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Accounts of the founding of India's Constitution tend to belong to one of three traditions. According to the first tradition, the Constitution was a document of continuity, designed to preserve the colonial apparatus of administration, which would be wielded by the Indian National Congress, the erstwhile party of the freedom, and now the party of government. According to the second tradition, the Constitution was an unwieldy framework of compromise, designed to satisfy a range of disparate factions within the »broad tent« of the Indian National Congress, and reveals no coherent design or overarching set of principles. However, according to the third tradition, the Indian Constitution is a document of principle, one that sets out a vision and a normative blueprint for India, and takes seriously its task of constituting a modern, democratic nation.

Madhav Khosla's *India's Founding Moment: The Constitution of a Most Surprising Democracy* belongs to this third tradition of thinking and writing about the historical moment that was the founding of the Indian Constitution. India's Founding Moment is primarily a work of intellectual history: Khosla takes seriously the ideas that were at the heart of the framing of the Indian Constitution, ideas expressed, debated and articulated by the founders, both in the Indian Constituent Assembly, and otherwise. Khosla understands the founders to be good faith political actors, genuinely concerned about establishing a flourishing democracy in a post-colonial nation, and with the Constitution serving as the instrument for accomplishing that task.

Khosla isolates three crucial elements of this overall Constitutional vision: »the explication of rules through codification; the existing of an overarching state; and representation centred on individuals.« (4) »In each case«, he continues, »there was an attempt to free Indians from prevailing types of knowledge and understanding, to place them in a realm of agency and deliberation that

was appropriate to self-rule, and to alter the relationship that they shared with one another« (4).

In three chapters, Khosla elaborates upon each of these themes. In »The Grammar of Constitutionalism«, he locates the length – and detail – of the Indian Constitution, with its 395 Articles, in the founders' belief that codification would help create a common grammar that would serve as a reference point for Indians as they reconstituted themselves from subjects to self-governing citizens. According to Khosla,

»[c]odification could provide common meaning to a set of principles relating to democracy in a land without such meaning. Familiar constitution-making endeavours, whether they aimed to limit the exercise of power or to enable it, had already presupposed a great deal of shared understanding. But the Indian context offered no such joint consensus. Codification was an effort to explicate such a consensus.« (38)

In other words, India's colonial past meant that it had not been able to develop, organically, a set of constitutional conventions, through years and decades of popular struggle and politics, that other countries had had the luxury of doing. The absence of such conventions, then, was to be filled in by a detailed written text.

In »The Location of Power«, Khosla takes up a subject that has vexed constitutional scholars – and indeed, lawyers – ever since the founding: Indian federalism. The founders designed a lopsided federal structure, where a double-tiered layer of government existed, but also where all the residuary powers lay with the centre, and indeed, the borders and very existence of provinces could be altered by the centre. What explains this asymmetric form of federalism? Khosla argues that at the heart of the founders' democratic vision lay the necessity for citizens to relate to each other qua citizens, and further, to accomplish this, it was necessary to

* MADHAV KHOSLA, *India's Founding Moment: The Constitution of a Most Surprising Democracy*, Cambridge (MA): Harvard University Press 2020, 219 p., ISBN 978-0-674-98087-7

»liberate Indians from localism« (73). This could only be accomplished through a centralised governance structure, as the founders were »doubtful of society's internal capacity to reconstitute interpersonal relations« (107). Democracy depended on citizens being able to engage with one another without being *reduced* to their group identities, and therefore, a significant degree of political action had to be assigned as the responsibility of the centre, where such engagement was possible.

This last point allows Khosla to segue into his final substantive chapter, »Identity and Representation«. Here, Khosla tackles another enduring point of contestation: the Indian Constitution's treatment of individuals and groups. Given that, historically, and during the colonial period, representation was mediated *through* groups, why did the Constitution make a radical departure from that by guaranteeing universal adult suffrage? Khosla argues that – stung by the partition of India along religious lines – the entire purpose of the Indian Constitution was »moving away from a representative framework that sought to express identities that were regarded as stable and fixed, and in moving towards a model of citizenship centred on the political participation of individuals« (136). This was because the colonial approach – which treated groups as the *loci* of representation – fundamentally denied Indians political agency by assuming that »individuals within certain groups would act collectively and in specific ways. They were denied the capacity to deliberate and act for themselves as individuals« (138). At the same time, this did not preclude the founders from deploying the category of groups – such as, for example, for the purposes of affirmative action – where, historically, domination and oppression had been instrumentalised through group identity, and where – therefore – individual emancipation was not possible without taking groups into account.

Thus, in sum, the central argument of Khosla's book is that through »codification, centralisation, and representation« (158), the goal of the Indian Constitution was to constitute democratic citizens. Or, to put it in other words, the goal of the Constitution was to foster the conditions that would make democracy possible, in a newly-independent nation that faced many structural and institutional obstacles to democratic flourishing.

India's Founding Moment is a carefully argued account of a significant historical moment – both

in the history of decolonisation and in the history of democracy – and repays close study. It also raises further lines of enquiry, and creates the terrain on which further questions can be asked about the history of India's founding. With respect to codification, for example, the Indian Constitution's detail does not preclude the existence of constitutional silences. Indeed, in some cases – such as in provisions involving Parliamentary Privileges – the original Constitution expressly gestured towards the conventions of Westminster parliamentary democracy; in others – such as, for example, provisions dealing with the office of the Governor, the Constitution explicitly refrained from codification – and indeed, it is the absence of codification that has led to sustained litigation before the courts throughout Indian Constitutional history. What determined the founders' choice to subject *one* set of issues to the »grammar of constitutionalism« through codification and not another? India's Founding Moment allows us to frame this question, and at least partially answers it: the founders chose to codify those bits that *they* felt necessary to the »grammar of Constitutionalism« – and it is a further, fascinating question why they felt as they did.

Similarly, the question of centralisation and federalism is complicated by the fact that while it is true that »localism« (in the sense of village-level governance) was seen as enmeshing individuals within community structures they could not escape, it is also true that historically, some of the more emancipatory social experiments in Indian colonial history emanated from provincial governments and the so-called »princely states« (monarchic enclaves within – and subject to the control of – British India). A classic example of this is that of affirmative action, which first began in the state of Kolhapur, and was then adopted by numerous provincial governments as well as other princely states. This history is closer to the classically federal idea of provinces acting as »laboratories« of democracy, allowing for experimentation and social innovation, the more successful of which is eventually taken up at the central level. Was this argument ever seriously made and considered by India's founders?

Finally, the question of representation leaves open the question of those provisions of the Indian Constitution which do appear to subscribe to the idea of group uniformity that Khosla argues that the founders were keen to avoid. Examples include

prohibitions upon land transfers between residents in Scheduled Areas (i.e. India's indigenous peoples) and outsiders; as well as the fact that, by making religious denominations the bearers of constitutional rights through provisions such as Article 26(2), the Indian Constitution appears to preclude the possibility of internal cultural dissent (recent litigation on this issue has led to ambiguous outcomes). It might be fascinating to ask, there-

fore, how these seemingly conflicting constitutional visions are to be reconciled.

India's Founding Moment is a deep and thoughtful account of the framing of India's Constitution. It locates the Constitution within a history of democracy, democratic ideas and democratic contestations. It is an invaluable contribution to the history of constitutionalism. ■

Alexandra Woods

Lawyers at the Front Line*

This is an impressive book that tells the stories of the legal figures involved in the events surrounding the 1895 Jameson Raid in the South African Republic (ZAR). It therefore deals with a well-known subject but from a new departure point, namely from character sketches of the lawyers involved. Some of these are already familiar to the South African legal profession, but Rogers crucially also includes a number of lesser-known figures. Divided into four parts, with the Raid occupying the central position, Rogers adopts a biographical approach to detail the legal-political dynamics of a marked moment in South Africa's long history of race politics.

Beginning with the historical setting in Part I, Rogers immediately provides a sense of context through the use of contemporary terminology, describing the polarisation between the Dutch and English populations, between the agrarian Boers (burghers of the ZAR) and the professional Uitlanders («outsiders», referring to the predominantly English-speaking newcomers attracted to the ZAR on the discovery of gold). Rogers discusses the reasons for the Jameson Raid, and finds that Uitlander discontent about the strict franchise laws – despite having been the main grievance propagated at the time – was probably only a minor part within a complex of British imperialist

agendas and capitalist interests. But the ground that Rogers really sets in these chapters is that of the racial tensions between the white populations of South Africa in the late 19th century.

Part II introduces us to the *dramatis personae*, the lawyers involved in the centre, at the peripheries, and behind the scenes of the Jameson Raid and the ensuing treason trial. Part III continues their stories leading up to and during the Raid and the subsequent trial. Finally, Part IV considers their divergent careers in the aftermath of the trial. The biographies are replete with factual detail, evidencing extensive historical work on known legal figures such as J. G. Kotzé, John Wessels, Jacob de Villiers as well as William Henry Somerset Bell, the first editor of *The Cape Law Journal* (later *The South African Law Journal*), with additional insight into the roles of James Rose Innes and W. P. Schreiner. What is novel is the regard given to characters less familiar, such as Henry Hull, Edward Hutchison, Willem Van Hulsteyn, and Charles and James Leonard. Rogers dedicates three chapters to the story of Charles, an attorney and one of the lead conspirators, and his ultimate escape to England. He brings these lawyers to life through a careful process of quoting source material illustrative of their personalities. Thus, we learn that self-assurance and outspokenness were significant character

* OWEN ROGERS, *Lawyers in Turmoil. The Johannesburg Conspiracy of 1895*, Cape Town: Stormberg Publishers 2020, ix + 517 p., ISBN 978-0-6399892-5-9