upon its repeal.\(^\text{911}\) While such legislation was in effect, women were less willing to identify themselves as prostitutes and went into hiding as it were, to avoid the gaze of the state. A report by the Deputy Registrar General of the Census of India in 1953 noted that the figures of prostitutes fell from 54,000 in 1931 to 28,000 in 1951. He added a word of caution that the census only recorded as prostitutes the women who practiced this profession openly; it did not account for the larger number of ‘clandestine prostitutes’. He opined in this regard that several women who stated their

\(^{909}\) The interviewers noted that questions regarding their relations with the police aroused suspicion and fear among the respondents and only a minority chose to respond. S.D. Punekar and Kamala Rao, *A Study of Prostitutes in Bombay (With Reference to Family Background)* (Bombay: Allied Publishers Pvt Limited, 1962), 154.

\(^{910}\) Dunekar and Rao, 152.

\(^{911}\) Tambe , *Codes of Misconduct* (2009) 117.
profession as ‘dancing’, and were accordingly classified as dancing girls, were actually prostitutes.\footnote{Report of the Working of the Contagious Diseases Act, July 1887.}

Other women evaded the coercive apparatus of the state by physically removing themselves from its gaze. The state’s toleration of red-light districts meant that such areas and their occupants were well known to the police. The police in cities like Bombay and Calcutta were able to maintain extensive registers of prostitutes that documented fairly intimate details such as age, address and history of venereal disease. Stricter anti-prostitution laws and moral panics, that led to periods of more intrusive policing, also witnessed several women moving out of the red-light areas and away from police information networks. The enactment of the Contagious Diseases Act in Bombay in 1887 was followed by reports of several prostitutes moving to Bandra and commuting to Bombay on the new inexpensive train system.\footnote{Letter to G.B Pant, Home Minister, 10 January, Subject File 31, Rameshwari Nehru Papers [NMML].} The authors of the SITA were dismayed by these unintended consequences. The redoubtable Rameshwari Nehru, President of the ASMH and the moving force behind the SITA, wrote to the Home Minister six months after the implementation of the SITA noting that the new legislation had “put fright into the heart of prostitutes,” and by clearing the red light areas of Delhi, like G.B. Road and Kath Bazaar, had served “some useful purpose”.\footnote{Prostitutes in Indian Censuses,” Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI].} However, the frequent prosecutions under the SITA only made the women engaged in prostitution leave their homes in panic to seek shelter in other parts of the city. Ironically, as long as the women lived in the red-light areas, which were known to the police, they could be prosecuted and punished for solicitation, but once they dispersed all over the city it was difficult for the police to trace them. Mrs Nehru noted with some alarm that since they had no other means of subsistence and knew no other trade, they were bound to stick to their old profession and would “exert themselves all
the more” to attract new customers. This complaint was echoed by the Law Minister, Ashoke Sen, who noted the complaints by residents of respectable localities in Calcutta that prostitutes were moving into their neighborhood after the implementation of the SITA, thus frustrating the very aims behind the Act and bringing residential neighborhoods to disrepute.  

Prostitutes achieved limited successes in making direct appeals to governments; however, these were framed as demands for benevolence or exemption rather than as assertions of rights. In the nineteenth and early twentieth centuries, these were mostly petitions by individual prostitutes to government authorities asking for an exception to be made in their favor on the grounds of hardship. Ironically, since franchise was granted according to tax and property qualifications, prostitutes were amongst the few groups of women who could vote. Residing in segregated neighborhoods in some cities like Lucknow, they emerged as an influential political constituency, and were able to access certain political channels. However, the political channels began to narrow with the growth of nationalist politics.

Congress leaders emphasized the need to recruit women from respectable classes and urged women to maintain modesty and decorum. For Indian nationalists in the nineteenth century, the figure of the prostitute was the foil for the idealized figure of Indian womanhood. As Ashwini Tambe points out, Gandhi expanded the avenues for women’s participation in the nationalist project by “evacuating them of sexual possibility”, emphasizing modesty and advocating celibacy among his followers, thus making it possible for large numbers of

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916 Petition from Bismillah, a prostitute formerly residing in Agra Cantonment, against her expulsion from that cantonment, Home: Legislative, 1918 [NAI].
respectable women to enter a domain populated by men.\textsuperscript{918} The new sphere of politics became one that was closed to participation by prostitutes. This change became evident when 350 prostitutes from Barisal in East Bengal, who had contributed to Congress funds and had become Congress members, were refused permission to seek office in Congress committees. Gandhi explained the refusal on the grounds that only those “who had pure hands and pure hearts” could lead the battle for swaraj and advised the women to give up their profession and take up constructive work.\textsuperscript{919} When he discovered that most had disregarded his advice and continued as Congress members, some even being elected as delegates to the annual sessions, he reacted angrily, branding them “more dangerous than thief, because they steal virtue”.\textsuperscript{920}

As episode from Lucknow shows how difficult such an appeal, even when made to a sympathetic politician, could be. In 1939, faced with an eviction order from the Lucknow Municipal Board, several prostitutes sent a petition for assistance to Vijaylakshmi Pandit, who had recently become the Minister for Health and Local Self Government in the United Provinces, and was the first woman to hold a ministerial post. Mrs Pandit narrates in her autobiography that she received a petition from several women who were protesting their impending eviction, but was unable to make out the details since the petition was in Urdu. Her aides were too embarrassed to give her the details and tried to prevent her intervention, but as “this was a matter pertaining to women and the appeal had been made to her as a woman”, she overruled the protest and went to meet the petitioners.\textsuperscript{921} Her chauffeur refused to drive Mrs Pandit to the destination.

\textsuperscript{921} Mrs Pandit was the sister of Jawaharlal Nehru and a prominent leader within the Congress party. In her later career, she would be elected to the Constituent Assembly, serve as Ambassador to the USA, the USSR and the UK and be elected President of the UN General Assembly. She would also preside over the 8\textsuperscript{th} session of the ASMH.
after being told the address, forcing her to drive the car herself. It was only after she reached her destination, that she realized what the situation was. She recounts,

“We reached the place and I was received by a woman with courtly manners and great poise who spoke beautiful Urdu. Iced drinks were produced… and I was then taken around part of the area and told that being moved from here the girls would lose many clients! I promised to speak to the chairman, knowing fully well that he was an archconservative…”

On her visit, Mrs Pandit discovered a young woman suffering from syphilis who was being refused treatment at the municipal hospital because she was a prostitute. Despite stiff resistance from doctors and bureaucrats, she was able to get the girl admitted to a clinic after giving an order in writing as the Minister for Health. Both her aides and the government doctors came out in strict opposition, telling her that she had “no business to get involved”.

Pandit reflects on this incident as one of the very few in her life that “gave her satisfaction”, especially since it spurred her to get the government to open a venereal disease clinic for women. Pandit’s narrative highlights the extremely limited intervention that could be made in favor of prostitutes through regular political channels. While Pandit was able to help an individual prostitute gain access to medical assistance and was able to use the incident to change policy, she made no mention of her success in preventing the eviction of these women. Her limited intervention was also serendipitous, arising as it did from her aides’ inability to read the Urdu petition. There were limits to the sisterhood women politicians like Mrs Pandit could extend to prostitutes. The women leaders within the Congress had emerged during the Gandhian

922 Pandit, Scope of Happiness (1969)141.
923 Pandit, 141.
924 Id.
mass politics of the 1920s and ‘30s. Thousands of women, including several of the Assembly members like Hansa Mehta, Durgabai, Rameshwari Nehru and Vijaylakshmi Pandit, joined the forefront of the civil disobedience movement in 1930 and led campaigns of breaking the salt laws and picketing liquor shops. The prospect of women ‘walking the streets’ was a source of anxiety to many, and detractors like Cornelia Sorabji were quick to dub female Congress volunteers as prostitutes.925

**Reclassification as Resistance**

While some prostitutes tried to minimize or invisibilize their physical presence, others contested the logic of enforcement, and attempted to become discursively illegible to the state, by denying that they fit the definition of a ‘prostitute’. Ashwini Tambe documents how prostitutes in Bombay sought to evade registration by the state by claiming to be married.926 Over 400 women engaged in prostitution got married within days of the Contagious Diseases Act being enforced in Bombay. Similarly, when the Delhi municipality began evicting prostitutes from the red light areas in the 1920s, several women claimed that while they did exchange sexual favors for money, they were not public prostitutes as defined by the statute.927

These claims of existing and making a living outside the law’s definition of prostitution reached the civil courts and enjoyed mixed success there. The High Court at Lahore ruled that women could earn their living by selling their bodies, and would be exempt from the anti-prostitution law, unless it was proved that they were public prostitutes, that is “[were] available

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926 Tambe, *Codes of Misconduct* (2009), 39.
927 I am grateful to Stephen Legg, Nottingham University, for sharing his research on this particular petition with me. Stephen Legg, “Scales of Prostitution: International Governmentalities and Interwar India” (unpublished manuscript on file with author).
at any times to the public at large”. Six women residing in Delhi had contested a notice of the municipality that sought to evict them for being public prostitutes. They lost their case before the District Judge but found the High Court more amenable to their reading of the facts. Mussamat Bandi Jan for instance was found living with one Chandu Lal as his mistress, and was being paid Rs 220 per month for her maintenance. The Court found that the fact that she remained content with one employer for several years suggested that she did not fall within the expression ‘public prostitute’, which would imply that she was letting her body out to hire to all visitors. Mussamat Moti Jan was also exempted, for though it was proved that she had lived with different lovers, it was clear that she was only with one person at a time. The Court held that it was clear that she was a prostitute, but doubtful whether she could be called a ‘public prostitute’.

The category of dancing girls created a certain ambiguity for the law. This ambiguity arose from the difficulties caused by transplanting the European category of “prostitute” to colonial India. As described above, this process led to most women who were outside the patriarchal household being marked as “prostitutes” as opposed to chaste housewives. These included courtesans, nautch girls and temple dancers, all of whom played important social roles in performing and maintaining artistic traditions, but also engaged in select sexual relations with patrons. The “dancing girl” was a difficult category for Indian nationalists. To nationalists and reformers the old category of “dancing girl” represented the decadent old order that had to be cleansed from modern India, but singing and dancing as occupations came to enjoy a new

929 Id
respectability. Indian music and dance were cast as part of the nationalist project, with the
discovery of “classical traditions”, and posed as a challenge to the West’s claim to cultural
superiority.\footnote{Amanda Weidman, Singing the Classical, Voicing the Modern: The Postcolonial Politics of Music in South India (Duke University Press, 2006).} Several women from courtesan backgrounds, such as Gauhar Jaan and M.S.
Subbalakshmi, emerged as national cultural figures.\footnote{Amanda Weidman, “Stage Goddesses and Studio Divas: Agency and the Politics of Voice,” in Words, Worlds, and Material Girls: Essays on Language, Gender, Globalization, ed. Bonnie McElhinny, (Mouton de Gruyter Press, 2007), 131-156; Vikram Sampath, My Name is Gauhar Jaan: Life and Times of a Musician (Delhi: Rupa and Co, 2010).} In independent India, classical traditions of music and dance were cast as integral elements of national culture. The decision taken by the
prostitutes of Allahabad to name their union, the Dancing Girls Union was a strategic one. The
courts had as early as 1933 held that carrying on the profession of a singer or dancer by women
does not necessarily connote the business of prostitution.\footnote{Parbatti Dassi v. King Emperor, AIR 1934 Cal. 198.}

Parbatti Dassi’s case starkly evidences the advantages women could gain from
representing themselves as dancers. Parbati Dassi, a middle aged woman living in Calcutta’s
notorious Bow Bazaar Street was arrested under the Calcutta SITA of 1923 for the offence of
trafficking her minor daughter Lakshi. An anonymous informant had written to the police that
Parbatti had brought her daughter to Calcutta for one Burman and engaged her in the sex trade.
The police on raiding her house found her living in a building occupied by several prostitutes.
Two prosecution witnesses came forward and admitted to having sexual relations with the
daughter in return for money. Lakshi’s testimony in court also revealed that her mother had
previously been prosecuted in Rangoon for prostituting her daughter. Parbatti Dassi denied these
allegations and asserted that Lakshi was a musical artist of some repute and that she had brought
her daughter to Calcutta for the purpose of employment. In her statement to the court she
produced a contract the daughter had with New Pearl Talkies, a cinema company, where she gave performances as a singer and a dancer.

The magistrate convicted Parbatti, stating that while Lakshi might have had an employment contract based on her dancing and singing abilities, it was a dual calling. It was “perfectly obvious” that her profession as a cinema actress and dancer did not clash with her “other less reputable calling”. The magistrate, observing that Lakshi was exploited both as a “cinema actress and a woman of the town”, also noted that it was “well known” that singing and dancing constituted the advertisement side of the trade of prostitution.

The High Court of Calcutta overturned the conviction and admonished the magistrate for assuming that a female professional dancer or singer must invariably be a person of loose moral character. The High Court recognized that actresses and actors are not always seen as respectable people, but noted that the circumstances of the profession had changed from the “middle ages” when they were deemed rogues and vagabonds. The court held that carrying on the profession of a singer or a dancer did not automatically connote engagement in prostitution. The Parbatti Dassi decision was prominently featured in the commentaries and legal guides written on the Bombay Prevention of Prostitution Act 1923, the Bengal SITA 1923 and finally the SITA when it was enforced. Thus, a lawyer advising a client facing prosecution under any of these laws would turn to the textbook and find the Parbatti Dassi decision prominently featured.\textsuperscript{934}

Recognition as a dancing girl as distinct from a prostitute depended entirely on the worldview of the judge in question. The decision of the Allahabad High Court in the Asghari Jaan case was cited as strong precedent that a woman who carried on the life of music and

dancing, and engaged in sexual intimacy in exchange for favors with one or two men, could not be presumed to be a ‘public prostitute’. 935

Yet a closer look at Asghari’s case reveals the evidentiary perils a woman had to negotiate if she tried to argue that she was a ‘dancing girl’ and not a prostitute. In December 1927, Asghari Jaan, a fifteen year old who identified herself as “belonging to the prostitute caste”, was served with a notice from the newly elected Municipal Board of Etah, directing her to cease practising her occupation as a prostitute at her place of residence, failing which legal action would be taken against her. The notice stated that she was in violation of the municipal bye-law that prohibited prostitutes from carrying on their occupation in houses near major roads. This information had been proclaimed to the public with the beat of the drum. 936

Asghari and her mother Mt. Bismillah argued that the bye-law was not applicable to her, as she was a singing and dancing girl and not a ‘public prostitute’. At the initiation of her suit, she claimed that she was ‘virgo intacta’ and produced several witnesses who had approached her mother to purchase her sexual favors but had been refused. Her statement was challenged by witnesses produced by the municipal board, who deposed that they “were on terms of intimacy with the plaintiff and had sexual connection with her”. Asghari also refused to submit to medical examination of her hymen by a lady doctor, on the grounds that she had in the duration of the litigation lost her virginity to a patron whose mistress she had become. The case went through three levels of trial and appeal, at each of which the court arrived at a different determination of Asghari’s occupation. 937

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935 The case was cited in Razia v. The State of Uttar Pradesh, AIR 1957 All 340 and Balwant and Others v. Deputy Director, AIR 1975 All 295.
936 S.247, United Provinces Municipalities Act, 1917.
The lowest court noted that Asghari had in her plaint identified herself as belonging to a caste of prostitutes. Asghari’s mother had admitted to being a public prostitute in the past and most of her aunts also carried on the profession. The court noted that in India prostitutes who habitually allowed “the use of their person for sexual intercourse in lieu of hire” also cultivated the arts of singing and dancing, “for gain and as an additional attraction”. Merely because some of the women earned more from music and dancing, the District Court ruled, it did not place them in a different category from public prostitutes.

On appeal, the court found that the case hinged on whether Asghari’s chief business was public prostitution or singing and dancing. The municipality acknowledged that Asghari could sing and dance but argued that it was not her chief profession, while Asghari’s lawyer argued that she practiced an art. In order to determine this, the court bizarrely sought to appoint an expert, paid for by Asghari, who would watch Asghari perform and then give evidence in court. A.A Jilani, a local lawyer, volunteered as the expert, and organized a performance of music by Asghari. She had to perform for four hours, till 1:30 a.m., before an audience of the “best educated singers in the city” who would hear her singing and assist Jilani as assessors. Jilani deposed in court that Asghari was a tolerably fair singer, that she was clearly trained in the arts, and that he could identify seven special characteristics of her performance. He added that a girl who is habituated to promiscuous sex as a public prostitute, could not possibly “possess a melodious and sustained voice” as Asghari did.

Jilani’s claims to expertise were dubious. He stated that while he wasn’t trained in music himself, he had been watching performances by dancing girls for twelve years. He had also been appointed by the Municipal Board of Aligarh to survey the houses of prostitutes to assess their value. His claim was that this made him familiar with the lifestyles of several public prostitutes,
who rarely had arrangements for singing. The High Court was horrified that the powers provided by the Civil Procedure Code for the establishment of a commission to examine accounts or to hold a local examination, had been used to direct a person to hear a woman sing and then report not only on her skill as a singer, but deduce her occupation from her musical talents.

The Allahabad High Court attempted to disregard Jilani’s evidence and drew instead on ‘common understandings’ of a public prostitute. According to the High Court, a public prostitute was “a woman who usually and generally offers her person to sexual intercourse for hire and who openly advertises and acknowledges her occupation by word of mouth, deportment or conduct”. The court noted that such a woman usually exhibited herself on a balcony or on the street to attract people. The High Court ruled that it would need evidence of a great degree of moral degradation before a woman could be evicted from her house, in which her family may live or where she might have invested her money. It even took account of Asghari’s patron and noted that an exclusive patron suggested that the intimacy might assume the form of a “more lasting alliance”. Thus, there was no presumption that she was a ‘public prostitute’.

Asghari’s case underscores that while it was possible to escape being hit by the laws targeting ‘public prostitutes’, the escape route from the mischief of the law was available only to women with certain resources. Civil litigation remained a lengthy and expensive process and had significant barriers to access. The Delhi litigation took five years and the decision in Asghari Jaan took four years. Only comparatively affluent women could sustain such litigation.

The maneuver of taking to the courts to contest categorization as a prostitute was often successful, leading the Delhi Municipality to state, “no law and order will achieve the object aimed at, ...the women complained against always come off best in a court of law”.\textsuperscript{938} However this strategy t was based on an implicit class differentiation of prostitutes. For a woman to escape

\textsuperscript{938} Legg, \textit{Scales} (forthcoming)
regulations targeting public prostitutes, she would have to demonstrate that she was sexually exclusive, or attached to a single man as ‘a mistress’ or a ‘keep’ at the relevant time. The courts privileged a certain kind of sexual commerce over others, reflecting a need to prevent the urban government from interfering with the sexual lives of upper class men, who would be the patrons of the ‘exclusive’ prostitutes.

Secondly, as the High Court decision in Asghari Jaan’s case demonstrates, the court was reluctant to interfere with individual property rights, including rights to a home in which a woman might have invested her fortune, unless the municipality could show some extreme level of moral degradation. These categorizations allowed only wealthier prostitutes and those who belonged to established prostitute clans to evade regulations. The patterns of the courts’ interpretations of law reinforced hierarchies and allowed the rights of one set of female reproductive laborers to be won at the expense of another, while also protecting the male need for sexual entertainment.\(^{939}\)

**A Representative Prostitute: How Husna Bai Came to Court**

The SITA finally came into force on 1 May 1958. Husna Bai moved the High Court of Allahabad on the same day. Her petition was unusual both in its timing and in the fact that the SITA had not yet been applied against her. Previous challenges by prostitutes to the legality of anti-trafficking laws and municipal regulations had only been made after the issue had been forced upon them, i.e. they had been arrested or had found themselves evicted from their

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\(^{939}\) Feminist scholars caution against strategies that are predicated on the state distinguishing between good female behavior and bad female behavior, in this case between a courtesan and a prostitute. Prabha Kotiswaran, “Labours in Vice or Virtue? Neo-Liberalism, Sexual Commerce and the Case of Indian Bar Dancing,” *Journal of Law and Society*, 37.1 (March 2010), 105-24.
homes. Therefore, their encounter with the courts was the result of an initial encounter with the police or the municipal government.

Husna Bai’s petition was a radical departure from this pattern, and reveals her awareness of the implications of the legislation well before it came into force, and had the resources and strategy to attempt to counter it. Her petition in view of surrounding circumstances is similar to Bulsara’s petition in the case of prohibition, though it was not described as a ‘test case’. It was an individual petition filed to challenge a law on behalf of a larger group.

The press gave wide coverage to the enactment of the SITA and the debates leading up to it. The police and social workers, both groups that prostitutes would come into contact with, were involved in drafting this law. The ASMH survey had interviewed a number of prostitutes about the conditions of their profession. They found that the SITA had created fear in the minds of prostitutes. Mary, a prostitute interviewed in 1965, recalled that she left Delhi for Agra in 1958, where she had plied her trade on GB Road, because she was terribly worried and upset about police raids that were expected with the enforcement of the SITA. Prostitutes, particularly in Uttar Pradesh, faced a harder time in the 1950s under Congress rule. As a number of prostitutes interviewed in the city of Kanpur pointed out, the number of their paying clients had declined after the departure of American troops, the abolition of zamindari (the landed aristocracy whose property was redistributed as a part of land reforms) and the migration of many rich patrons in the Partition. The SITA was the last straw.

Clearly, those involved in the prostitution trade were aware of the implications of the SITA. As the Statesman noted, funds were being collected from customers and local traders on

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940 In Re Shantibai Rani Benoor, 1951 AIR (Bom) 337, Smt Sona Bai and others v. Municipality of Agra, AIR 1956 All 736.
941 Mathur and Gupta, 189.
942 Vidyadhar Agnihotri, Fallen Women; A Study With Special Reference to Kanpur (Kanpur: Maharaja Printers, 1954), 17.
G.B. Road and Kath Bazaar, in order to fight the statute in the courts. The day before the SITA came into force, seventy five women claiming to be members of the Professional Singers and Dancers Association staged a silent demonstration outside Parliament. They spent the day on the grounds near the northern gates of Parliament and presented a memorandum stating that the suppression of their profession would lead to its spread to respectable areas.

Meanwhile, on the day that Husna Bai filed her petition in Allahabad, around 450 singing and dancing girls, and women of ‘ill fame’ in the city, formed a union to fight against the Immoral Traffic in Women and Girls Act. The Allahabad Dancing Girls Union announced that it would hold demonstrations in protest against the enforcement of this law and would take legal steps for its nullification, as “it was a clear encroachment on the right to carry on any profession guaranteed by the constitution”. Simultaneously, a group of prostitutes in Calcutta’s red light area threatened to go on a hunger strike if the government did not provide them with alternative means of livelihood. Brojobala Dassi, a representative of the Calcutta organization convened a press conference and noted that the law would reduce 13,000 prostitutes to penury. Within a week of Husna Bai filing her petition, Mahroo and Ram Pyari, two prostitutes from Delhi, filed a petition in words almost identical to Husna Bai’s before the High Court at Delhi. Like Husna Bai’s, the Delhi petition challenged the SITA for being ultra vires the rights guaranteed under Article 14 and 19 of the Constitution, and applied for an interim stay against the state and against eviction of the petitioners by their landlords. Moreover, the government was clearly expecting such a challenge. The Central Ministry of Home Affairs, which had authored the SITA, noted of

946 Id.
948 “Prostitutes Plea Rejected: Circuit Court Decision,” The Times of India, 8 May 1958.
Husna Bai’s petition, “as was expected, a prostitute of Allahabad had filed a writ petition before the High Court challenging the validity of the SITA”.949 The circumstances suggest that Husna Bai’s petition was not an isolated individual act, but part of a concerted set of actions by groups of prostitutes in North India to resist the SITA. The scale of these activities led to an editorial decrying “demonstrations, moves to form trade unions and threats of civil disobedience that have accompanied the promulgation of the SITA”.950

**The Prostitute as a Citizen: Can the Subaltern Sue?**

It is only when we compare Husna Bai’s petition to the prevalent strategies adopted by prostitutes for dealing with repressive laws in the earlier period, that the radical nature of her tactic become evident. Prostitutes had usually dealt with repressive laws by evading the state’s gaze, Husna Bai on the other hand put herself firmly in view of the state. The act of filing a writ petition was an extremely public one, as is evident from the extensive coverage of Husna Bai’s petition in the national media. In their petition before the Allahabad High Court, Husna Bai and her cousin Shama Bai named five respondents: the Union government, the government of the State of Uttar Pradesh, the District Magistrate of Allahabad and Husna Bai’s landlords, two private individuals. The court proceedings therefore alerted the Home Ministry in Delhi, the State government under whose authority the police operated as well as the local municipality of Husna Bai’s presence.

In addition to her defiant ‘publicity’, Husna Bai departed from the prevalent strategies of her peers by taking advantage of the constitutional discourse, which allowed her to challenge the very fundamentals of the law. The previous history of litigation focused on women who argued that the categories criminalized by the state did not apply to them, whereas Husna Bai’s petition

949 Note to Joint Secretary, Serial No 4, Ministry of Home Affairs: Police Branch IV, File 37/3/58, 1958 [NAI].
sought to contest the categories themselves. Husna Bai claimed her right to trade and profession as guaranteed to her under the Constitution, by stating that prostitution was her hereditary trade and her only means of livelihood. She claimed freedom for her entire class, rather than asking for an individual exemption from the law.

Husna Bai’s open declaration of her profession was a deliberate decision. The courts had made it impossible for women who tried to evade being classified as prostitutes to challenge the constitutionality of anti-prostitution laws. In 1956, several women living in Agra were served notices of eviction by the Municipal Board, under a bye-law that sought to keep public prostitutes out of certain neighborhoods. Four women who had failed to comply with the eviction notice faced criminal proceedings. In the criminal case, the women contended that they were singing girls and not public prostitutes, while their lawyer simultaneously filed a writ petition under Article 226 before the Allahabad High Court challenging the constitutionality of the bye-law on the ground that it infringed his clients’ rights to freedom of trade and profession. The Allahabad High Court dismissed the petition on the grounds that if the women stated they were not public prostitutes, then they had no locus standi to challenge the bye-law in court.951

Thirdly, contrary to the official discourse of prostitution as ‘unproductive labor’, Husna Bai presented herself as a laboring citizen claiming economic rights. She represented herself as the main earner in her household, on whose earnings from prostitution her female cousin and two younger brothers were wholly dependent. Acknowledging that she had no other sources of livelihood and was unlikely to have marriage prospects, she contended that the SITA would render both her and her family destitute and therefore defeat the goal of the welfare state laid out in the Constitution. She pointed out that it was the law that rendered her an unproductive citizen

951 *Sona Bai and others v. Municipal Board, Agra*, 1956 AIR (All) 76.
and a burden upon the state, challenging the state’s narrative of prostitution as unproductive employment.  

Husna Bai’s self representation as a prostitute challenged the presumptions that framed the debates over prostitution, chief among which was the prostitute’s position as a victim coerced by men or economic circumstances.  

We should exercise caution in reading her petition as a representation of Husna Bai’s reality; nevertheless it was a powerful discursive act, forcing the state to deal with the willing sex worker, and was possibly the first such articulation in the Indian public sphere, predating the sex- radical feminist position by several decades. 

Finally, the writ petition Husna Bai filed required a minimal, fixed court fee, unlike the expenses that would have been incurred in a civil suit. Husna Bai’s petition was heard directly by the Allahabad High Court and disposed of within two weeks unlike civil suits that took an average of five to six years. In contrast, the writ petitions by prostitutes, even ones that went through several stages of appeals to the Supreme Court, were disposed of within a year at most. 

The potential effectiveness of the remedy and the availability of multiple forums to pursue it caused a degree of panic within the bureaucracy and social organizations. 

Husna Bai’s lawyers made a two pronged claim, both examined in separate sections below. First, they argued that various sections of the SITA were an unreasonable restriction her right to practice her trade and profession. Secondly, they targeted s.20 of the SITA which gave the magistrate wide powers to extern a woman who was suspected of being a prostitute, ie.

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952 Since the 1920s, prostitutes had been categorized with other forms of unproductive labor in the Indian census. “Prostitutes in Indian Censuses”, Ministry of Home Affairs, Police Branch II, File 46/53, Volume III, 1953[NAI]. 
remove her from the area under his jurisdiction. Both claims are examined in two separate sections that follow.

**The Right to Practice the World’s Oldest Profession**

Husna Bai’s first claim, and the one that caused the greatest amount of anxiety, was that the SITA violated her constitutional right to practice “her trade and profession”. The Committee on Social and Moral Hygiene had been alerted to the extant understanding that as the Constitution recognized the fundamental right of any person to practice his profession, no authority could prohibit the act of prostitution without denying this right. The drafters of the SITA had tried to get around this by allowing an individual woman to carry out prostitution provided she did not create a public nuisance, while criminalizing acts that supported organized prostitution, such as brothel keeping.

Husna Bai claimed that the SITA, in effect, illegally prohibited her from carrying on her trade by imposing unreasonable and illegal restrictions upon it. The Allahabad High Court had to first consider whether prostitution could be considered a profession. Justice Sahai reflected that the profession of a prostitute existed in all civilized nations from the earliest times. This hearkening back to the ancient origins of prostitution was feature common to most writing of prostitutes in this period, which established that the prostitute had always played a deplorable but important social role. The strongest challenge to this school of thought came from women’s activists, like Kamaladevi Chattopadhyaya, who argued that prostitution arose “from old habits of degrading customs, outmoded rotting vestiges of the past that cling to present social modes and needed to be swept away”. However, both narratives suggested that the existence of

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955 *ASMH Report*, 11.
957 Kamaladevi Chattopadhyay, Presidential Address, 4th All India Conference of the ASMH, ASMH Memorial, 61.
prostitution as a social fact had very little to do with the exercise of conscious choice by the woman involved. Social surveys and lectures attempted to examine the causes of prostitution and identified several that suggested that women entered prostitution for external reasons. Justice Sahai listed them as including difficulty of finding employment, other options of work being laborious and ill paid, harsh treatment at home, promiscuity amongst the poor, urbanization, bad examples set by the wealthy, and the depredations of profligate men.

In contrast, it was evident that a large number of prostitutes saw themselves as professionals, and sex as work. It has been noted that the colloquial terms for prostitution in vernacular languages, including kaam, dhanda, and pesha, translate as work, rather than pleasure. The Advisory Committee on Social and Moral Hygiene found that two large categories of prostitutes saw no shame in their profession and viewed it as a legitimate activity. The first of these were the hereditary prostitutes, or women who came from communities where daughters traditionally took up sex work to maintain the family, while the men were employed in ancillary occupations such as pimping or music. Such communities included the Gomantak Maratha and Kolatis in Bombay and Goa, the Basavi and Koyi in Madras and the Nutts and Bedias in North India. The other category were devadasis, or women who had been dedicated to temples as young girls and were sexually available to leading local men.

For many of these women, sex work was simply part of their larger repertoire of skills. The Advisory Committee interviewing a number of women in a North Indian brothel was taken aback when upon the conclusion of the interview, the women pleaded that the members of the Committee stay longer and watch their performances of singing and dance. What should one make of this insistence? Perhaps after a detailed examination by the Committee on the subjects

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958 ASMH Report, 4.
of their entry to the profession, the conditions they lived in and whether they desired to leave, they felt it important to communicate this aspect of their work to the Committee.

In another situation, the Committee members expressed regret at seeing a twelve year old girl not attending school. The angry mother, a famous courtesan remarked,

“[W]hat can school give here? I am giving her a very hard training, teaching her music, education, dancing and the art to please, which is better than any education that can be got in school. These arts of our country would be dead but for us, who have kept them alive”.959

Studies showed that a large number of prostitutes entered the profession as a result of being born to a particular family or community, for instance, 54% of prostitutes in Kanpur belonged to prostitute families.960

For judges and other state actors, it was easier to reconcile oneself with the idea of singing and dancing girls as professionals –after all several received rigorous musical training, and supported large households. Claims to professional status made by women found in lower class brothels, who had little exposure to artistic training, were much harder for state authorities and women’s organizations to comprehend. Lady Rama Rau presents a vignette, where three prostitutes who “could not sing, dance, nor had any education or general knowledge” told the committee that they preferred the life they lived in brothels to the conditions in the under-developed villages that they came from.

“[T]here were three young lovely girls protected by three elderly, hideously ugly women, whom they claimed as their

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959 *ASMH Report*, 5.
mothers, we asked questions and were told that these young women were very happy in town, for in the village they lived in the darkness, worked hard in the fields, ground corn on chakkis, which blistered their hands, were never able to buy new clothes, had no new entertainments such as cinema, motor drive and parties. They were never able to earn more than a few annas a day, but since they had moved to their city their income had gone up to Rs 1,000 a month, between them and they had to work for only 8 to 11 p.m leaving the rest of the day free for them to do what they liked. One of the girls told us that she had four young brothers in the villages, whom she could now afford to send to school, and in time she would like to buy her family more land in the village”.

With remarkable candor, Lady Rama Rau concluded, “the Committee could not find an adequate answer to their arguments”. Contemporary surveys of prostitutes give us a sense of their earnings as well as of class differentiation between prostitutes. In the Kamathipura area of Bombay, the Committee’s findings showed that two-thirds of the women earned between Rs 51-100 a month after paying a cut to middlemen. Another study from the interior industrial city of Kanpur revealed that a 53% of the prostitutes earned under Rs 50 a month, and another 33% earned between Rs 50-100. Thus, the average income for a prostitute would be Rs.68 per month, comparable to that of a junior government clerk.

Justice Sahai settled the debate raised by Husna Bai by declaring that the state could not deny that prostitution was a trade for the purposes of Article 19(1)(g) of the Constitution, as the

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962 Punekar and Rao (1967), 142.
SITA itself referred to prostitution as a trade on several occasions. Finally, he ruled that the use of the word “any” in Article 19 of the Constitution before the words, “profession, or to carry on any occupation, trade or business” clearly indicated that normally a citizen is free to carry on any trade. He noted that even under the Indian Penal Code, prostitution itself was not a crime, the code only prohibiting the sale or employment of a minor for the purpose of prostitution or illicit intercourse.

Reasonable restriction of the right to freedom of trade and profession had been permitted by courts in general public interest. However, it had been established by multiple cases that if the effect of a restrictive legislation were to totally prevent a citizen from carrying on a trade, business or profession, such a restriction would be unreasonable and void. Justice Sahai reiterated that the key question was whether the restrictions imposed upon the trade of prostitution under SITA were reasonable in the interests of the general public, and did they in effect completely restrict the practice of prostitution.

Husna Bai’s lawyer highlighted two major provisions of the SITA that indirectly limited her ability to practise prostitution even as an independent profession. These provisions defined brothels and criminalized living on the earnings of prostitution.

The SITA was aimed at destroying organized prostitution, therefore chief among its aims was the closure of brothels. Section 2(A) of the SITA defined a brothel as a house, room, place, or any portion of the same which were used for the purpose of prostitution from the gain of another person or for the mutual gain of two or more prostitutes. Thus, in effect, any place where more than one prostitute resided would be defined as a brothel. Women living in a brothel could

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963 S.7(2)(a), SITA, 1956.
964 S.372, Indian Penal Code, 1875.
965 Chiranjit Lal Chowdhury v. Union of India, AIR 1951 SC 41
966 Justice Sahai cited Rashid Ahmad v. Municipal Board, Kairana, 1963 AIR SC 163, one of the early vegetable seller petitions, discussed in the introduction as precedent on this point.
be evicted by a magistrate and be exterminated from a district.\textsuperscript{967} Husna Bai however lived with her extended family at No.54-A, Mohammad Ali Park. This included her cousin Shama Bai, a prostitute and a co-petitioner, and under the SITA automatically designated her home as a brothel. The petition by Mahroo and Ram Pyari, the prostitutes from Delhi also pointed out that the definition of the brothel was so wide and extensive that it prohibited any kind of association between prostitutes and prohibited their relations with their friends and family. It also prevented them from living with their adult children. Over half the prostitutes surveyed in Kanpur lived in a shared single room with two or three other women.\textsuperscript{968} Several prostitutes who shared premises attempted to evade the law by putting up partition walls in their tiny rooms so that each woman would have her own residence, and thus the dwelling could avoid being classified as a brothel.\textsuperscript{969}

The realities of a prostitute’s life were also hit by S.4(2) of the SITA which criminalized living on the earnings of prostitution. This section provided that any person over the age of eighteen who knowingly lived on the earnings of prostitution of a woman or a girl would be subject to imprisonment for up to two years and a fine of a thousand rupees. The second part of the provision identified certain categories of people who were presumed to be living on the earnings of the prostitute, unless it was proven otherwise. These included persons acting as touts or pimps, those exercising control and influence over a prostitute’s movements, and finally “any person” living with or habitually in the company of a prostitute.

The provisions cited above were put in place to penalize pimps, brothel keepers and others who were believed to exploit women for prostitution. However, the phrase “any person” covered a wide range of people including the parents, brothers and sisters of prostitutes. If a

\textsuperscript{967} S.18 and S.20 of the SITA, 1956.  
\textsuperscript{968} Agnihotri (1954), 97.  
\textsuperscript{969} Id.
prostitute were living with her family or associates an automatic presumption would be drawn against them.

S.4(2)(a) of the SITA had been deliberately crafted. The original governmental draft of the SITA had exempted the mother of the prostitute if she were infirm or over the age of 60 years of age, and children if they were under the age of 21. However, Lady Rama Rao persuaded the Home Ministry that the exemption for the mother should be removed and that for children lowered to eighteen years of age.970 In an explanatory note, the AIWC explained that a mother as an adult is supposed to know better and be more responsible. Further, they believed that this would create an incentive for a prostitute to leave the trade to shield her parents from prosecution.971 During their visits to brothels, the Committee for Social and Moral Hygiene had noted the presence of several elderly women who posed as relatives and friends of the prostitutes, taking care of them when they were ill, accompanying them to doctors and lending them money.972 The Committee however viewed these older women with suspicion and were convinced that they were brothel mistresses who were living off the prostitutes like parasites.

Prostitution is often seen as an activity located outside the familial space of the home. However, as Ashwini Tambe points out, there exist strong continuities between families and brothels in their structures of affection, obligation and domination.973 The empirical reality of prostitution, challenging the separateness of the domestic sphere in the abstract, was that many women engaged in prostitution lived with their extended families. Most prostitutes not only maintained their children and family establishments in the cities where they worked, they also

970 Serials 8 and 9, Ministry of Home Affairs: Police IV, 37/3/58, 1958 [NAI].
971 AIWC Opinion of Mrs Mithan J. Lam (Bill No 58 of 1954), File No 138, All India Women’s Conference Papers, IV Installment [NMML].
972 ASMH Report, 4.
sent remittances back to their families in villages. The Bombay survey showed that more than a third of prostitutes sent home between Rs 10 to 20 every month.\textsuperscript{974} The organization of prostitution was diverse, though the SITA treated all prostitutes the same. For instance, only 36\% of the prostitutes interviewed in Kamathipura in Bombay admitted to giving a commission to the brothel keeper, which usually amounted to half their income.\textsuperscript{975}

Justice Sahai was quite persuaded by the Husna Bai’s claim that S.4(2) (a) was an unreasonable restriction on her ability to practice her profession. He noted that, unlike other countries, in India it was common for members of a family to live together. He agreed with the petitioner’s contention, that there must be hundreds of prostitutes whose parents and other family members live with them, and share household expenses, but may not in any manner be encouraging, abetting or helping them carry on prostitution. Unless it was specifically proved that such family members were living off the prostitute’s income or encouraging her profession, Justice Sahai ruled, it would be “extremely risky and not free from danger” to presume otherwise and place the burden of presumption upon them. This subsection, it was accordingly held, was not reasonable and had no sufficiently close connection with the object of suppressing immoral traffic in women.

Justice Sahai’s however dismissed Husna Bai’s petition on technical grounds. Therefore his determination that prostitutes had the fundamental right to carry out their trade, and that the definition of the brothel and S.4(2)(a) in the SITA were unconstitutional, did not have legal force and was only in the nature of \textit{obiter dicta}. However, this created almost comical anxiety back in Delhi. The Law Minister expressed concern that the court had declared that prostitution was “a

\textsuperscript{974} Punekar and Rao,(1967)144.
\textsuperscript{975} Punekar and Rao, (1967) 144.
profession, or at least a trade” and it could therefore not be banned but only reasonably restricted. He wrote to his advisors asking whether the government could make a distinction between trades that could be legitimately followed and others which may not amount to a crime but were opposed to public policy. He drew an analogy to telling a lie, which by itself was not an offence but could not be considered legitimate or proper.  

The ASMH’s response to the court’s findings was even stronger. Rameshwari Nehru argued that there needed to be a total abolition of prostitution, which would require even individual and voluntary prostitution by adult women to be made illegal. In order to further this goal, she argued that the Constitution should be amended to abrogate the freedom to trade and profession.

The Geography of Freedom: Eviction and the Freedom of Movement

Husna Bai’s second major challenge was to S.20 of the SITA. As a contemporary legal expert described it, “section 20 finishes the entire business of prostitution”. It gave the magistrate power to remove any woman or girl from the limits of his jurisdiction, upon receiving information that she is a prostitute. If the woman concerned failed to comply with the court’s order, both she and any party that harbored or concealed her were liable to steep fines. This was in addition to the restriction instituted by S.7 of the SITA, which prevented prostitution being carried out within 200 yards of any place of public religious worship, educational institution, hospital or nursing home.

Since the nineteenth century, the movement of prostitutes had come under the intense scrutiny of the state, linked to its concern with the spread of venereal diseases. Several scholars

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976 Note by B.N Data, Minister for Law and Justice, Ministry of Home Affairs: Police IV, 37/3/58, 1958 [NAI].
977 Letter to G.B Pant, Home Minister, 10 January, Subject File 31, Rameshwari Nehru Papers [NMML].
979 S.20, SITA.
have demonstrated that colonial intervention in public health and hygiene was spatial, through the creation and monitoring of new geographies.\textsuperscript{980} The Cantonment Acts of 1864 and 1889, and the Indian Contagious Diseases Act, 1868 were all enacted over concerns over the rising rates of venereal diseases amongst British troops, and sought to bring about compulsory registration of brothels and prostitutes, regular medical exams and mandatory treatment of infected women. Women who refused to comply with the regulations were expelled from cantonments and regimental bazaars where their main business was. Stephen Legg demonstrates that the creation of segregated red-light areas in Indian cities was a result of the policies of the colonial state.\textsuperscript{981} Military authorities remained concerned about the presence of women outside the cantonment who were not within the ambit of the Cantonment Act. Rather than extend military powers to cities, the colonial government suggested that the problem be resolved through the use of municipal laws. Since the entire town could not be declared out of bounds for soldiers, municipalities drew on both common law principles and new powers to segregate prostitutes. New municipal and police laws gave the city authorities the power to evict prostitutes and keepers of brothels, and punish women for soliciting in a public place. The state did not use these powers to abolish prostitution, but to push prostitutes into ‘tolerated zones’. Specific red-light areas like Grant Road and Kamathipura in Bombay and Sonagachi in Calcutta emerged after this shift in law and policing.

Despite the colonial origins of the municipal administration system, with the political reforms of 1909 and 1919, there was greater Indian involvement in municipal government which brought about changes in municipal governance. For instance, the Delhi Municipal Corporation

received an increasing number of petitions from citizens in Delhi demanding the eviction of prostitutes from specific commercial areas.\textsuperscript{982} Stephen Legg argues that these demands reflected nationalist and reformist voices as well as a reaction to forcing prostitutes out of military bazaars into the city.\textsuperscript{983} As municipal governments came to be dominated by elected representations, abolitionist campaigns were launched against red light areas. For instance, in \textit{Asghari Jaan’s} case the chief complainant was Pundit Shiva Datt, the Vice Chairman of the Municipal Board of Etah, and the chief witnesses for the prosecution included a servant of the Chairman of the Municipal Board and the cousins of a municipal contractor.\textsuperscript{984}

With Independence, popularly elected municipalities began to exercise greater vigilance and challenged the very geography of toleration that they had previously created. Prostitutes and brothel keepers were forced to grapple with this shift in the register of governance. \textit{Kachanmala Dassi’s} case is an instance.\textsuperscript{985} Lilabati Debi, the tenant of 8\textsuperscript{th} Latu Mullick Lane was served a notice of eviction by the owner of the property, Kanchanamal Dassi and the Commissioner of Police, Calcutta for using the premises as a brothel and causing a nuisance or annoyance to the occupiers of neighboring premises. Lilabati Debi readily conceded that she was using the house as a brothel, though her witnesses did argue that it was a “very peaceful brothel” where only teetotalers and non smokers were allowed. Her chief defence was that Latu Mullick Lane had two other brothels and was part of the brothel quarter. It was also in proximity to the large red light area of Rambagan. In her argument, citizens who live in the brothel quarter are not entitled to object to a house being used as a brothel. Her lawyer, Robi Roy, attempted to argue that the

\textsuperscript{982}DSA/Chief Commissioners Files/Local Self Government/1940 (2) (97): Note with Regard to Action Taken by the DMC in Connection with the Removal of Prostitutes from Prohibited Areas of Delhi, 9 October 1940 [DSA].
\textsuperscript{983}Stephen Legg, “‘Governing Prostitution in Colonial Delhi: from Cantonment Regulations to International Hygiene (1864-1939),’ \textit{Social History} 34.4 (2009) 447-467, 460.
\textsuperscript{984}\textit{Municipal Board, Etah v. Asghari Jaan and Mt. Bismillah}, AIR 1932 All 264.
\textsuperscript{985}\textit{Kachanmala Dassi v. Lilabati Debi}, AIR 1951 Cal 164.
free association of men and women outside marriage was quite moral according to the standards of a progressive society. The court rejected both contentions, holding that ‘respectable people’ in a red light area have the right to complain if the brothel causes them annoyance; in this case, people coming at odd hours of the night and going away in the morning was annoyance enough. The court further ruled that in deciding a test of morality, it goes neither by the private morality of the judge, nor the “fanciful morality of persons who happen to be propounding a new sociology or advanced philosophy of morals”, but by the ordinary and normal standards of morality prevailing and accepted in the society.\textsuperscript{986}

Even sovereign commitments of long standing could be overturned. The municipality served notices of eviction to several women belonging to the Kanchan community who resided in the prostitute quarters in the old city of Malerkotla. The women had been granted permission by a royal firman of the Nawab of Malerkota in 1913 to reside in the Sunami Gate area. However, the High Court held that the decision of a former sovereign could not bind the rights of a sovereign legislature.\textsuperscript{987}

Common to all sets of regulations, whether in the ‘segregationist’ or ‘abolitionist’ phase, was a lack of interest in the prostitute or her well being. The governing principle behind tolerating and evicting prostitutes was a concern with disease, public health and morals. The prostitute herself was a figure to be tossed around according to the prevalent logic of governmentality. Section 20 of the SITA elevated this power of local government and granted it uniformly to magistrates across the country.

Husna Bai’s petition attacked S. 20 of the SITA on three grounds. The first was that the section infringed upon her right to move freely through the territory of India and her right to

\textsuperscript{986} \textit{Id.}
reside and settle in any part of India as guaranteed under Article 19(1)(d) and Article 19(1)(e) of the Constitution. Secondly, it infringed her right to equality under Article 14 of the Constitution, inasmuch as it conferred unrestricted powers upon the magistrate and provided no reasonable basis for classifying prostitutes. Finally, it was contended that these powers were not a reasonable restriction on her right to practice her trade and business as contemplated under Article 19(6) of the Constitution.

Husna Bai’s concern about eviction becomes clear through the list of respondents. As respondents 4 and 5, she names Abdul Hameed Khan and Abdul Hameed. Abdul Hameed, a wealthy businessman and proprietor of the Lal Biri Works at Allahabad was the owner of No. 54-A, Mohammad Ali Park, the address at which Husna Bai resided. Abdul Hameed Khan was the tenant of this address from whom Husna Bai had subleased her room. She prayed that they both be restrained from taking any action for forcible eviction of her from the premises where she lived and carried out her profession.

Justice Sahai was quite emphatic that there was some force in the objection to the constitutionality of S.20 of the SITA on the ground that it violated a citizen’s right to move freely and settle in any part of the territory of India. He noted that under this provision, the magistrate had the power to remove a prostitute from a place for all time to come. There was no time fixed for the period she could be removed or prohibited from re-entering. The court noted that this could not be seen as a reasonable restriction as it seemed to have no connection with the object in view, i.e. the suppression of traffic in persons and exploitation of others. Evicting a prostitute from a locality merely prevented prostitution in that particular locality and shifted the activity to another location; it did not liberate any woman from the profession.
There was already precedent for a ruling like Justice Sahai’s. The Bombay High Court in 1950 had struck down an analogous provision of the Bombay Prevention of Prostitution Act, 1923 on the grounds that it violated Article 19(1)(d) and (e) of the Constitution. In Shantabai Rani Benoor’s case, the petitioner had been served an order by the Additional District Magistrate of Poona, directing her to remove herself from Poona City to a place beyond the radius of five miles from Poona City within a period of a month. All the notice required the petitioner to do was to remove herself from Poona City to somewhere beyond the radius of five miles from the Poona Post Office. The High Court noted, “the dominion of India was very vast,” and there seemed no way to enforce the order, or for the policeman to know where the woman would have to be taken. Whereas only sixteen women had approached the High Court, the judgment invalidated the notices issued to three hundred and forty women in Poona.

Both Justice Sahai’s decision in Husna Bai and the Bombay High Court decision in Shantibai relied on a decision of the Bombay High Court in a case involving externment orders under the Bombay Public Security Measures Act, 1947. The petitioner in this case had been evicted because of his political actions from the city limits of Ahmedabad in 1948. On the commencement of the Constitution, he challenged the orders and the law as a violation of his rights under Article 19(1)(d) and (e). The court rejected the contention that such a restriction was reasonable as it permitted the citizen to be anywhere in the vast territory of the Union of India, except only for the city of Ahmedabad. The state conception of populations that could be moved around as required came to be challenged profoundly through the Constitution. As Durgabai Deshmukh had presciently warned Nehru, “the individual freedom of movement which the

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988 In Re Shantabai Rani Benoor, 1951 AIR (Bom) 337.

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Constitution guaranteed complicated the state’s plans. The state was powerless to check the flows of people.”\(^{991}\)

Justice Sahai took seriously Husna Bai’s claim that S.20 was arbitrary and conferred wide discretion on the magistrate in deciding which prostitute to remove outside his jurisdiction. As he noted, “it is left to the sweet will of the magistrate to remove one prostitute and not another though her case may be quite similar to the case of one who is being removed”. There were no guidelines to determine in which cases, “it became necessary in the interest of the general public” that a woman would be required to remove herself. The idea of rational classification and equality of treatment within the same class had been prevalent in cases involving prostitutes even before the Constitution.

In 1931, several challenges were made to bye-laws enacted by municipalities under the UP Municipalities which sought to prohibit prostitutes from residing in certain areas or conversely to limit prostitutes to certain localities. Chanchal, a prostitute in Hathras was arrested and fined for violating a bye-law, that had listed thirteen streets and localities where no public prostitute was to be permitted to reside. This prohibition exempted all prostitutes who already owned homes or resided in these areas at the end of 1925, and applied only to ‘newcomers’. The Allahabad High Court acquitted Chanchal and struck down the bye-law as *ultra vires* the governing UP Municipalities Act, as it did not amount to the prohibition of public prostitutes but merely a prohibition of an arbitrary class of prostitutes.\(^{992}\) Justice Sulaiman ruled that this arbitrariness created an “invidious distinction” that benefited one class of prostitutes and injured another. The court ruled that it was illegal for the municipal board to single out a particular prostitutes or a group of prostitutes and prohibit her or them from residing in a particular area.

\(^{991}\) Letter from Durgabai to Nehru, 7 September 1954, Durgabai Deshmukh Papers, (NMML).

\(^{992}\) *Mt Chanchal v. King Emperor*, AIR 1932 All 70.
Such discrimination would defeat the object of framing such a bye-law and not meet the requirements of the “maintenance of health, safety and convenience of the inhabitants of the town”, the grounds on which the municipality was delegated this power.

The High Court of Allahabad proceeded to strike down similar bye-laws that were enacted by the municipality of Agra, holding that a prohibition must be general and of universal application and could not make an exception in favor of a particular group.\textsuperscript{993} While there existed an older precedent of the Allahabad High Court requiring equal treatment within a class to meet the purpose of the legislation, both Husna Bai’s lawyers chose to draw upon new constitutional jurisprudence under Article 14.

The Supreme Court of India had held in 1952 that the principle of equal protection under the law permitted reasonable classification for the purpose of legislation. However, for a law to pass the test of valid classification, it must be founded on an intelligible differentia which distinguishes the persons affected from those that are not, and such classification must have a rational nexus with the object the law sought to achieve.\textsuperscript{994}

According to Justice Sahai in the \textit{Husna Bai} case, S.20 of the SITA failed to meet this test of valid classification. He pointed out that the provisions of the SITA provided no guiding principles which a magistrate could use to determine whether a prostitute should be removed. The preamble to the SITA only noted that the Act was “in pursuance of the International Convention signed in New York on 9\textsuperscript{th} May, 1950, for the suppression of immoral traffic in women and girls”. The magistrate was given “a naked and arbitrary power” in Justice Sahai’s words, and a law that gave uncontrolled authority to discriminate violated Article 14 of the Constitution. Justice Sahai approvingly quoted the decision of the US Supreme Court on the

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  \item \textsuperscript{993} \textit{Mt Muhammadi v King Emperor}, AIR 1932 All 110; \textit{Mt Naziran v. King Emperor}, AIR 1932 All 537.
  \item \textsuperscript{994} \textit{State of West Bengal v. Anwar Ali Sarkar}, AIR 1952 SC 75.
\end{itemize}
Equal Protection Clause holding that, “if a statute does not disclose a definite policy or objective and confers authority on an administrative body to make the selection at its pleasure, the statute would be held to be discriminatory irrespective of how it is applied”.\footnote{995} Critical to his judgment was his identification of the magistrate’s office as an executive authority. The magistrate in colonial India was a civil servant appointed by the government who exercised a wide range of powers. Nationalists had argued that this made magistrates less likely to be neutral when serving in a judicial capacity and had campaigned for the complete separation of the judiciary from the executive. Article 50 of the Constitution placed a duty upon the state to achieve complete separation of the judiciary from the executive in the public services of the state. However, administrative reforms were slow and the complete separation would not be achieved till the 1970s.\footnote{996}

The striking down of S.20 of the SITA caused considerable consternation to the bureaucrats at the Home Ministry. The drafters of this statute believed they had been careful in avoiding charges of arbitrariness. They had learnt from the experience of the Bombay government in \textit{Shantabai Rani Benoor}’s case in which the court had declared void the clause conferring the power to extern under the Bombay Prevention of Prostitution Act because it did not give the affected person an opportunity to be heard.\footnote{997} Taking this into consideration, S.20 of the SITA explicitly required that the magistrate give the girl or woman in question an opportunity to provide evidence before determining that she was a prostitute and needed to be

\footnote{995} \textit{Yick Wo v. Hopkins} (1886) 118 US 356 (J).
\footnote{996} “Proposed Law Minister Conference- Separation of Judiciary from the Executive”, Ministry of Home Affairs, File 9/1/60- JII [NAI].
removed from the area. The Law Minister asserted that this clause was sufficient to meet the test for arbitrary classification.

The debate over S.20 of the SITA and the power to extern more generally reflected tensions between older colonial ethics of government and a new vision of governance that was opened up through the Constitution. For the Home Ministry bureaucrats, the powers of the magistrate under S.20 were not unusual, as Lokur said, “such discretion was often vested with judicial officers”. However, the argument made by Husna Bai relied on a new standard of citizens rights echoed in a series of court decisions, all of which reflected Justice Bose’s belief that the test for arbitrariness was whether, “the collective conscience of a sovereign democratic republic as reflected in the views of fair-minded, reasonable, unbiased men, who are not swayed by emotion or prejudice, can consider the impugned laws as reasonable, just and fair and regard them as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today”.

It was not, therefore, surprising that Husna Bai chose to rely on the new constitutional jurisprudence on equality rather than citing the older Allahabad cases which dealt with rational classification. The decisions in Chanchal’s and Naziran’s cases had struck down the impugned bye-laws on the ground that they discriminated between different prostitutes and defeated their own purpose, which was to end prostitution. While both Chanchal and Naziran were acquitted and excused from paying the fine, the Court’s recommendation to the municipality was to redraft the bye-law to make the prohibition general and not “leave other prostitutes free to ply their trade”. The central concern motivating the constitutional jurisprudence was not the efficacy of

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1000 Id.
the laws, but the restrictions on the rights of the citizen. The courts conceded that rights could be restricted, but insisted that such restriction was to be strictly scrutinized.

**From Husna Bai to Kaushalya Devi: The Legacy of a Court Decision**

Despite the excitement raised by Husna Bai’s petition, and the contentions that were accepted by the Court, Justice Sahai’s final decision was mild. While noting that he found “some substance in the submissions of the petition” that section 20 and section 4 of the SITA were unconstitutional, he declined to express any final opinion. As Husna Bai’s rights had not yet been infringed upon, he held that the petition had been filed prematurely and could not be entertained. In this, he was relying on a series of cases which had held that to make a case for the relief of a writ, “it is incumbent upon the petitioner to establish that the law complained of… affects or invades his fundamental rights as guaranteed by the constitutions, and cannot be merely declaratory in nature”. 1002 Husna Bai attempted to argue that there was a real possibility that her landlords might threaten her with legal proceedings, but she could provide no ‘tangible evidence’ of the same.

The newspaper headlines portrayed this as Husna Bai’s defeat – as the *Times of India* declared, “SITA held Valid: Woman’s Plea Fails”. 1003 Though the court had noted that several sections of the SITA were unconstitutional, what remained with the dismissal of the petition on technical grounds, were non-binding observations of a single judge of the Allahabad High Court. Thus, in the ordinary course of events, this should not have been a cause of concern for the government.

The Home Ministry under whose jurisdiction the SITA came, had followed Husna Bai’s petition closely. Following the decision, the Home Minister asked for a detailed opinion from the

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1002 *Chiranjit Lal Chowdhury v. Union of India*, AIR 1951 SC 41 (P), (pp. 52-53).
law ministry on the possible impact of the amendment. After three months of consultations the Law Minister was able to assure him that the comments made by Justice Sahai were only in the nature of obiter, there was no serious risk of the provisions being struck down as unconstitutional, and no immediate action was required.\footnote{Note by S. Balakrishna, Assistant Legal Advisor, Ministry of Home Affairs: Police IV, File 37/3/58, 1958.}

Nevertheless, the decision in Husna Bai began to take on a life of its own. As one of the earliest cases on the SITA, decided within two weeks of the act coming into force, the decision was reproduced in all leading commentaries on the act. Mazhar Hussein’s popular commentary on the SITA published in 1958 reproduced a newspaper article that described Justice Sahai’s decision as the case had not yet been published in any law journals.\footnote{Mazhar Hussein (1958), 62.} In an introduction, Hussein noted that Justice Sahai had observed that sections 20 and 4(A) placed unreasonable restrictions and were hit by Articles 15 and 19 of the Constitution. Mazhar Hussein was a lawyer based in Lucknow and was the author of several treatises. His commentary on the SITA remains the leading textbook for practitioners, and till 1960 was the only work on the subject. The question of the possible impact of the fundamental rights upon the SITA had troubled both the government and women’s groups for a few years, and Justice Sahai’s obiter provided the roadmap for lawyers.

SITA cases rarely went up to appellate courts and therefore leave few traces in the judicial record.

One of this small number of reported High Court decisions under the SITA was a complaint before the Bombay High Court, against a prostitute living in Radhabai Building in Bombay. She faced proceedings under SITA for practicing her profession near schools, temples and hospitals. The woman admitted to being a prostitute but denied soliciting customers in
public. The High Court dismissed the complaint, holding that a woman’s right to practice her
profession could only be restricted “in the interests of the general public”, and as the residents of
the locality had not complained about the woman and did not mind if she carried on the
profession inside her room, no case under the SITA could be made out.1006

The older municipal regulations that sought to regulate prostitution also came to face
constitutional challenges, and while courts differed in their decisions, some did consider the
arguments for reasonable classification and arbitrariness laid down in Justice Sahai’s decision.
For instance, the Sessions Court of Malerkotla acquitted thirteen persons who had been charged
with violating municipal prohibitions on practicing prostitution in the old city of Malerkota. The
judge expressed the view that the municipal resolution was not a reasonable restriction on the
practice of trade and occupation guaranteed in the Constitution. Although this acquittal was
reversed by the High Court, it was because evidence was produced that the municipality had
marked several areas including Satta Bazaar, Quila Rehmatganj, the Railway station and the area
outside the walled city. The courts accepted that restrictions on prostitution could not be
absolute.1007 Similarly, Kamla China, a prostitute residing in G.B Road, Delhi’s notorious red
light area, on being externed from the neighborhood contested her conviction in court. The
Sessions Judge acquitted her, explicitly citing Justice Sahai’s assessment of the constitutionality
of S.20 of the SITA1008.

The next few years saw repeated contestation of the SITA before High Courts, usually
arising from the criminal cases of women arrested for prostitution or for refusing to heed an
eviction order. The High Courts of Bombay and Uttar Pradesh struck down S.20 of the SITA as
unconstitutional, while the High Court of Andhra Pradesh upheld the law. Not only did all the

courts address Justice Sahai’s decision, the women’s lawyers made complex arguments on the relationship between prostitution and the new postcolonial state.

Begum Do Husain Saheb Kalawat, a prostitute living in the town of Barsi, in Bombay State, was served with a notice by a magistrate asking her to remove herself from the city and go to Osmanabad within three days. He made the order after receiving several complaints that she was carrying on her profession within 80 feet of the municipal school, her behavior was indecent, young girls had to go past her house to go to school and that she often advertised herself by standing on the public road. Prima facie, the magistrate found that she fit into the category of prostitutes who ought to be removed in the interests of the general public. Begum Kalawat moved the High Court and argued based that S.20 was \textit{ultra vires} Article 14 and 19(1)(d) and (e) of the Constitution. The court, in striking down S.20 as unconstitutional, noted that in order to determine whether the restrictions on fundamental rights were reasonable in the interests of the general public,

“one must remember that women do not choose their vocation because they like it. It has been recognized that in a large measure they are forced into this vocation by social conditions and most often against their will. One may not, therefore judge these cases with any amount of harshness”. \textsuperscript{1009}

The High Court however refused to accept the contention that the law violated Begum Kalawat’s right to practice her trade and profession. Her lawyer, U.R. Lalit conceded that restrictions of her right under Article 19(1)(g) had to be read with Article 23 which prohibited traffic in human beings. Moreover, the Supreme Court in a case involving auctioning of alcohol licenses had observed, “that it could not be denied that the state has the power to prohibit trades

that are illegal or immoral or injurious to the health of the public ...laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be unconstitutional because they enact a complete prohibition” 1010

Reflecting on the *Shantabai* decision which held the Bombay Prevention of Prostitution Act, 1923 was struck down as unconstitutional, the Advisory Committee on Social and Moral Hygiene expressed an apprehension that similar challenges under Article 19 might be raised against any effort to regulate prostitution unless Article 19 was made subject to some restrictions in the interests of public decency, public morality or public health. 1011

The Allahabad High Court, too, refused to accept that the SITA encroached upon a woman’s right to carry out her trade and profession. Noting that the women rested their claim on the obiter observations made by Justice Sahai in *Husna Bai*, the High Court ruled that prostitution, like gambling, touting and other “inherently immoral” occupations could not be put on par with normal respectable professions. 1012 The words “any profession” provided under Article 19(1)(g) could not, in the court’s view, be interpreted as ‘any profession that a citizen may adopt’ regardless of the effect on public interest. 1013

However, the court found that the petitioners, six prostitutes from Kanpur who faced an externment order, were on ‘surer ground’ when they relied on Articles 19(d) and (e), i.e. their right to freely move in the country. Justice Broome highlighted the fact that S.20 sought to control the movements and residence of prostitutes, rather than bring prostitution to an end. He did not require her to give up her trade, but merely to remove herself from the limits of the local jurisdiction. This, the court held, was not a reasonable restriction on the petitioner’s right of

1011 *ASMH Report*, 32.
1013 Following the precedent of *Phool Din. v. State of Uttar Pradesh*, AIR 1952 All 491.
movement. In determining whether a restriction of reasonable, the Supreme Court had recently held it would take into account the “nature of evil that was sought to be remedied, the ratio of harm caused to individual citizens and the beneficial effect reasonably expected to result for the general public”. 1014 Following this, Justice Broome found that a woman proceeded against under S.20 did not have the option to cease to be a prostitute and continue to reside in the neighborhood. Past history as a prostitute could still be used as grounds to expel a woman in the present and there was no time limit on the period of her expulsion from the district.

The court carefully distinguished the case at hand from a recent Supreme Court decision on the Bombay Police Act which had upheld the power to extern goondas or dangerous thugs from the district, on the grounds that the state could put fetters on an individual’s freedom in the larger interests of society. 1015 Broome distinguished the threats goondas and prostitutes posed to the community: goondas were likely to commit violence and posed a greater threat to the community, justifying drastic measures limiting their rights; prostitutes on the other hand presented at worst a threat of the contamination of morals.

Justice Broome echoed the reasoning in Husna Bai in attacking the “unguided and unfettered power” delegated to the subordinate magistrate, by pointing out that in the absence of guidelines, he could make the determination of abridging fundamental rights at his own sweet will, and this decision was not subject to scrutiny of a higher authority. 1016 Central to Justice Broome’s objection was the exercise of this power of determination by an executive authority.

Even the lawyer for the state of UP conceded that if S.20 were to be construed as conferring powers on the executive, it must held to be unconstitutional. The Court rejected the contention that the magistrate’s powers under S.20 were in his judicial capacity, observing that the

1014 Narendra Kumar v. Union of India, AIR 1960 SC 430.
procedure described in the SITA, given the absence of cross examination or the requirement for a reasoned decision, could not be equated with a judicial trial before a court of law by “any stretch of imagination”.\textsuperscript{1017} The court accordingly declared S.20 of the SITA unconstitutional and quashed proceedings against the six women.

The Andhra Pradesh High Court adopted a divergent view upholding the constitutionality of S.20.\textsuperscript{1018} There were two important points of difference between the Andhra Pradesh decision and the cases before the Allahabad and Bombay High Courts, discussed above. Firstly, the Andhra Pradesh High Court emphasized that the SITA was passed long after the advent of the Constitution and was necessary to enforce Article 23 of the Constitution, and thus enjoyed a greater presumption of constitutionality. The judge disagreed with the decisions in \textit{Husna Bai} and \textit{Begum Kalawat} by holding that the restrictions imposed by S.20 were reasonable in light of the object to be achieved. He defended the absence of any limit to the prostitute’s possible externment, on the grounds that it was difficult for a magistrate to “divine at the time of the order how long it would take for the woman to be rid of such tendencies as are likely to pollute the atmosphere”.\textsuperscript{1019}

Secondly, he held that the magistrate did not have unchecked discretion or arbitrary powers under the act. He went through the procedure step by step to demonstrate that the process described was a judicial process. However, the empirical distinction between Andhra Pradesh and the states of UP and Bombay was that post independence reforms had been successful in separating the judiciary from the executive at the level of the magistrate. The court ruled that the discretion exercised by a magistrate in a state where there has is separation of the judiciary from the executive cannot be deemed to be the exercise of discretion by an executive authority. The

\textsuperscript{1017} \textit{Kaushalya v. State of Uttar Pradesh}, AIR 1963 All 71
\textsuperscript{1018} \textit{Vanga Seetharamamma v. Chitta Sambasiva Rao and another}, AIR 1964 AP 400.
\textsuperscript{1019} \textit{Id.}
discretion that would be disallowed in an administrative or executive authority would be permitted in a judicial body.

Whether the courts upheld the constitutionality of SITA or chose to strike it down, the debate gradually shifted emphasis from the rights of a prostitute to the process that the state must follow. The decisions increasingly turned on the question of discretion given to a magistrate, a figure that came to be viewed differently as the postcolonial state sought to separate the judiciary from the executive.

Faced with conflicting decisions across the country, the Supreme Court admitted the UP government’s appeal in the Kaushalya case. A constitutional bench of the Supreme Court was convened to hear the petition, which saw heated arguments from both sides. The court ruled to uphold the validity of S.20 and expressly overruled the decisions in Husna Bai and Begum Kalawat. The court went through the procedure laid down under S.20 and noted that it approximated the process of a judicial enquiry. The fact that the state had given the prostitute an opportunity to be heard on the charges preferred against her and to adduce evidence to the contrary, necessarily implied a right to a public enquiry. She could engage an advocate, ask for examination of the informant and cross examine witnesses as well as adduce her own evidence. Further, the Supreme Court settled the question of the magistrate’s role, holding that it was a judicial one and therefore subject to revisions by the Sessions Court and High Court.

Kaushalya’s lawyers had argued that S.20 violated the principle of reasonable classification required by Article 14, on the grounds that it allowed the magistrate to discriminate between different prostitutes who lived in the jurisdiction. Chief Justice Subbarao held that the reasonable classification test was founded on the idea of intelligible differentia that had a rational nexus with the object sought to be achieved by the law. The court held that there was an obvious

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difference between a prostitute who carried on her trade on the sly or lived in a sparsely populated area of the town, and one who lived in a busy locality within easy reach of public, religious and educational institutions. Chief Justice Subbarao explained,

“Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralise the public morals, but, what is worse, to spread diseases not only affecting the present generation, but also the future ones. Such trade in public may also lead to scandals and unseemly broils.”

The Supreme Court accepted the claim that the prostitute has a fundamental right to move freely and reside throughout the territory of India, and S.20 of the SITA was clearly a restriction of this right. However, the court also held that the “reasonableness” of such a restriction depended upon the “values of life in a society …and the degree and urgency of the evil sought to be controlled”. Departing from the earlier more neutral descriptions of prostitution, the court noted that the magnitude of the evil and opined that the urgency of the reform may require drastic remedies like deporting the worst prostitutes from their area of operation. The prostitutes’ contention that this would lead to a situation where they were tossed about the country through consecutive orders of various magistrates was rejected by the Supreme Court as “bordering on a fantasy”. The court went onto state that if the presence of a prostitute in a locality has a demoralizing influence on the public, (having regard to the density of the population, the
existence of schools, colleges and other public institutions) the order of deportation was necessary to curb the evil of prostitution and to improve the public morals.

With the decision of the Supreme Court in *Kaushalya*, the constitutionality of the SITA was settled, and no further constitutional challenges would arise for the next fifty years.\(^{1021}\) However, can we write off this entire process of litigation as a complete victory for the state? What does the litigation reveal about the changing vocabulary of prostitutes and ways of organizing? How did the Constitution come to matter in the lives of prostitutes?

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\(^{1021}\) *Sahyog Mahila Mandal v. State of Gujarat*, (2004) 2 GLR 1764

\(^{1022}\) *Shankar’s Weekly*, March, 1953
Conclusion

“Even a depraved woman cannot be deprived of her right except for good reasons”

Chief Justice Subbarao

The enactment of the constitution transformed the everyday regulation of prostitution in India. First, by abolishing trafficking through the Constitution, the authors sought to create conditions of freedom – from individual exploiters – for prostitutes, while also providing a legitimate basis for the state to regulate the daily life of these newly free subjects. This process of abolition and rescue by the bureaucracy of social welfare, in contrast to its colonial predecessor, became marked as an arena where women could play a role in public life. Secondly, the litigious prostitute in the Indian republic was able to represent herself as an economic actor asserting her rights in a public space. Central to such prostitutes’ claims was the redefinition of the idea of the productive citizen, challenging claims made by elite women that prostitution was unproductive work.

How does one evaluate the process of litigation that began with Husna Bai’s petition? What insights does it offer into the relationship between women and a postcolonial constitutional republic? If one adopts a doctrinal approach, the process of litigation initiated by Husna Bai stands defeated in the Supreme Court’s decision in Kaushaliya Devi. The Supreme Court declared the SITA to be constitutionally sound and held that the rights of prostitutes could be restricted in the interests of the general public. This reading would echo readings by Indian feminists, who have argued that law is a hegemonic project of patriarchy and modernity, legitimizing only particular ways of being and doing, and that rights lose their transformative potential when

1023 The State of Uttar Pradesh v. Kaushaliya and Others, AIR 1964 SC 416
institutionalized by law.\textsuperscript{1024} Such a reading would also find favor with American critics of the right’s revolution, who have argued that courts have limited powers to achieve social change and the costs of litigation are not worthy the small judicial victories that can be achieved\textsuperscript{1025}. Prabha Kottiswaran, a legal ethnographer of the contemporary sex work industry in India, argues that sex workers are unlikely to participate in bourgeoisie civil society mechanisms like litigation, winning greater victories through their participation in ‘political society’.\textsuperscript{1026}

This skepticism of law is a valuable corrective to triumphant accounts of legal liberalism. However, viewing the success or failure of legal mobilization purely in terms of a judicial verdict severely limits our understanding of the role of law in society.

Legal practices and rights discourses develop lives outside formal state institutions.\textsuperscript{1027} It is remarkable that prior to Husna Bai’s petition, there existed in the popular imagination of prostitutes the belief that the right to work in the Constitution meant that the state could not abolish prostitution. The argument was made several times to the members on the Advisory Committee of Social and Moral Hygiene, so that they had to recognize the fact in the beginning of the report.Prostitutes talked back to middle class women’s groups in the language of rights. A bemused Rameshwari Nehru would recount how a number of prostitutes marched to her house, “to claim the freedom given to them by the constitution to ply their trade unharrassed by police for earning their livelihood”\textsuperscript{1028}.

\begin{thebibliography}{10}
\bibitem{1028} Rameshwari Nehru, Presidential Address, 8\textsuperscript{th} All India Conference on Social and Moral Hygiene, 1960, 110
\end{thebibliography}
Any interpretation of these cases must begin by acknowledging the significance of the number of prostitutes who became litigants and the confident assertion of their rights. This challenges us to rethink the belief that the courts in India were the exclusive domain of the bourgeoisie. Muslim women prostitutes like Husna Bai faced several degrees of marginalization and do not fit easily with other “oppressed groups” whose presence in the colonial courtroom has recently been studied. Nita Verma Prasad and Mitra Sharafi attribute to legal successes forged by Hindu widows and Muslim wives to “liberal judges” and “chivalric imperialism” respectively. But destitute widows and abandoned wives were easier objects of sympathy when compared to prostitutes, whose disruptive presence was recognized even by judges who gave favorable hearings.

I would argue that the presence of prostitutes in courts and their legal consciousness are both products of their marginalization. Prostitutes became subject of intense state scrutiny and regulation since the mid-nineteenth century. Their lives and movements were often circumscribed by regulations, the breach of which subjected them to harassment from state authorities. Prostitutes had multiple points of contact with state agencies, ranging from policemen and doctors to social workers. Their experience with the criminal justice system would bring them into contact with lawyers. Thus, they would have greater awareness of the laws that affected them than middle class or elite women, who little few direct contact with the state. Direct evidence for this hypothesis exists in fragments. Mary, a prostitute based in Agra, on being interviewed in 1958, noted, “the brothel keeper and the inmates knew that the SITA, 1956 would soon be implemented in Delhi… they had good knowledge of the provisions of the law and they were very clear the Act forbade commercialized prostitution but not prostitution

As Veena Oldenburg’s research shows, prostitutes were among the few groups of women who owned property and appeared as taxpayers in colonial registers, exercising some of the basic requirements for citizenship.

More significantly, prostitutes rarely acted alone. Almost all the cases that appeared before court had multiple petitioners, and even in Husna Bai’s case, it becomes clear that her petition was being supported by other prostitutes in the city. The role of associations in supporting legal mobilization has been emphasized. Living in geographically restricted areas and linked to each other with kinship and caste ties, prostitute organizations appeared in the 1950s. The Allahabad Dancing Girls Union and the Calcutta organizations had been discussed above. As professional associations, these organizations were distinct from charitable groups that worked with prostitutes. The Punekar and Rao study of the Bombay red light areas contrasted the Gomatak Maratha Samaj, an organization led by middle class men who sought to prevent the dedication of girls of the Naik community, and the activities of the Association of Tawaifs and Deredars, which ostensibly promoted music and provided facilities to its members for training in music and dance. While the Maratha Samaj was praised for its success in providing matrimonial opportunities to Naik girls, the Tawaif Association was described a “shield to protect the unscrupulous from law enforcing activities”.

Studies of legal mobilization emphasize that every culture offers only a limited stock of resources and practices from which citizens draw to construct meaning and negotiate social interactions. The enactment of the Constitution created a powerful new resource and added to this stock of resources. The ability of prostitutes to mobilize these resources was limited by the

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1030 Mathur and Gupta (1958), 189.
1032 Punekar and Rao (1962), 179.
1033 McCann (1994), 305.
biases the figure of the prostitute evoked in the judicial system. This interplay becomes clear when we notice what arguments get greater legal traction. Husna Bai’s claim that the SITA restricted her freedom to practice her profession is more easily dismissed than her complaint that powers of externment granted to the magistrate were arbitrary and violated her right of free movement. The prostitutes were successful to the extent that they were able to show that the SITA adversely affected society at large, for instance, in granting unregulated powers to a magistrate. As McCann observes,

“
To take advantage of contradictions, to open up silences, to turn the rules against the rulers, to work for change within existing cultural traditions- these generally are the most effective strategies available to traditionally oppressed and marginal groups”. 1034

This recognition by the court was not insignificant, and till the decision in Kaushalya, it operated as a precedent in almost all cases. Even after the decision in Kaushalya, the judgments in Husna Bai and Begum Kalaat circulated in legal textbooks and commentaries and continue to be used by lawyers.

Litigation as a strategy was also one of those rare moments when a subaltern would appear to speak. This remained its most discomfiting feature, particularly for women leaders who had carved a role for themselves within the postcolonial state, speaking on behalf of these marginalized women. This form of speech also manifested itself in petitions of habeas corpus brought by women who were confined to rehabilitation and rescue homes, seeking to free themselves of the state’s interference. These moves drove editorials to sarcastically remark, “that primary assumption behind the rescue of fallen women now being systematically undertaken in

1034 McCann (1994), 308.
the country in obedience to the STIA is that the fallen women are anxious to be rescued”; however, the escape of women from rescue homes and their challenges to their confinement should compel sociologists and psychologists to address themselves to the “mystery of certain women’s prejudice against respectability”.1035 I am not suggesting that this was the authentic voice of the prostitutes, indeed by the very conditions of subalternity it was precluded to be, however, the constitutional space allowed for a voice that represented the prostitute to become visible in a public domain.

Unsurprisingly, women’s groups were extremely critical of representations by prostitutes as authentic and unmediated speech. In its report to the government, the Advisory Committee on Social and Moral Hygiene warned, “if every adult woman must be taken at her word, and her statement in court, while still under the influence of her pimp must be accepted as incontrovertible, no charge can be driven home in a court of law”.1036 Durgabai Deshmukh at various points stated that she was “deeply concerned to hear that the beggar and the prostitute have asserted their right under our constitution to carry out their ancient professions”.1037 The solution to her and her contemporaries lay in having the courage to amend the freedoms in the Constitution and “not sacrifice the welfare of the community as a whole to the vagaries of a dissolute few”.1038 Despite judicial victories, the experience of litigation brought a degree of wariness to the state, as can be seen in demands for greater clarity to law to prevent resort to

1037 Durgabai Deshmukh, President Address, 5 Annual Meeting of the ASMH, 1956, p. 18.
court on ‘frivolous grounds’. As Rameshwari Nehru lamented, “the uncertainty of law” deterred social work.  

1039 Letter to G.B. Pant, Home Minister, 10 January, Subject File 31, Rameshwari Nehru Papers [NMML].
Conclusion

This dissertation has argued that the Indian Constitution mattered in the everyday lives of citizens in significant ways. It shows that in the early years of the Republic, constitutional law emerged as a field where the postcolonial state and other authorities (whether religious, community, market or of political society) would interact and give shape to a new postcolonial governmentality. Through this, it suggests that the making of the postcolonial state was a process and not an event, and complicates accounts that focus only on elite policy-makers and the logic of the state.

These claims are more significant than they might appear at first glance. Scholars writing about law and society in the West have not needed to be apologetic about legal histories. As Hendrik Hartog explains, in his magisterial study on law and married life in 19th century America, law and legal practices have been intrinsic to American life. As Hartog states, “Americans had law, they made law, they inherited law, they used law and they were subject to law”. On the other hand, precolonial India was portrayed as a space without law, thus justifying British governance. Moreover, the laws that existed before 1947 were neither made nor inherited by Indians. Indeed that Indians actually ever used law or were made subject to it, is a matter of continuing debate, with a significant number of scholars arguing that the law and the state remained external to the imagination of a majority of Indians, even following Indian independence.

The constitutional litigation examined in this thesis challenges the above narrative, for we see varied groups and individuals showing great awareness of the law and quite skillfully

engaging the legal system. In fact, it is often the government which appears frustrated by, and under-prepared before, law courts. This comes through most strikingly in a case where a local municipality begged the Supreme Court for extensions since it had no budget for litigation expenses, never having dealt with legal challenges in Delhi before.\textsuperscript{1041}

**The Postcolonial Moment**

Several times over the last few years, it has seemed that the events of the 1950s, which make up the subject of this dissertation, are repeating themselves. In June 2012, a puritan police commissioner in Mumbai decided to interpret the still extant Bombay Prohibition Act strictly and began a highly publicized campaign against drinkers, horrifying many when he arrested a woman for adding liquor to homemade chocolates.\textsuperscript{1042} Early in 2011, the government of Maharashtra decided to raise the drinking age in the state to 25. Both events prompted a young ‘public spirited’ actor to file legal challenges in public interest. Imran Khan applied for a writ of mandamus arguing that the increased drinking age violated the right to equality laid out under the constitution.\textsuperscript{1043} In an interview, echoing Framji Balsara (of the Prohibition Test Case), he said that he wanted to enact his rights as a citizen.\textsuperscript{1044}

Around the 2011 a series of high profile ‘2G’ corruption scandals led to public interest litigation that challenged the government’s system of issuing licenses for spectrum, which led to the questioning of government licensing to exploit a range of natural resources. The Supreme

\textsuperscript{1041} Mohammad Yasin v. Town Area Committee, Jalalabad, Writ Petition 132 of 1951, [SCRR]
\textsuperscript{1044} Interview with author, 6 August, 2010.
Court found the allocation process arbitrary, cancelled all existing licenses and proposed a method that would reduce bureaucratic discretion in allocating all natural resources.\textsuperscript{1045}

Earlier, in March 2010, the Hindu nationalist government in the state of Karnataka enacted an absolute ban on cattle slaughter and criminalized the possession of beef, challenging the consensus that had been reached in the \textit{Qureshi} case.\textsuperscript{1046} The law was criticized as an attack on civil liberties, and challenged before the courts by the All India Jamiat ul-Qureshi as well as by dalit groups.\textsuperscript{1047}

Finally, in June 2012, the Supreme Court, urged by NGO’s, took \textit{su\ moto} notice of the violence and harassment faced by sex workers and ruled that the state must guarantee their right to dignity, which was an essential part of their right to life under Article 21 of the Indian Constitution. The Court constituted a panel, which included representatives of sex worker associations and trade unions, and was tasked with making recommendations for rehabilitation of sex workers as well as for ensuring that those who continued in that line of work could do so with “dignity”.\textsuperscript{1048} The Court also passed orders relaxing the address verification requirements for sex workers, enabling their access to ration cards. Unsurprisingly, the government and certain

\textsuperscript{1045} \textit{Centre for Public Interest Litigation v. Union of India}, Writ Petition (Civil) No 423 of 2010; \textit{Subramaniam Swamy v. A.Raja}, Civil Appeal No. 10660 of 2010 (on file with author)
\textsuperscript{1047} S.Syama Prasad, “New Cattle Bill to Slaughter Civil Liberties in the State”, Bangalore Mirror, \url{http://www.bangaloremirror.com/index.aspx?page=article&sectid=1&contentid=201203082012030805212111236a5f867} (as visited on 22\textsuperscript{nd} March, 2013); Vinod K. Jose, The Beef Over Buff: Why Karnataka’s Cattle Slaughter Bill is Simply Ridiculous”, Carava, 1\textsuperscript{st} September, 2010, \url{http://caravanmagazine.in/perspectives/beef-over-buff} (as visited on 22 March 2013).
\textsuperscript{1048} \textit{Buddhadev Karmaskar v. State of West Bengal}, Criminal Appeal 135 of 2010 (on file with author).
women’s organizations were horrified and submitted affidavits suggesting that this would lead to an indirect legalization of prostitution.\(^{1049}\)

Given all these recent developments, it is tempting to deduce a linear narrative from the inauguration of the Indian Constitution to the \textit{lawfare} of contemporary India. However, this could only be accomplished at the cost of erasing the ambiguity about the constitution that marked the period between 1950 and 1964. Contemporary litigants are motivated by a sense of possibility of what they can achieve from the courts; the characters who appear in this dissertation took a much greater gamble by going to the courts.

\section*{Talking the State’s Language}

Critics of the Indian constitution have repeatedly pointed out that it reflected a certain bourgeois nationalist vision of the state rather than popular constitutionalism. This was a concern that Dr Ambedkar, Chairman of the Drafting Committee shared. He warned the Constituent Assembly that “Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it.”\(^{1050}\) To its authors, the constitution was a state project that had to be disseminated amongst the masses, through school textbooks, pamphlets, public exhibition and documentaries.\(^{1051}\)

The availability of judicial remedies however made the constitution a two way process. This was a point noted by Zairul Hassan Lari, a renegade Muslim League member of the Constituent Assembly, who left midway through the deliberations for Pakistan. Lari agreed with

\begin{itemize}
  \item \(^{1049}\)“Supreme Court Considers Regulating Prostitution”, \url{http://indiatoday.intoday.in/story/supreme-court-prostitution/1/145521.html}; Krishnadas Rajagopal, “Sex Workers: Government Objects to Apex Court Suggestion”, \textit{Financial Express}, April 19, 2012.
  \item \(^{1050}\) Dr. B.R Ambedkar (General: Bombay), Constituent Assembly Debates, 4 November, 1948.
  \item \(^{1051}\) Srirupa Roy (2007); \textit{Our Constitution} (Films Division: 1950), \textit{The Case of Mr X} (Films Division, 1952), \textit{The Case of Mr Critic} (Films Division, 1952).
\end{itemize}
Ambedkar that “constitutional morality …had to be cultivated”, but perceptively noted that not only people but governments too had to learn it.\textsuperscript{1052} It is important to recognize that the Constitutional document by itself was neither emancipatory nor repressive, but provided a language in which the citizen could communicate with the state. As Upendra Baxi has argued, the power of the judicial discourse in India was its capacity to raise awkward questions about the intention, competence and wisdom of the executive.\textsuperscript{1053} These awkward questions frustrated the executive, delayed or forced policy changes and caused significant expenses. Shankar’s cartoon (Fig. 5.1) conveys some of this frustration, as in shows Nehru patching up holes in the constitution while lawyers just dug in new ones.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{fig5.1}
\caption{Rodent Problem.} \footnote{Shankar’s Weekly, March 20, 1955}
\end{figure}

\begin{footnotesize}
\textsuperscript{1052} Zairul Hassan Lari (Muslim: United Provinces), Constituent Assembly Debates, 8 November, 1948.
\textsuperscript{1054} Shankar’s Weekly, March 20, 1955
\end{footnotesize}
Those who had made successful interventions in the process of constitution-making, now
demanded the Constitution be amended or transformed. Bombay ministers held that no solution
save a Constitutional amendment could successfully implement prohibition.1055 Following the
Qureshi judgment, the cow-protection lobby despaired of any solution under the present
Constitution.1056 Poignantly, even a liberal lawyer like Durgabai Deshmukh, on being confronted
by prostitutes asserting their right to the profession, argued that the solution lay in having the
courage to amend the freedoms in the Constitution.1057

Was constitutional law only a tactic? While the constitutional strategy was often used as a
tactical tool by litigants, it also began to operate as an organizational assumption for citizens and
as a background threat for the state.1058 Despite frequent denials of their rights by the state,
Muslims in colonial India continued to assert that they could sacrifice cows based on a right
rooted in their status as British subjects. Similarly, sex workers even after the Supreme Court
judgments to the contrary continued to assert that they had a right to practice their profession.
This is slightly different from American constitutional rights consciousness, which Hartog
defines as “a faith that the received meanings of constitutional texts will change when confronted
with the legitimate aspirations of autonomous citizens and groups.”1059 This faith survived even
when these aspirations, such as those of blacks, women and gays, ran contrary to the current
doclines of constitutional law, due to the implicit belief that the state would endorse their needs

1056 Lala Hardev Sahai., “Sarvocha Nyayalaya ka nimay godhan ko katal se naheen bacha sakta: Pashu visheshagyon ka safal shyadra” (trans. Supreme Court Decision could not save cows from slaughter: Animal experts’ successful conspiracy), Purushottam Das Tandon Papers, File 277 [NAI]
1058 I draw these three categories from the work of Leslie Pierce. See, Leslie Pierce, Morality Tales: Law and Gender in the Ottoman Court of Aintab (Berkeley, University of California Press, 2003) 5-7
at some point in the future. In the Indian context, a faith in the remedial power of the Constitution seems to have existed even without the requirement for or seeking of state endorsement.

Concurrently, state authorities began to become more cautious about law. In the prohibition case, after multiple legal challenges, the government spent considerable time and energy trying to make the system of investigation and administration of prohibition offences conform to legal standards.\(^\text{1060}\) Experts hired by the government drew widely on knowledge of comparative law and experiences in other jurisdictions, particularly the United States.\(^\text{1061}\) Legal experts in the law ministry at Delhi struggled to bring wayward state legislation in conformity with the Supreme Court decisions in the *Qureshi* cases.\(^\text{1062}\) Similarly, the problems of prosecuting sex workers led to significant rounds of consultations between police officers and social workers.\(^\text{1063}\) Therefore it was ‘constitutionalism from below’ that made the postcolonial state attempt to discipline itself.

**Procedure over Substance**

This dissertation demonstrates all arguments did not gain equal traction before courts of law. In fact, substantive rights claims that were more likely to capture public imagination had less success before the courts. The answer lay partly in the nature of rights themselves. As noted earlier, fundamental rights in the Indian constitution could be circumscribed on a variety of

\(^{1060}\) File No. BPA 1654, Home III, 1954, [MSA]


\(^{1063}\) Ministry of Home Affairs, File 46/53- Police II, Volume II [NAI]
grounds, and the list of grounds was itself expanded through amendments. Moreover, fearing litigation, the constitution had expressly provided that the rights could be limited by “procedure established through law”, rather than the more substantive “due process of law” standard that governed [x]. Thus, courts were hesitant in the early years to strike down legislative initiatives even when they had concerns about the policy implications. Therefore, the courts found in favour of the ban on cow slaughter, held the imposition of commodity controls to be a reasonable restriction on the right to trade and profession, considered the eviction of prostitutes a reasonable restriction of their right to free movement, and viewed the imposition of prohibition as a reasonable restriction on property. They were conscious of the fact that these laws were enacted by an elected government that enjoyed both democratic legitimacy and popular authority and so were careful in what they struck down.

However, in these very cases, the courts accorded very different treatment to procedural claims. They came down heavily on what they perceived as bureaucratic arbitrariness. In the prohibition cases, expanded police powers and unfair burden of proof was challenged. In the commodity control cases, it was the excessive delegation of authority to bureaucrats that drew judicial ire. In the prostitution cases, the arbitrary powers of a local magistrate to evict any woman from the neighbourhood became the area of contestation.

Independence created the conditions for such claims to resonate strongly. The state was being reconstituted, over five hundred territories were being absorbed, the administration had rapidly expanded and government was entering into new arenas. This opened up the question of defining jurisdictions. Federalism, and the separation of the judiciary from the executive, both

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1065 Art. 21, Constitution of India. For an account of how due process played out in the constituent assembly see, Austin, (1966) 101-111.
became productive sites of litigation. With a strong centralized government, for the first time, the local, provincial and national arenas of politics all came to interact with one another more closely. Shared competences and diverging policies, in cases of prohibition and cow slaughter, provided many loopholes that could be exploited. More significantly, despite the constitutional mandate the separation of the judiciary from the executive was a slow process.\textsuperscript{1066} The higher courts staffed largely by judges drawn from the bar were suspicious of the authority district magistrates who were drawn from the civil service and also served executive functions. The judges remained unconvinced that members of the administration could play an independent judicial role. In the prostitution cases, this comes out most clearly in the contrast between the decisions of the Allahabad and the Andhra Pradesh High Court on S.20 of the SITA Act. In Allahabad, where the separation of the judiciary from the executive has not yet taken place, the clause is struck down on the grounds that it permits the magistrate to exercise power arbitrarily, but in A.P which is one of the first states to separate the judiciary, the court upholds the constitutionality.

Karen Orren narrates an account of American constitutional development through the lens of conflict between the older notions of rights of officeholders and those of private citizens, with the Supreme Court frequently siding with the former.\textsuperscript{1067} India did not have a long common law history of officeholders, and the 1950s placed the offices that had evolved under colonial rule in a state of flux. As a representative democratic state, the government did not hesitate to intervene with authorities--be they princes, landlords, priests or husbands--to whom the colonial

\textsuperscript{1066} “Proposed Law Minister Conference- Separation of Judiciary from the Executive”, Ministry of Home Affairs, File 9/1/60- JII [NAI].
state had, at least publicly, appeared to grant neutrality. Similarly, the great office of the colonial district magistrate was also being redefined through these constitutional challenges.

Critical scholars have observed the transformation of heated rights questions into debates over procedure with some regret. Upendra Baxi has lamented that the crucial grassroots issue of agrarian reform got converted into a ‘superstructural issue’ of the limits of judicial power and the plenary power over amendments. The translation of politics into law has consequences. Julia Eckert even warns us that the growing centrality of legal norms in people’s attempts to resist governmental authority is changing the modes of resistance and submission. It reduces the pluralism of the ‘weapons of the weak’, replacing to some degree the many other forms of circumventing, subverting, and conforming to authority.

However, as this dissertation demonstrates, the consequences of this translation can also be beneficial to subaltern litigants. Three of the four sets of litigants in this dissertation represent groups that are marginal and have limited social capital amidst a wider public. The Muslim butcher, the Marwari trader, and the Muslim prostitute, were all vilified and had few allies outside their own groups. Therefore an argument rooted in their rights, as prostitutes, traders or butchers, would not find popular resonance outside. However, by framing their problem as one of procedure, these litigants were able to deflect attention from their own selves and present problems generalizable to the broader public. This presents an interesting contrast to colonial India, where emphasizing particular rights was more profitable. Unsurprisingly in colonial India Muslims, sex workers, and traders, all made arguments rooted in custom and religion.

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Constitutionalism from the Margins

This dissertation shows that constitutional litigation was not limited to elites and was accessed by a diverse cross section of people. I would even suggest that the constitutional culture of the 1950s was shaped predominantly by the interventions of certain marginal groups. The institution of electoral democracy generated a particular form of subalternity, minorities that were unable to succeed electorally increasingly turned to courts. While this is not unusual in most democracies, the situation was complicated in India because electoral minorities are not just about class or ideology but are inextricably linked to ascriptive identities.

When I began research I had not imagined that every set of litigation would be dominated by members of a particular community. While cow slaughter was more easily an identity issue, I had not imagined that commodity controls, prohibition and prostitution, would also deliver up a preponderance of cases from one community. All electoral minorities were not able to gain access to the courts. So what determined the ability to successfully litigate?

As this dissertation shows, it was often groups that faced the greatest degree of state oppression that were best able to litigate. Butchers, liquor sellers, and sex workers all deal with multiple sets of regulation and face the intrusive presence of state officials, be they health inspectors, policemen, social workers or municipal officers. They all gain multiple points of contact with the state and gain familiarity with rules and regulations. The level of awareness demonstrated by illiterate sex workers about the intricacies of zoning regulations for instance is often surprising. Traders, while often willing to operate outside the gaze of the state, found

themselves suddenly under surveillance during the Second World War and this surveillance became institutionalized after independence.

Secondly, the groups that exhibited greater legal consciousness and access were those who had strong community associations. These ranged from formal institutions like the Bombay Parsi Panchayat and the Marwari dominated Federation of Indian Commerce and Industry, to more hybrid associations like the All-India-Jamiat-ul-Quresh, to the newly set up Dancing Girls Association. These groups that doubled both as professional associations and caste/community organizations, were instrumental in legal mobilization, lobbying, circulating knowledge, supporting litigation. The existence of these associational forms complicates the divide between the categories of civil society and political society. It also challenges traditional accounts of liberal politics, and suggests that liberty, property and community are inextricably linked in India.

**Markets and Circulation**

Where did claims for rights emerge from in the 1950s? A common thread running through the cases in this dissertation show is a concern about the practice of trade and professions and free movement of goods and services. While the butchers and the commodity traders directly fall into the category, this thesis also uncovers commercial interests that lay behind the civil liberties challenges to prohibition. The cases brought by the sex workers were about harassment and equality, but also fundamentally about the right to earn their livelihood. Therefore, a significant proportion of everyday rights cases in Nehruvian India emerged via the market.
The easiest explanation of course, is people would incur costs to go to court only if there was something substantial at stake. However, this also sets up a new template for thinking about the Nehruvian state in India. The Nehruvian state with its instrumentalities of planning, nationalizing of key industries, and state directed development projects, has been described as anti-market. What the multitude of new legislation examined in this thesis suggests is, that instead of being crudely anti-market, the new state attempted to create a new set of market norms and reshape networks of circulation, of goods (alcohol, beef and cotton), capital, and bodies.

The vision laid out in the Directive Principles imagined a new governing logic for state and society. This transformation did not take place overnight, and the roots of this were laid in the late 1920s and 1930s with increasing electoral representation in municipal and provincial governments. Municipalities in the 1920s sought to expel prostitutes, while the first elected provincial governments in 1939 attempted to bring about prohibition.

The rights claims before the judiciary in the 1950s, unlike the rights claims today, were not claims for new rights, but claims for continuing older practices that were now being challenged or forbidden by the new government. Therefore, the contest was not just between a totalitarian state imagination and an individual, or even majority and a minority, but over the creation of a new kind of ethical agent. Tracing a similar process in the 19th century, Ritu Birla has shown how indigenous merchants who were marked out as deviants by colonial market governance, recast themselves as responsible economic actors by coding their business practices as culture. As this dissertation points out, while a claim of cultural autonomy could be made against a colonial state, it was harder to sustain in a democratic republic. Constitutional law thus became the field where citizens marked as deviants in the new order could recast themselves as constitutional actors.
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