



LSE India Summit 2017 Working Paper #4

1. Does Forced Philanthropy Work? CSR in India
2. Does India Need 'Virtual Water'?
3. India Abroad: From Third World to Regional Power
4. **Do We Need a New Constitution for India?**

Table of Contents

Executive Summary	2
Panellists	2
Introduction	2
Shifting geopolitics and India's defence budget	2
Developmental interventionism within the South Asian region	3
Contemporary challenges: China, the Trump Administration, and Brexit.....	4
Recommendations	4

Executive Summary

The Indian constitution was adopted in 1950 following extensive debate, but how has it fared in the 67 years since it was promulgated? In light of recent controversial statements that the constitution ought to represent a greater degree of 'Bharatiyata' (loosely translating as 'Indian-ness'), the expert panel at the LSE India Summit 2017 were invited to reflect on the framing of the text, the institutional imagination it put in place, and how it has been used by the judiciary as a legal text. The prospects and requirements for reform going forward were also assessed.

Panellists

Pinky Anand, Lawyer, Senior Advocate, and politician, currently Additional Solicitor General of India at the Supreme Court of India.

Chintan Chandrachud, Associate in Quinn Emanuel Urquhart & Sullivan LLP, London.

Kalpana Kannabiran, Director of the Council for Social Development, Hyderabad.

Madhav Khosla, Inaugural B.R. Ambedkar Academic Fellow at Columbia Law School, and a doctoral student in political theory at Harvard University

The session was chaired by **Mukulika Banerjee**, founding Director of the South Asia Centre and Associate Professor of Anthropology at LSE.

Introduction

The Constitution of India is the longest in the world and its creation was the beginning of one of the most ambitious constitutional experiments in the world. In her opening remarks Dr Mukulika Banerjee, Director of the LSE South Asia Centre, acknowledged that the session cue "do we need a new constitution for India?" was provocative – and deliberately so. The idea for the panel was sparked following [controversial remarks](#) by RSS Ideologue K.N. Govindacharya, who argued the constitution needed to be re-written to reflect a greater degree of 'Bharatiyata'. The final session at India @ 70: LSE India Summit 2017 therefore did not seek to prescribe change, but to ask if the challenges to Indian democracy that are visible

today call into question any of the fundamental aspects of the text. In this context Dr Banerjee posed four intersecting discussion points to the panel:

- The framing of the constitution – how radical was it as a text at the time, and what kind of institutional imagination did it put in place?
- What kind of ‘constitutional morality’ (a term coined by Dr B.R. Ambedkar) did it require of Indians? Are the citizenry living up to this?
- How has it fared as a legal text? What guidance has it offered the judiciary across the anticipated and unanticipated issues that have arisen over the years?
- What has been the ‘career’ of the constitution? How has it evolved, and does it need to change if it is to continue serving as India’s foundational text?

The history of India’s constitutional experiment

When talking about the great constitutional revolutions, most people will think about those in the late 18th century, where citizens in America or France were bringing down power that wasn’t democratic. However, Madhav Khosla highlighted that “India is unique because it exemplifies the post-colonial constitutional challenge”. By 1947 intellectuals had been debating the conditions required for a country to transition to democracy for a century, with prominent philosophers such as John Stuart Mill and Alexis Tocqueville in the 19th century declaring that not all countries could become democracies. India was certainly not viewed as a contender.

Nor was it a given that India would pursue democracy following the departure of the British. Mr Khosla emphasised that the voices saying India could both modernise and democratise in the mid-1940s were in the minority. Jawaharlal Nehru and B.R. Ambedkar were competing against more dominant schools of thought, including the Gandhians who thought India should resist modernisation, and thinkers like M.N. Roy who rejected democracy as a viable political system for India.

However, the state came into being and people started interacting with each other in new ways – as free citizens not colonial subjects. It was against this backdrop that the constitution was negotiated by the Constituent Assembly over a period of two years of intense debate. It was hugely ambitious but it was partly as a result of its creation that the constitution came to shape and embody the state from the beginning of India’s independent history.

Is the constitution working?

Mr Khosla remarked that “no constitution can generate the conditions for its own success or failure”, arguing that its fate will depend on “factors external to the text”. In this light, the panellists agreed that there is no need at present to radically overhaul the text. Responding to the suggestion that the constitution might somehow lack ‘Bharatiyata’, Pinky Anand declared that “in spirit the Indian Constitution is native” in that it took into account the specific considerations which faced the nation following independence. In addition, the Constituent Assembly insisted on a very wide interpretation of ‘India’, and in doing so acknowledged its diversity and protected this with multiple safeguards to equal rights.

However, the ongoing challenge has been to realise the high ambitions of the constitution. The key point that Dr Kalpana Kannabiran made was that many

important provisions underpinning fundamental rights have not been enacted effectively to date. For example, manual scavenging continues despite Article 17, which proscribes untouchability. In other instances, rights which seemed fairly robust have come under threat more recently: India has a strong history of freedom of speech and expression but in the last five years [three leading rationalist intellectuals](#) have been murdered and no one has yet been convicted. University leaders have been forced to [come out in defence](#) of the right to dissent in the face of clashes over free speech on campus and efforts to restrict associational freedoms.

The freedom to eat certain foods has also come under fire, with authorities banning beef and shutting down associated businesses and mobs targeting people based on what they eat. The right to choice in relationships (curtailed, for example, by the criminalisation of homosexuality and the 'love jihad' movement against intermarriage between Hindus and Muslims) and the continued use of the Armed Forces Special Powers Act in the north and northeast were also cited as examples where citizen freedoms continued to be curtailed, in violation of the constitution's provisions.

Mr Khosla argued that there are two challenges undermining the success of the wider constitutional experiment. First is a collapse in the rule of law: the criminal and civil justice systems are not serving the citizens, those that need justice cannot get it, while too many criminals walk free. On top of this the Supreme Court is not functioning effectively. It is getting bogged down in issues that should really be dealt with by the High Court, while avoiding getting involved in complex political issues where its judgement is needed most, such as demonetisation or Aadhaar.

The second challenge is a lack of ambition among leaders. In the 1950s there were leaders who believed it was possible to rewire the system and build a democracy, even though there was no historical precedent. Today there is a narrowing of liberal space and a lack of leadership at an elite/institutional level which is articulating liberal common sentiments. As a result, many key constitutional values are not being reinforced – the politicians aren't doing it, nor are the media or judiciary.

Constitutional morality

Dr B.R. Ambedkar, chief architect of the constitution and LSE alumnus, spoke of a 'constitutional morality' which had to be cultivated among the people who became citizens of independent India. More specifically, the term can be understood as the attachment created to constitutional ideals that must be performed. It requires mechanisms, institutions and social imaginaries to create a sense of constitutional patriotism that citizens subscribe to and express. The success of the constitution can therefore also be associated with the degree to which this constitutional morality is 'lived' by Indian citizens today.

There was agreement between speakers that constitutional ideals are widely understood. Mr Khosla argued that the text "invades, informs and influences every aspect of [Indians'] lives", while Dr Banerjee spoke about meeting people in the course of her fieldwork who might not have read the constitution – or even have the ability to do so – but would debate fundamental constitutional ideas articulately in their own languages.

However, Dr Kannabiran suggested that the rise of violence against minorities pointed to a breakdown in constitutional morality. The recent Supreme Court interim order – which makes it compulsory for the national anthem to be played in all cinema halls before a film – became a key topic of debate within this discussion. On the one

hand, the question was raised of whether this is an issue the Supreme Court should be ruling on at all. On the other, the treatment of a disabled man who was beaten up for not standing during the anthem led to a discussion of vigilantism. The idea that people would take the law into their own hands and punish perceived transgression with violence points to a worrying disregard for the rule of law, a key pillar around which the constitution is built.

An audience member raised the question of what should happen in the absence of an effective state, which remains a problem in parts of India. If the common man does not have access to effective policing or justice, how should they respond to crime? Ms Anand acknowledged the issue of police reform is “an unending struggle”, and that in this scenario civil society action is the optimum fall back. However, a violent response is can never be justified under the constitutional framework.

Prospects for amendment

The Constitution has shown a reasonable degree of flexibility over its career to date, as evidenced by the fact that rights which were not engrafted into the original constitution have been read into it: for example, the right to food was brought in under the right to life. Others have been added by amendment, for example the Right to Education, which was introduced in 2002.

As Chintan Chandrachud put it, “the fact of the matter is that [the Constitution] is changing all the time, and it will continue changing” i.e. there will always be need and appetite for further reform. Over the course of the panel, speakers brought up several issues which need attention. Some are already under discussion, for others the prospects for amendment are low due to a lack of political will. For example, Ms Anand highlighted the current debate around the selection of judges. The constitution envisioned that the president would appoint judges in consultation with the Chief Justice, however this system has broken down over time and is now under review.

The electoral system and voting rights were a recurring feature of the discussion, for example the need for absentee voting was raised early on. Dr Chandrachud highlighted that a basic issue that still has not been addressed is whether the right to vote is a constitutional right. The ambiguity lies in the fact that Article 326 provides for universal adult suffrage, without explicitly mentioning the right to vote. Although one might argue it can be read into 326, there have been several recent cases where it is treated as a privilege that is granted by statute, but can equally be taken away in certain circumstances. The problem with this is the right to vote is a ‘gateway’ to other rights so citizens are denied on multiple levels if they cannot vote. There is also the concern that if this right is not read as being implied by the text, other ‘unenumerated’ rights (i.e. not explicitly set out in the text) such as right to privacy or right to information may be at risk.

Dr Chandrachud described the ban on prisoner voting as particularly problematic, firstly because it is a blanket ban (a prisoner is barred from voting whether they are serving a short sentence for a petty crime or a life term for murder); but secondly because undertrials are not allowed to vote, which flies in the face of the idea of ‘innocent until proven guilty’.

Recommendations

- There is no need for a radical overhaul of the Constitution of India. As a text it is inclusive, providing for a wide range of rights. It has also demonstrated sufficient flexibility so it can be amended in line with contemporary developments as required.
- More attention should be given to articles which are not currently enforced effectively. For example, Article 17 prohibits untouchability but discrimination against Dalits is still widespread today. Article 21, the right to life and liberty, is compromised by the continuing use of AFSPA in Kashmir and the north east.
- Part of the problem is that the detail of key articles are rarely taught in constitutional law in India. Changes to legal education to place greater emphasis on these parts of the constitution would therefore be a good starting point.
- Currently there is a trend towards interpreting constitutional provisions very narrowly. The courts should push for broader interpretations which protect the rights of minorities. Citizens and civil society organisations must also launch and sustain social movements which bring flagship cases to the court, and educate judges on progressive interpretations of constitution provisions.
- The need for judicial reform has now reached a critical point. There are over 20 million cases pending in India's district courts alone ([2016 estimate](#)), meaning that some civil cases may never be addressed. Judicial delays seriously undermine the rule of law, and the lack of a strong legal response to vigilantism results in others thinking they can get away with violence. This makes minorities in particular extremely vulnerable, regardless of the constitutional protections that exist.
- One way to improve the legal system would be to give the High Courts more power. This would put pressure on courts at this level to perform better, instead of referring decisions upwards. It would also reduce pressure on the Supreme Court, which would then have more capacity to produce timely rulings on pressing issues. Improving the judicial appointments system is also a priority.
- Better policing is also needed – at the moment police officers often act as gatekeepers, for example by deciding whether or not First Information Reports (FIR) will be filed. This is in violation of Article 39A which guarantees equal justice.
- The right to dissent must be protected, particularly in universities, which should also be encouraging their students to question and debate. The increasing use of the 'anti-national' label has disturbing implications for freedom of speech.
- The right to vote should be made an explicit constitutional right. It is often read into existing provisions and underpins much of the jurisprudence of the Supreme

Court relating to elections. However, amending the constitution would help to remove the ambiguity around this key 'gateway' right.

- The electoral system would benefit from a range of adjustments. For example, there is a need for greater clarity on the rules around disqualification/conflict of interest for elected representatives, and absentee voting needs to be put in place to avoid e.g. of migrant workers/students studying abroad being deprived of their right to vote. The ban on prisoner voting should also be revisited as the lack of sentence-based classifications and the inclusion of undertrials in particular sits uncomfortably with wider constitutional principles of inclusion.



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