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Journal of Democracy, Volume 32, Number 1, January 2021, pp. 111-125 (Article)

Published by Johns Hopkins University Press



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THE THREE FACES OF THE INDIAN STATE

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For more than seven decades, India's Constitution has provided a framework for liberal democracy to flourish in one of the world's most plural societies. Recent institutional changes and bureaucratic practices, however, have undermined central tenets of the prevailing constitutional order. India's new constitutionalism has three distinct, yet overlapping, manifestations: the ethnic state, the absolute state, and the opaque state. This new order—whose legitimacy rests entirely on popular authorization without reference to how power is used—has weakened not only the rule of law, but also equal citizenship, the system of checks and balances, and the mechanisms for ensuring accountability.

The making of modern India marked a dramatic effort to institutionalize democracy in a country without wealth, widespread literacy, or social homogeneity. With the exception of the Emergency in the 1970s, India's constitutional structure has been relatively stable. Scholars and commentators have come to associate Indian democracy with certain institutional features: the regular occurrence of free and fair elections, equal citizenship, checks on governmental power across vertical and horizontal dimensions, a judiciary with strong powers of review, and an elaborate bill of rights.

This framework, however, is not as stable as it has seemed. In fact, it has been changing in fundamental ways. The transformation has involved legal changes as well as shifts in administrative and bureaucratic practices that are momentous even if less formal. At a time of burgeoning global interest in the crisis of democratic constitutionalism,¹ the models of statehood that have long shaped our political imagination have come into question. In particular, new attention is being paid to

constitutionalism in illiberal or nondemocratic regimes, and to the role that law plays in authoritarian systems.² A study of the Indian experience can contribute crucially to these inquiries.

In today's India, the assent of the people is considered to be not only necessary but also sufficient to justify all forms of state action. Individually, the three faces of the Indian state—what we call the “ethnic state,” the “absolute state,” and the “opaque state”—bring to light an underappreciated side of India's contemporary political order. Together, their unique conjunction at the present historical moment offers us a new vision of Indian constitutionalism that departs from the received wisdom.

The Ethnic State

The 1947 partition of British India into the nation-states of India and Pakistan took place amid extraordinary violence and mass migration. Despite simmering Hindu-Muslim tensions, India's 1950 Constitution boldly affirmed secularism and equal rights. The document's citizenship provisions avoided any hint of communal identification, adopting a *jus soli* (birth-based) rather than *jus sanguinis* (descent-based) model.³

In December 2019, India's legal regime departed from this founding conception by explicitly linking membership in the political community to religious identity. An amendment to the 1955 Citizenship Act declared that Buddhists, Christians, Hindus, Jains, Parsees, and Sikhs from Afghanistan, Bangladesh, and Pakistan could receive an expedited pathway to Indian citizenship. The law's stated objective is to protect persecuted religious minorities in South Asia. The law, however, does not accommodate persecuted Muslims in neighboring countries, such as the Ahmadis in Pakistan or Hazaras in Afghanistan, and only includes those neighboring nations that have a Muslim majority.

This measure challenges the core constitutional doctrines of equality before the law and equal protection. India's founding charter guarantees equal protection and equality before the law to “any person,” including foreigners. As is the case with most constitutional equality guarantees, India's permits distinctions between persons only when such distinctions are rationally related to a legitimate legal goal. Here, the measure fails by being both under- and overinclusive: It does not include all nearby persecuted religious minorities, and it offers any migrant from the list of specified religions and countries fast-track citizenship whether that person has been religiously persecuted or not (there is no provision in the law for determining if someone is threatened by religious persecution).

By treating religious identity rather than religious persecution as the ground for distinguishing between persons, the new law also violates the constitutional principle of secularism. One religion—Islam—is placed on a lower footing than others. Simply put, the fact of one's religion determines one's ability to obtain an accelerated path to Indian citizenship.

The new citizenship law has come into being alongside a proposal to populate an all-India National Register of Citizens (NRC) that will distinguish between illegal migrants and legal residents. The NRC's origins lie in attempts to regulate entry into the state of Assam in northeastern India, a problem that was aggravated by the 1971 war between India and Pakistan that led to the creation of Bangladesh. In 1983, a government run by the Indian National Congress (the Congress party) enacted a law to adjudicate citizenship-related disputes in the region, where India shares a long border with Bangladesh. In 1985, an agreement known as the Assam Accord tried to resolve continuing concerns. Migrants who had entered Assam prior to 1966 could gain Indian citizenship, as could some who had come between 1966 and 1971.

That was how things remained until 2005, when a Supreme Court ruling peppered with communal observations struck down the 1983 law, questioning its capacity to address illegal migration.⁴ The distinction between Hindus and Muslims became all the more apparent when, around the same time, citizenship rules were amended to allow for a very different approach in addressing the entry of Hindu migrants into the states of Gujarat and Rajasthan.⁵ In 2014, a Supreme Court ruling referred several outstanding questions regarding citizenship to a larger bench while—strangely—directing the completion of a citizens' registry in Assam anyway. In other words, the court deferred tests for defining citizenship but nonetheless ordered a comprehensive enumeration of citizens.

The court order to compile a citizens' list in Assam (where nearly two-million people could be rendered stateless, mostly for lack of documentation) added fuel to demands for a citizens' list that would cover all of India: Enter the all-India NRC. Occurring alongside the new citizenship law, the proposal for a list has caused widespread anxiety, with millions fearing deportation or detention if they do not qualify to be on it. The Bharatiya Janata Party (BJP) government of Prime Minister Narendra Modi says that India's 195 million Muslims have nothing to fear because the NRC project is about identifying illegal migrants. This is cold comfort, however, since it is unclear how illegality will be determined. The perverse logic is plain: The state declares that citizens have no cause for concern but enjoys discretion in deciding who is a citizen.

The new citizenship law and the proposed NRC interact in disconcerting ways. Even if non-Muslims emigrating from Afghanistan, Bangladesh, and Pakistan find themselves left off the NRC, the new law offers them a route to citizenship. Muslims coming from those same countries will have no equivalent recourse. The NRC, seemingly a neutral administrative exercise, in reality would have far greater implications for one community than for others.

Even if one takes the NRC at face value and accepts its neutrality, bureaucratic incapacity could make it a vehicle of disaster for many. The Supreme Court's review of the 1983 act ignored the reality that India's

many poor citizens lack access to documents. The court cited U.S. and U.K. measures that place the burden of proof on the person claiming citizenship, but these examples transfer poorly to a country such as India, where documentation as basic as birth certificates often does not exist. Indeed, as recently as 2015–16, just 62 percent of children under five possessed birth certificates, according to the government’s own data.⁶ In one recent case, a court in Assam rejected the claims of a person with many official documents and decades of residency in India. The ruling focused on where the burden of proof resided but ignored the question of what a reasonable standard of proof might be.⁷ If such cases signal what lies ahead, then millions of poor Indians will struggle to “prove” that they are Indian, and those who are Muslim will find themselves excluded.

The shift toward ethnocracy did not start with the BJP’s rise to power in the 2014 election. The nation’s caste-based quotas have increasingly become a means for sharing power among castes rather than securing individual freedom. As for secularism, politicians of more than one party have long been no better than fair-weather friends to it. India has separate sets of personal laws based on religious identity and accords autonomy to educational institutions established by religious minorities.

What is novel, however, is the BJP’s systematic and all-encompassing vision of India as a Hindu nation. That vision has driven a public discourse in which Muslims are openly vilified, has encouraged official tolerance of extralegal violence against them, and has been behind decisions such as the government’s resolve to build a Hindu temple on the spot where a mosque (the Babri Masjid) had stood for centuries in Ayodhya, Uttar Pradesh, until Hindu-nationalist activists razed that structure in 1992.⁸ The new citizenship law and the NRC capture how a legal measure and an administrative exercise—the former appealing to humanitarian principles, the latter a seemingly innocuous bureaucratic activity—can further the rise of the ethnic state.

The Absolute State

In India today, the state has more power than ever, and that power is concentrated in the central executive. The state’s formal powers have greatly increased while the traditional system of horizontal and vertical checks and balances has broken down. Legal changes and institutional dynamics have resulted in a state whose authority is increasingly absolute.

The separation of powers. India’s Constitution establishes a parliamentary system, with its central feature of the executive’s *responsibility* to the legislature. It is Parliament—not the people directly—that selects the prime minister, and legislators exercise oversight over executive action. In recent years, however, India has begun to resemble a presidential system adorned with parliamentary characteristics, rather than the other way around.

How should one understand this shift? In large measure, its roots lie in a 1985 constitutional amendment—commonly known as the “anti-defection law”—that sought to address legislator defections and bribery-related scandals. Defections regularly threatened the stability of elected governments. The defections were transactional: Lawmakers would accept side payments to cross the floor and vote against the government, thereby precipitating its fall.⁹ To remove lawmakers’ incentives to switch parties in exchange for vast sums of cash, the anti-defection law stipulates that individual legislators who defy their party whip on a vote can be disqualified from holding a seat in Parliament.

This law, meant to remedy legislative anarchy and political corruption, has struck instead at the heart of parliamentary government.¹⁰ With the amendment in place, whips acting on behalf of party leaders predetermine how votes will be cast. Individual lawmakers no longer have an independent voice; their deliberations and debates are an empty show. As a result, the relationship between the legislature and the executive is turned on its head. The executive controls the ruling party, and the ruling party controls how legislators can vote. The executive no longer answers to Parliament. Rather, Parliament answers to the executive. The people’s elected representatives are stripped of the power to check the executive branch.

This institutional change has undermined accountability mechanisms not only in the Parliament of India but also in the state assemblies, since it applies to them too. Ruling parties in a hurry to enact their agendas often seek to bypass committees, thereby stripping legislatures of the scrutiny and consensus-building that committee work can provide. The amendment has also empowered governments to adopt strategies that would likely fail if legislators enjoyed independence. “Money bills,” for instance, are supposed to be restricted to taxes and spending, but are now used to push through other kinds of legislation. Money bills are a way of bypassing the upper house: They can only be introduced in the lower house, and they do not need upper-house approval to pass. Since the present government’s coalition is currently short of a majority in the 245-member upper house, the ability to circumvent this chamber has obvious appeal. In 2016, the government introduced a law authorizing India’s Aadhaar project (a nationwide biometric identity system) as a money bill precisely to circumvent the check that bicameralism provides. Legislators, their votes cabined by the anti-defection law, are powerless to stop such maneuvers.

The anti-defection law interacts in worrying ways with the absence of internal democracy within India’s political parties. With no leadership elections inside parties, and few mechanisms for genuine deliberation and consultation, nearly all Indian political parties are run by small coteries of elites. With the anti-defection law having broken the bonds of democratic accountability between legislators and the voters who elect them, and with political parties curbing any semblance of internally democratic practices, the autocratic grip of party bosses is strong.

The anti-defection law has led neither to stable nor to clean politics. Over time, legislators have found clever workarounds. They have been known to defy whips after being pledged an opposition-party nomination in a subsequent by-election. Horse-trading and bribery have not gone away so much as moved to a different stage of the process. Speakers of legislatures have become increasingly politicized, since these officials are now legally entrusted with decisions about matters such as whether and when to commence disqualification proceedings against a noncompliant member. Such dynamics only underline the collapse of norms and institutions that used to undergird representative government.

If the legislature is no longer an effective check on the executive, much the same can be said for the judiciary.¹¹ This is startling: Only a few years ago, the judiciary was seen as one of the most powerful branches of government.¹² Now, even the highest courts are becoming known for avoiding controversial cases. Urgent constitutional questions—such as those raised by contentious changes made to campaign-finance laws two years ago, or by the August 2019 decision to abrogate Jammu and Kashmir's constitutional autonomy without consulting its legislature—remain unanswered because courts will not hear the cases that might resolve them. The security lockdown in Kashmir has resulted in hundreds of arrests and detentions, but *habeas corpus* petitions are languishing as people sit in jail for want of courts interested in compelling the government to explain why they are behind bars.

While turning a blind eye to many contentious measures, the judiciary has approved others. A court ruling in favor of the government does not, by itself, raise concerns. Yet the logic of various high-profile decisions is not encouraging. Aadhaar has received sanction without much judicial heed paid to surveillance-related fears. In the Babri Masjid matter, courts have acquitted all those charged with the mosque's 1992 destruction (several are BJP members), and the support that judicial rulings have lent to the plan to build a Hindu temple on the site contrasts sharply with the principles of adverse possession that courts usually apply in land disputes.

The judiciary's withdrawal has been puzzling because India's courts have not been subjected to packing or other control techniques as seen in Hungary, Poland, and Turkey. Moreover, India's courts enjoy a rare institutional safeguard: For nearly three decades, the courts themselves have exercised almost complete control over the formal processes by which judges are appointed to the higher bench.

None of this is to say that the executive has not tried to exert formal control over the judiciary. In 2014, soon after the present government came to power, Parliament passed a constitutional amendment authorizing the creation of a National Judicial Appointments Commission (NJAC) to replace the current system, known as the *collegium*. In a rare instance of direct confrontation, the Supreme Court struck down the

NJAC measure for violating the principle of judicial independence.¹³ Subsequent government efforts to alter appointment rules and qualifications for administrative tribunals have been similarly invalidated.¹⁴

If government attempts to curtail judicial independence have failed, why has it nonetheless declined? One answer suggests that the government has found subtler ways to curb the courts. These methods include slow-walking *collegium* recommendations, delaying background checks for nominated judges, and refusing to increase the number of judicial posts.¹⁵ But the formal powers of the Indian judiciary, both administrative and substantive, remain significant and cannot be ignored. Thus judicial self-abrogation—whether adopted as a survival tactic in the face of an assertive new government, for reasons of ideological sympathy with that government, or on simple careerist grounds—is at least part of the answer. The courts have, in other words, become participants in politics, even if they have also been victims of it.

Federalism. Like the separation of powers, federalism is a structural check on state authority. Both the central government in New Delhi and the 28 state governments enjoy constitutionally exclusive legislative and executive powers. While state governments have never possessed powers that are comparable to those of the center, new developments have greatly diminished their position. Reduced fiscal authority is arguably the most significant of these.

Since the end of the “License Raj” and the onset of market liberalization in the early 1990s, economists have expressed misgivings about the nature of fiscal federalism in India, especially in the absence of a national common market. India’s constitutional design led to states crafting bespoke tax regimes for themselves, facilitating commerce within states but not between them. After years of deliberation, the central and state governments forged a compromise—represented by a 2016 constitutional amendment—to dramatically reimagine taxation powers through a new, harmonized regime of indirect tax collection known as the Goods and Services Tax (GST). Before the GST, the center taxed the production of goods and services while the states taxed their sale. With the GST, states lost their exclusive power to tax the sale and purchase of goods.

The GST has changed Indian federalism: States have ceded their tax powers to a new body—the GST Council—in which the states collectively hold two-thirds of the votes. The ink on the GST accord had barely had time to dry before the compact was tested. The GST’s complexities plus a slowing economy left the center short of the revenues that it needed to compensate the states as guaranteed over the scheme’s first five years to ensure revenue neutrality. Well before the covid-19 pandemic, economic pressures were leading to center-versus-state squabbles over the timing and size of revenue transfers. The center’s ability to meet its obligations has remained in doubt.

India’s states have never had especially strong taxation powers, and

so have always counted on fiscal transfers from the center. Under successive governments, the center has increasingly tied transfer payments to specific welfare initiatives. These ballooning transfers give the center power over spending on matters which, constitutionally, are largely the purview of the states.¹⁶ When it came to power in 2014, the current government promised to rationalize central welfare schemes and to devolve a larger share of centrally collected tax revenues to the states, but it has balked on both measures.¹⁷

Indian federalism has been called into question in two further respects. The first relates to the political identity of states. In August 2019, Parliament passed the Jammu and Kashmir Reorganisation Act, splitting the state—long the subject of a bitter dispute between India and Pakistan—into two new territories largely under the central government’s jurisdiction. The center-appointed governor of Jammu and Kashmir had dissolved the state’s legislature in mid-2018 when the governing coalition collapsed. In 2019, the law reorganizing the state passed without meeting the constitutional requirement that the center consult affected states before redrawing state boundaries or changing a state’s constitutional status.¹⁸ In other words, the center had made an Indian state extinct without consulting the elected representatives of its people.

The second relates to the central government’s tendency to involve itself in domains where states enjoy exclusive legal powers. A recent example is a law that liberalizes agricultural commerce, enables contract farming, and gives the center more powers to regulate certain food staples. Constitutionally, agriculture is a topic for the states to regulate, but the center cited its interstate-commerce authority as well as general national-interest grounds for the law. That it was enacted without consulting the states, without a parliamentary debate, and by a voice vote in the upper house heightened the impression of the center infringing on the states. Like the workings of the GST and the handling of Jammu and Kashmir, the easy enactment of such a law underlines the commanding nature of the BJP’s ascendancy. The future of Indian federalism will, in turn, likely be shaped above all by which political parties control the center and the states.

Expanding government powers. Along with these developments has come a steady increase in the central government’s powers, especially as regards national security, surveillance, and regulation. India has a long history of draconian national-security laws.¹⁹ A notorious example is the Unlawful Activities (Prevention) Act. Originally passed in 1967 and strengthened by a Congress party government in 2008 and the current BJP government in 2019, this act gives the national police and security forces extraordinary powers of investigation, detention, and punishment. In its latest form, it provides broad grounds for including not only groups but individuals in the “terrorist” category. Predictably, dissenters and civil society activists have fallen prey. The government’s

vast, arbitrary powers to prosecute individuals—even if such actions ultimately fail—raise special concerns in a country where prosecutors’ offices have scant independence from the executive, and where sluggish courts can leave people in jail for years without trial.²⁰

Aadhaar is the world’s largest biometric identification project and the flagship effort of the emerging surveillance state. Conceived more than a decade ago and given a statutory basis in 2016, Aadhaar has the professed aim of improving delivery of welfare and public services, but its design raises concerns. The agency charged with overseeing Aadhaar, the Unique Identification Authority of India, stores metadata in ways that can be matched across services to profile a person’s activities. Aadhaar numbers will end up in enough databases, public and private, to raise worries about data security given the number of intermediaries involved. Concern should sharpen when one reflects that Indian law currently does little to safeguard personal data, and that the data-protection bill currently under discussion in Parliament will still let the government access and process personal information in numerous circumstances.²¹

Along with enhanced security and surveillance powers, new regulations extend government power over both capital and civil society. In 2010, a Congress party government revamped the law governing foreign contributions to associations, companies, and individuals. The new law banned foreign funding of any organization deemed “political in nature,” with the task of devising a precise definition of that vague language left wholly to the central government’s discretion. In 2020, the BJP government added further restrictions on the use and transfer of foreign funding, further hobbling the operations of civil society groups and research institutions.

While a plethora of justifications have been offered for the absolute state—national security, economic growth, better governance—the emphasis is always on outcomes rather than on reaching them in ways that respect constraints on state power. The structures of authority and the processes that uphold freedom are treated as secondary at best. What unites the disparate justifications is their conclusion: Lest some significant goal go unreached, state power must know no bounds.

The Opaque State

Although never famous for transparency, the Indian state did become more open about its everyday operations in the last quarter-century. As civil society grew more active, as politicians embraced greater decentralization, and as international norms shifted, Indian governance became noticeably less opaque. Recent measures, however, have cut against this grain as the state has increasingly walled itself off from scrutiny.

Transparency in government. In 2005, Parliament enacted the Right to Information (RTI) Act, which built on the example of the U.S. Free-

dom of Information Act (FOIA) from the 1960s. Under the RTI Act, Indians can petition public authorities for information about how budgets are allocated, regulations are written, and government programs operate. In contrast to what FOIA provides, however, Indian officials who fail to respond in a timely manner can be fined for their inaction.²²

While the law has been beset with numerous implementation failures, India's politicians have also worked overtime to undermine it. The Congress party government that held office from 2004 to 2014 attempted to narrow the scope of documents that could be requested and to raise the barriers to filing RTI claims. Those efforts to dilute the rules failed, but the BJP's more recent moves to weaken the law on the level of personnel have not. In 2019, Parliament removed the provisions that mandate fixed, five-year terms for the information commissioners who populate the law's appellate body, and eliminated the clause that pegged commissioners' salaries to those of respected state and national election commissioners. Further, the current government has delayed naming new commissioners to replace retiring ones, deigning to fill vacancies only when civil society has pressed the judiciary to intervene. A similar strategy has been applied to a new anticorruption ombudsman's office, the Lokpal. The Modi government has marginalized it by slow-walking appointments to the agency.

Control over government information has drawn attention in the context of official statistics about the functioning of India's economy.²³ In late 2014, the new BJP government released fresh estimates of GDP growth as part of an effort to improve the methods by which India's national accounts are tracked and reported. A technical dispute over the accuracy of the new numbers broke out.²⁴ It acquired political overtones when the Modi government revised downward its estimates of how growth had fared under the preceding Congress government, while presenting a much rosier picture of GDP under the BJP. The credibility of India's statistical agencies suffered a further blow in 2019, when the responsibilities of the independent National Statistical Commission were rescinded and given to a government agency led by a senior political appointee. To make matters worse, on two separate occasions in 2019, the government either delayed or withdrew flagship government-survey data when the findings highlighted severe economic distress.

Political finance. These changes are important enough, but the most serious impact on transparency and accountability has arisen with regard to political finance. The original sin plaguing India's system of electoral funding dates back to 1969, when Prime Minister Indira Gandhi prohibited the corporate funding of politics without replacing it with a well-regulated system of public financing, thereby pushing political giving underground.

As the transparency movement gathered steam in the 2000s, it claimed some modest victories. Parliament made it mandatory for parties to report large contributions, and to publish reports of income generated and money spent. That same year, the Election Commission of

India required candidates to disclose their personal financial assets and liabilities (along with their criminal records and educational qualifications) while submitting their nomination papers. These measures were, of course, far from sweeping—parties' accounts were not independently audited, candidates easily hid assets by parking them with family members, and small donations faced no disclosure requirements (allowing a donor to “repackage” a large donation by breaking it into countless undisclosed smaller ones).

More recently, things have been moving against rather than toward greater transparency. In 2018, under the guise of reducing opacity in political giving, the government introduced an “electoral bonds” scheme. Under it, individuals and firms can donate to a party by purchasing bearer bonds (that is to say, something very close to cash) from a public-sector bank and depositing them in the party's account. While the transaction flows through the formal banking system, it protects the anonymity of all parties involved—neither the donor nor the recipient has to disclose the exchange.

Although some have heralded this system, with its nominal delinking of donors' and recipients' identities, as a method for curbing illicit quid pro quos, these details are in fact accessible to the public-sector bank, to government regulators, and, by extension, to the government itself. A system in which political contributions are transparent to the banking regulator but hidden from the general public is an Orwellian caricature of the term “transparency.” To encourage would-be donors to use electoral bonds, the government eliminated the statutory ceiling on corporate giving and abolished the requirement that firms declare itemized political contributions on annual disclosure statements. Moreover, Parliament relaxed the prohibition on foreign funding of politics by redefining firms previously designated as “foreign” to be domestic concerns.

In short, it is now possible for previously designated foreign firms to give unlimited sums to political parties without having to disclose a single rupee—and no one would be able to connect the dots. Unsurprisingly, electoral bonds have massively benefited the ruling party. In 2018–19, the BJP's income from “unknown sources”—mostly via electoral bonds—was 1.5 times greater than that of all the other five national parties combined.²⁵ The importance of such developments cannot be overestimated. They call into question whether India will even remain an electoral democracy (however illiberal).

The Triple State

Studies of law under authoritarianism often follow Ernst Fraenkel's distinction, laid out in his 1941 classic *The Dual State*, between the “Prerogative State” and the “Normative State.”²⁶ Fraenkel thought of the former as a realm of political power unbounded by law, while the latter described bureaucratic rules that functioned across different domains.

With this dichotomy, Fraenkel grasped that law plays a significant role even in regimes that are largely free of legal shackles.

What stands out most sharply about India's constitutional evolution is not a bifurcation between, on the one hand, tasks and institutions that exemplify arbitrary power, and on the other, tasks and institutions where law still acts as a constraint. Rather, it is that the state wears different faces—choosing which to adopt as its goals and circumstances shift. The Indian state has learned to show different aspects to different constituencies, to deflect attention from its real behavior, and to make citizens guess constantly about what exactly is afoot. Moreover, it inhabits this protean state of being with remarkable ease, deploying whichever presentation of itself seems best suited to meet the political demands of the moment. The current focus on strengthening state capacity could ironically make matters worse. If a state that relies on confusion and coercion acquires more capacity, this means that its ability to confuse and coerce its people will rise as well.

The interaction between these three faces of the state—ethnic, absolute, and opaque—remains to be fully studied. At one level, it is easy to see that each aspect feeds into and strengthens the others. Rather than being in mutual conflict, the myriad justifications behind ethnic differentiation, absolute power, and a lack of transparency complement and reinforce one another. For example, the use of religion as a criterion for citizenship strengthens attempts to reduce federal autonomy—as can be most powerfully seen in the context of Jammu and Kashmir, which before its bifurcation and demotion to union territory status was India's only Muslim-majority state. At another level, however, the state is creating additional layers of mistrust between citizens and itself on issues such as surveillance: Ethnic differentiation means that some citizens (most notably, religious minorities) need to fear being surveilled more than others do. Similarly, the state's opaque character not only reveals itself in the context of government data; it also feeds into, for instance, the way Parliament has come to operate without that essential feature of a legislative body, deliberation.

At another level, more complex dynamics may well be at work. The combined lack of horizontal and vertical checks results in an all-powerful central executive. Yet, interestingly enough, the absence of horizontal checks even at regional levels has sown the seeds of sub-national authoritarianism.²⁷ How Indian voters will respond is an open question. Will the gathering realization that the separation of powers has collapsed, leaving authoritarianism a reality at the regional level, make voters numb to the rise of authoritarianism at the center, or will it put them more sharply “on their guard” against this eventuality?

As for that rise, the most striking feature of India's new constitutionalism is the presence of popular authorization alongside the absence of the rule of law. The “congruence between official action and the law,”

Lon L. Fuller once observed, is central to the rule of law. An independent judiciary, practices of faithful interpretation and implementation, and procedural norms are vital to prevent “a broken and arbitrary pattern

India’s new constitutionalism has altered the meaning of legitimate state action. The focus today is exclusively on the source of power, rather than on a classical-liberal concern with how power is used.

of correspondence between the Constitution and its realization in practice.”²⁸

Over time, India’s juridical framework has changed in important ways—many of which we have outlined in this article. But equally noteworthy is how much depends on the administrative practices underpinning the formal, overarching framework.

The extent to which matters turn on bureaucratic action—the exercise of power—within formal legal schemas that change only incrementally makes conditions more ominous.²⁹ A new political force with a strong ideological

agenda can work an existing system to entirely rework a nation; so much can be subverted by keeping so much intact. Such an outcome highlights the longstanding weaknesses of India’s public institutions—a reality that has sometimes been underappreciated because formal frameworks have not been weaponized by a powerful executive leader.³⁰ Political fragmentation and the absence—until a few years ago—of an ideologically driven ruling party have long masked the degree to which freedom’s fortunes in India have been hostages to contingency, reliant more on the state’s good behavior than on solid juridical and institutional constraints. Liberal-democratic constitutionalism in India, in other words, has been living on borrowed time.

India’s new constitutionalism has altered the meaning of legitimate state action. The focus today is exclusively on the source of power (popular authorization), rather than on a classical-liberal concern with how power is used (in ways that respect and promote freedom rather than baffle or override it). This political shift reminds us that only within the domain of politics, through the emergence of new alignments and ideas, can a different constitutionalism arise. Thus India’s long-term challenge is not simply to generate a new popular will but also to establish rules and practices that can provide a new account of the legitimate exercise of power.

NOTES

The authors thank Devesh Kapur, Jonathan Kay, Pratap Bhanu Mehta, Arvind Subramanian, and Mark Tushnet for detailed comments. Jonathan Kay also provided excellent research assistance. Any errors are the authors’ own.

1. See, for example, Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Pennsylvania Press, 2016); Mark A. Graber, Sanford Levinson, and Mark Tushnet, eds., *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018); Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Cambridge: Harvard University Press, 2019).

2. See Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100 (January 2015): 391–462; Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85 (March 2018): 545–83.

3. See Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge: Harvard University Press, 2013), 51–81.

4. *Sarbananda Sonowal v. Union of India* (12 July 2005), 5 SCC 665.

5. In 2004, the Citizenship Act itself was also changed to deny birthright citizenship to a person born in India who had one parent who was an illegal migrant at the time the person was born. This measure was largely targeted at Muslim migrants from Bangladesh. See Niraja Gopal Jayal, "Faith-Based Citizenship: The Dangerous Path India is Choosing," *India Forum*, 1 November 2019.

6. Rukmini S., "India's Poor Are Also Document-Poor," *Mint*, 6 January 2020, www.livemint.com/news/india/india-s-poor-are-also-document-poor-11578300732736.html.

7. See *Nur Begum v. Union of India*, W.P.(C) 1900/2019, 18 February 2020 (Gauhati High Court).

8. For instance, while several states have passed laws that criminalize forced religious conversions, in 2020 at least five BJP-ruled states—Assam, Haryana, Karnataka, Madhya Pradesh, and Uttar Pradesh—mullied enacting more stringent rules aimed at combatting "love jihad," an alleged Islamic conspiracy whereby Muslim men trick Hindu women into marriage with the aim of converting them.

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