

THE BOOK REVIEW

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Portuguese State, Society and Polity

Kanaklatha Mukund

A Polarized Debate

Amit Julka

Television and the India Story

Pamela Philipose

How Power Shapes the Idea of Race

Susan Visvanathan

The Shadowlands

Anupama Srinivasan

Urdu Poetry and the Idea of India

M Raisur Rahman

Unmuting the Silences of Micro-History

Malashri Lal

A Novel with a Contemporary Flavour

Somdatta Mandal

Mythology as Graphic Novel

Subhadra Sengupta

'Opening the Fort from Within'

Pradeep Gopalan

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Contents

Kanakalatha Mukund	<i>India, The Portuguese and Maritime Interactions: 2 Volumes: Science, Economy and Urbanity, Vol. I; Religion, Language and Cultural Expressions, Vol. II</i> edited by Pius Malekandathil, Lotika Varadarajan and Amar Farooqui	04
Uma Shanker Pandey	<i>The Camel Merchant of Philadelphia: Stories from the Court of Maharaja Ranjit Singh</i> by Sarbpreet Singh	06
Amit Julka	<i>Who Killed Liberal Islam</i> by Hasan Suroor	07
Ashutosh Kumar	<i>Judicial Review: Process, Powers, and Problems—Essays in Honour of Upendra Baxi</i> edited by Salman Khurshid, Sidharth Luthra, Lokendra Malik, Shruti Bedi	09
Ajay K Mehra	<i>Constitutional and Democratic Institutions in India: A Critical Analysis</i> edited by Sudha Pai	10
Ali Ahmed	<i>Modiplomacy: Through a Shakespearean Prism</i> by T.P. Sreenivasan	12
Pamela Philipose	<i>The Indian Newsroom: Studios, Stars and the Unmaking of Reporters by Sandeep Bhushan; India's State-Run Media: Broadcasting, Power, and Narrative</i> by Sanjay Asthana	13
Susan Visvanathan	<i>Superior: The Return of Race Science</i> by Angela Saini	15
Anupama Srinivasan	<i>Dark Fear, Eerie Cities: New Hindi Cinema in Neoliberal India</i> by Šarūnas Paunksnis	16
M Raisur Rahman	<i>Poetry of Belonging: Muslim Imaginings of India, 1850-1950</i> by Ali Khan Mahmudabad	18
Jobeth Ann Warjiri	<i>Megalomania</i>	20
Malashri Lal	<i>Suralakshmi Villa</i> by Aruna Chakravarti	22
Somdatta Mandal	<i>Quartet (Chaturanga)</i> by Rabindranath Tagore. Translated from the original Bengali with an Introduction by Nirmal Kanti Bhattacharjee	23
Rohini Mokashi-Punekar	<i>Karna: The Great Warrior</i> by Ranjit Desai. Translated from the original Marathi by Vikrant Pande	24
Subhadra Sen Gupta	<i>Aranyaka: Book of the Forest. Story & Art</i> by Amruta Patil. Concept: Devdutt Pattanaik	26
Malati Mukherjee	<i>Bombay Balchao</i> by Jane Borges	27
Pradeep Gopalan	<i>Outcaste (Bhrasht): A Novel</i> by Matampu Kunhukuttan. Translated from the original Malayalam by Vasanthi Sankaranarayanan	28
Semeen Ali	<i>Man Without a Navel</i> by Hemant Divate; <i>Cosmopolitan</i> by Mustansir Dalvi; <i>When Seeing is Believing: Poetry in Images</i> by Bina Sarkar Ellias; <i>A Dinner Party in the Home Counties</i> by Reshma Ruia	29
Shyamala A Narayan	<i>Sipping the Jasmine Moon: Selected Poems</i> by Lakshmi Kannan. Introduction by Jayanta Mahapatra	32
Sudhirendar Sharma	<i>The Rickshaw Reveries: Dark Dazzling Delhi Stories</i> by Ipshita Nath	33
S Deepika	<i>Translating Odisha</i> by Paul St-Pierre	34
Nita Berry	<i>The Golden Eagle</i> by Deepak Dalal. Illustrations by Krishna Bala Shenoit	35
Padma Baliga	<i>The Unexpected Adventures of Remi</i> by Shweta Roy. Illustrations by Atish. Cover Design by Ambika Karandikar;	
	<i>The Daughter from a Wishing Tree: Unusual Tales about Women in Mythology</i> by Sudha Murty. Illustrations by Priyanka Gupta	36
Chittaranjan Subudhi	<i>Side Effects of Living: An Anthology of Voices on Mental Health</i> edited by Jhilmil Breckenridge and Namarita Kathait	37

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overrun the Constitution' (quoted in Khosla 2012: 155). Baxi's argument in favour of an 'activist judiciary' emanate from his view that the 'established' legal theory that jurists have devised for the judiciary in the 'stable and settled polities' of the developed world cannot be grafted in an underdeveloped country like India which is 'still working out its social, political and economic hierarchies' and which is committed to the social and economic democracy as one goes through the constituent assembly debates (p. 145). Baxi, therefore, makes an important distinction between jurisprudence and urges the Indian judiciary to move towards the latter. While jurisprudence determines 'the principles, ..., doctrines, maxims of law and the concept of law', jurisprudence which is also termed by Baxi as 'democracy enhancing jurisprudence' represents the 'judicial review process and power that enhance life under a constitutional democracy' (p. viii). For Baxi, adherence to jurisprudence would enable the judges to impart 'new legal and social meaning' to the existing law and the constitutional provisions while interpreting it so that the expanded law can serve the purpose of creating a 'new social order' which would be just and based on rights (p. x). In the process of doing it, Baxi would suggest that judiciary should get imbricated in the making and reshaping of the public policy and governance.

Importantly for Baxi, along with judicial legitimacy, social legitimation should also work as an additional source of the power of judicial review to be exercised by the Supreme Court and the High Courts. Establishing the notion of substantive justice and equality by expanding the constitutional and legal interpretation of rights would help the judiciary in ameliorating poverty and human sufferings of the vast multitude.

The importance of Professor Baxi's ideas is in realizing that the way 'judicial discretion' that may even pass as judicial activism (if not judicial overreach), should be put into democratic purpose seemed so 'revolutionary when introduced, now seem so natural as to have been inevitable... (becoming) the part of the legal landscape' (p. xx). The volume is an excellent academic tribute to the great constitutionalist and must be read by those interested in the subject. On a personal note, the image which lingers on with me is watching Professor Baxi, then Vice Chancellor, walking alone on Chhatra Marg to his residence from Law Faculty with books.

Ashutosh Kumar is Professor, Department of Political Science, Panjab University, Chandigarh.

How Institutions Are Shaped

Ajay K Mehra

CONSTITUTIONAL AND DEMOCRATIC INSTITUTIONS IN INDIA: A CRITICAL ANALYSIS

Edited by Sudha Pai
Orient BlackSwan, 2020, pp. 490, ₹1,350.00

The book under review, studying public institutions in India follows *Rethinking Public Institutions in India* edited by Devesh Kapur, Pratap Bhanu Mehta and Milan Vaishnav (OUP 2017). Grouped in five parts, the volume examines sixteen institutions, aside from analysing methodologies for studying institutions. Though the larger periodic context of post-Independence and post-Constitution polity is part of the analytical scheme, the institutional review focuses beyond the 1990s. The volume editor Sudha Pai also contributes a substantial Introduction laying out the context of the study bringing together a dense discussion of the themes in the chapters. Even though the focus is on institutions, the democratic and constitutional processes that give the institutions their strength and highlight their functional weaknesses, have also been analysed.

The institutions selected for analyses are Parliament (four chapters), the Higher Judiciary (four chapters), the Election Commission (four chapters) and Federal Institutions (four chapters). The institutions not covered are that of Prime Minister, Cabinet, Governor, Police and the bureaucracy. Though there is an essay 'Time to Imagine a Presidential System', an old and inconclusive debate in the Indian context, the office of the President is also excluded. However, the strength of the volume is that it has taken up institutional processes for analysis and also the debates over the National Judicial Appointment Commission (NJAC) and judicial overreach as well as institutions such as NITI Aayog, Minorities Commission and Language Commissions.

Aseema Sinha's perceptive essay on methodology suggests that institutions should be studied beyond success and failures factoring in their macro features such as 'coordination, credibility or autonomy'. She has argued that 'the analysis of institutions requires a clear analytical framework and careful metrics to assess design features, outcomes and types of dysfunction' (p. 65). Institutions are also

products of social and political bargains at the time of their creation, which would need to be factored in to understand the ways of their functioning and efficacy.

Vidhu Verma emphasizes the social, economic and political contexts of institutions, examining the record of six institutions formed in the 1990s: the National Commission for Scheduled Castes, the National Commission for Scheduled Tribes, the National Commission for Other Backward Classes, the National Commission for Minorities, the National Commission for Women and the National Commission for Human Rights. This interesting methodological approach effectively addresses the question 'why and how the Indian state has responded to institutional change and the democratic inclusion of historically disadvantaged groups.' The responses and decision-outcome of these institutions has been poor.

Though the 'decline of parliament' question is posed at the outset, instead of examining the processes and institutional systems facilitating the functioning of the Indian Parliament, the chapters examine the legislative process in a macro sense (Kaushiki Sanyal), pose a question regarding 'Benefits from Chaos?' (Ajit Phadnis), discuss 'Executive-Legislative Relations in the Period of Multiparty Governments' (KK Kailash) and advocate a Presidential system for India (Shashi Tharoor).

Kaushiki Sanyal rightly looks at the decline of Parliament in terms of multiple variables such as increasing participation and influence from the civil society organizations, media and social media in policy process, side-lining of the legislatures as a forum for debate and discussion, and so on. She rightly points out that all governments have used ordinances to bypass the Parliament. The lack of research support for Indian legislators and parliamentarians is an issue. Sanyal lists measures to strengthen the legislature. Ajit Phadnis analyses the political incentives behind disruptions of the Parliament. In his innovative analysis he argues that 'disruptions are more likely when the anticipated benefits increase and/or the anticipated costs decrease' (p. 147).

Arguing that executive-legislative relations become contentious only in a competitive multiparty system, Kailash looks at how it has developed since the one-party dominant system gave way. He rightly argues that 'Executive-legislative relations have not witnessed noticeable changes despite the changed composition of Parliament simply because the executive has found new ways to match the requirements



of changed scenario and maintain its distinctive advantage' (p. 153). Shashi Tharoor recommends a Presidential System for India that would bring in a more representative executive head. He strongly argues that 'our

parliamentary system has created a unique breed of legislator, largely unqualified to legislate, who has sought election only in order to wield (or influence) executive power. It has produced governments obliged to focus more on politics than on policy or performance' (p. 183).

Aside from evaluating the Supreme Court (Pallavi Bedi), Part III looks critically at the relationship between the Supreme Court and Parliament (Goutham Shivshankar), judicial overreach (Upendra Baxi) and the National Judicial Appointments Commission (NJAC) judgment (Anirudh Burman and Suyash Rai).

Bedi argues that the design of the framers of the Constitution was not to make the Supreme Court primarily a court of appeal, but to be more a constitutional court. However, it has increasingly become a court of appeal leading to high pendency of cases. She argues that either it should be restrained in its appellate functions, or a separate National Court of Appeal with circuit bench across the different parts of the country should be established.

Recognizing that the structure of the Court and Parliament are subject to various structural and doctrinal constraints that limit their capacity to dominate the other, Shivshankar sees 'an unsteady equilibrium or a *modus vivendi*, with neither institution having a clear upper hand' (p. 231). Baxi examines the question of judicial overreach. He raises the question often raised from the ruling classes as well as by what he calls 'commentariat'—public intellectuals, the media, retired civil servants and political party spokespersons. The political executive has oftentimes criticized the Supreme Court for trying to be the third chamber, though an unelected one, of the Indian Parliament.

The NJAC was a controversial move by the Bharatiya Janata Party government during its first term (2014-19). The Supreme Court took cognisance of it and a five judge bench headed by J Kehar Singh delivered a 4 to 1 judgment rejecting the Act. Burman and Rai rightly argue that 'the Constitutional Amendment and the NJAC Act suffered from various structural defects in view of the Court's insistence that judicial independence requires judicial primacy in

appointments.' They point out further 'that neither the Constitutional Amendment nor the NJAC Act actually met any of the objectives stated by the union executive. The two laws diluted judicial primacy considerably without sufficiently articulating any guidance on substantial issues' (p. 278).

Each of the four issues picked up in the critical review of the Election Commission—its functioning (SY Qureshi), Criminalisation of Politics (Jagdeep S. Chhokar), Public Funding of Elections and Political Parties (Rajeev Gowda and Varun Santosh) and the need for proportional representation (E Sridharan) are integral to the discourse on elections in India.

Qureshi takes the readers through a gamut of issues and argues for a fiercely independent Election Commission. Chhokar argues that 'Criminalisation of politics is one of its (India's) prominent infirmities' (p. 317). He backs up his claim: '... the figure (of MPs with criminal records) rose from 23 per cent in 2004 to 28 per cent in 2009 and 34 per cent in 2014. That the problem is not confined to the Lok Sabha but is equally rampant in the States is shown by the fact that of a total of 4,082 MLAs in the States, 1395 have criminal cases pending against them' (pp. 317-18). He rightly points out that the solution lies in, as suggested by the Law Commission of India in its 170th report, reforms in political parties.

Gowda and Santoshi explore 'the efficacy of public or state funding of elections and political parties in improving electoral processes and outcomes, and by extension, democratic governance in India.' The analysis of the authors indicates that a bulk—71% for national parties and 58% for regional parties—of the income of political parties are from unknown sources. This is where they recommend public funding. They argue: 'The rationale of providing public funding is to guarantee that all serious political forces have access to adequate resources to the electorate with a wider choice of politicians and policies. Our proposal will ensure that candidates have at least a threshold level of funds to enable them to remain competitive, while incentivising political parties to significantly improve transparency through mandatory reporting requirements, embrace grass-roots financing from a large donor base and thereby eschew dependency on funding from businesses' (pp. 367-68).

Sridharan explores the possible options in switching to a PR system and then discusses the possible consequences in terms of greater representativeness and party system changes (p. 372). The purpose is not to recommend

the proportional representation system but to look for an option to the representational quagmire that the Indian electoral system faces. He argues that a change to some PR variant is only a second-best solution.

The NITI (National Institution for Transforming India) Aayog is the newest and in a way the most contentious institution of the four federal institutions discussed in the volume. This was created by Prime Minister Modi in 2014 soon after he came to power by dismantling the Planning Commission (PC). Arun's essay on the NITI Ayog is perhaps the first one to give a comprehensive account.

Rao examines the changing landscape of Indian fiscal federalism highlighting the change from the strategy of planned economic development that was centralizing in nature, to market based development that reduces, if not ends completely, the regulatory role of the Union government. It also entails greater cooperation between the Centre and States and among the States inter se in providing public services. This also led to a division of the grants made by the Centre to the States between Plan and non-Plan grants; while the former was done by the Planning Commission, only the latter were left with the Finance Commissions. This changed with the fourteenth Finance Commission as the Planning Commission was abolished in 2014. Rao concludes that the Indian fiscal federalism is still a work in progress.

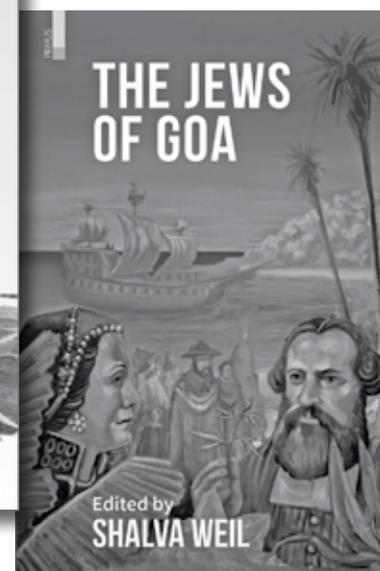
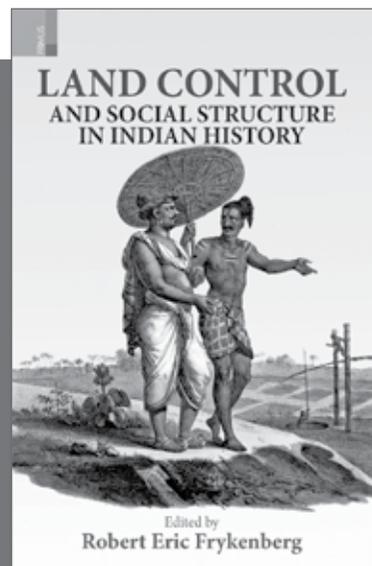
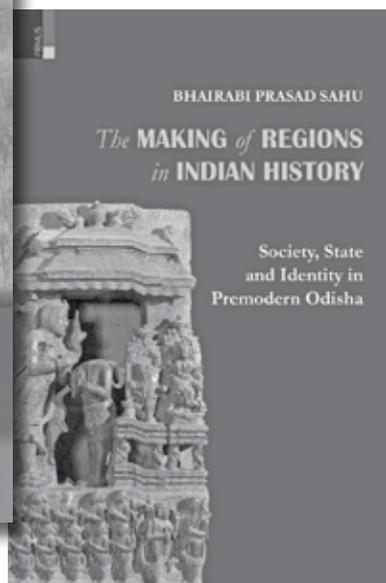
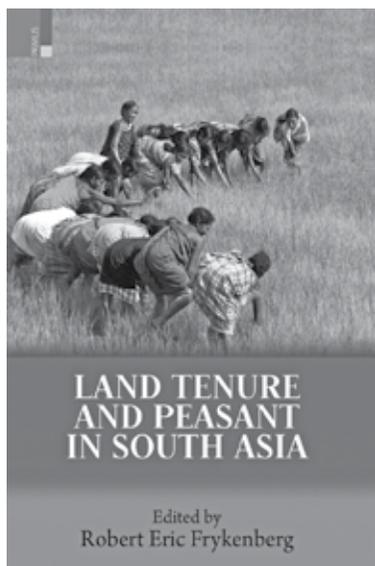
Sengupta's study of the National Commission for Scheduled Castes (NCSC) critically examines the demographic and social status of Scheduled Castes in the country and the performance of the NCSC. Despite carrying out its mandate effectively, 'lack of political will to strengthen the institution, budget restrictions, understanding and its recommendatory role have rendered it yet another institution in the administrative and bureaucratic maze without the requisite power to perform effectively' (p. 449).

Sarangi examines several language commissions and committees created by the Indian state at various levels within a decade after Independence aimed at organizing the given linguistic diversity and correlating it with the aims and objectives of the language policy.

Sudha Pai deserves commendation for bringing in complex institutional issues in one volume, each one competently handled by the respective contributors.

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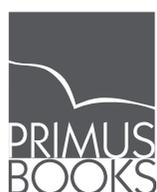
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