

ARCHIVES OF DEMOCRACY: TECHNOLOGIES OF WITNESS IN
LITERATURES ON INDIAN DEMOCRACY SINCE 1975

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Maya Dodd

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INTRODUCTION

After *Midnight's Children*: Political and Narrative Order

“Cessation of A Poet”

*I am a poet/who has not seen the conflicts of yester years
But I have seen the horrors of today-those horrors whose trauma will/
pass from generation to generation
And having seen them/I have ceased to be a poet/
And become a testimony/ to voices that are choked/ and shrieks that rent the air*

(- Chandrasen Momaya trans. from Gujarati by Mansukhlala Jhaveri).¹

In her work on the English novel in India during the colonial period, *In Another Country*, Priya Joshi makes a pointed observation on the varied role of the novel in the context of Indian nationalism:

If the novel was a form whose ascendance was twinned to the consolidation of the nation-state in Europe, the story is subtly different in India. . . It is fair to expect that the novel might also have been the literary form best equipped for nationalism, but this we see was not to be. The novel in India seemed better equipped for liberation than for nationalism, and the boom in novelistic output that has subsequently occurred in the 1980s has taken place in a time when the future of Indian nationalism is being questioned.²

The suggestion that the novelistic form stopped short of aiding the liberationist version of nationalism through the postcolonial period points to a crucial difference between anti-colonial and postcolonial nationalisms: these nationalisms operate in two different times structured by colonial and postcolonial state power respectively.

¹ Qtd. in John Oliver Perry, ed., *Voices of Emergency: An All India Anthology of Protest Poetry of the 1975-77 Emergency* (Bombay: Popular Prakashan, 1983), 225.

² Priya Joshi, *In Another Country: Colonialism, Culture, and the English Novel in India* (New York: Columbia University Press, 2002), 260-261.

Consequently, during the postcolonial period of literary production, it has become increasingly evident that the ongoing questioning of nationalism is significantly informed by interrogations of the postcolonial state. In substantiating her argument, Joshi identifies a series of 1980s novels, such as I. Alan Sealy's *Trotter-Nama*, Amitav Ghosh's *Shadow Lines*, Shashi Tharoor's *The Great Indian Novel* and Salman Rushdie's *Midnight's Children* as "nationroman," but notes that while these are national novels, instead of furthering a celebratory nationalism, they are united by an elegiac mood. She sees their mood as "befitting the demise of one political and narrative order, even as these novels struggle to give voice to the possibility of an alternative one."³ It is interesting that Joshi locates the novel as appropriate for an earlier advocacy of nationalism, but then declares the more recent uses of the novel as questioning that nationalism. By foregrounding the centrality of the concept of "freedom" for the nation and the state in a recently colonial cultural context, as marks India, the reasons underlying the contemporary novel's vexed relationship to nationalism begin to take shape.

Following Benedict Anderson's argument on the specific role of the novel in establishing the postcolonial nation, several critics have challenged this claim.⁴ In the Indian context, Rosinka Chaudhuri in "The Flute, Geronition and Subaltermist

³ Ibid., 262.

⁴ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983). Several critics including Partha Chatterjee have contested Anderson's formulation on the linkages between literacy, reading publics and acts of imagining the nation. See special issue "Grounds of Comparison," *Diacritics*, Vol., 29.4, (1999). Similarly by refusing Anderson and Jurgen Habermas' specific designation of the "public sphere" for the privileged publics, I instead use the term "public culture" to describe more democratic cultural arenas (as suggested by Carol A. Breckenridge and Arjun Appadurai in the 1988 inaugural issue of the eponymous journal.)

Misreadings of Tagore”⁵ offers a critique of postcolonial studies’ privileging of the novel, and attempts to nuance Dipesh Chakrabarty’s claim that the dominant expressive connection to political modernity in India is found in the new prose of fiction. To this, Chaudhuri adds the case of verse as being an equally noteworthy form for the modern national subject, and some would also add journalism to the list of constitutive genres. In a similarly expansive vein, my own attempt gestures towards multiplying the question of form to adequately address the sharing of contextual space between literary and other writings. Since the formation of the nation-state did not exhaust the demand for *swaraj*, a focus accorded to the continued imagination of liberation writings also needs to be undertaken so as to examine literatures deliberating on the fact of freedom after decolonization. Writings on these themes are seen to proliferate in forms of non-fiction. And just as the imaging of freedom moves between fictional and non-fictional genres, so in turn the question of freedom merges into an interrogation of democracy. Consequently, by extending Joshi’s characterization of “liberation writings,” to include these forms, one can begin to broadly consider the aftermath of postcoloniality in literatures on Indian democracy.

The suggestion that political and narrative orders are related is brought to the fore in studying the period of the Indian Emergency of 1975. Salman Rushdie’s *Midnight’s Children*, a novel frequently taught in classes on Indian history is an exemplary case in point. Rushdie’s tale ends in 1976, an eloquent fact when considering that *Midnight’s Children* occupies a position of prominence in the

⁵ *Social Text* 22.1 (2004) : 103-122.

preliminary canonization of postcolonial writing.⁶ Even though *Midnight's Children* only narrates the bare beginnings of the nascent story of a disillusioned India, it is significant that in the novel the momentous birth of the nation is tragically followed by the still-birth of the state. While the novel opens with the birth of the narrator, Saleem Sinai, at the Nehruvian stroke of midnight, “when India awakes to life and freedom,”⁷ the narrative stalls at the birth of Saleem’s son, Aadam Sinai: a child born at the precise moment of the declaration of Emergency. While Saleem communes with midnight’s 1001 children to offer us omniscient narration, Aadam Sinai, born on the midnight of the Emergency is unable to speak. Priya Joshi offers a reading of the significance of “fabulous” breakdown in *Midnight's Children*, since it is with the advent of the Emergency that the children of midnight lose their miraculous powers:

In the chapter entitled ‘Midnight,’ Saleem’s sperectomy –what he calls ‘the draining of hope’ (521) that follows his forced castration—corresponds with Indira Gandhi’s Emergency, one of the most egregious violations of democratic process in India when Mrs. Gandhi, who was found guilty of election fraud, responded by clamping a twenty-one-month state of Emergency during which constitutional rights were ‘temporarily’ rescinded, freedom of the press was denied, and many of Mrs. Gandhi’s real and imagined critics were summarily jailed or dismissed. The period of the Emergency forms one of the most horrific chapters in the novel. . . It is also significant that in this chapter, the narrative, like Saleem, breaks down.⁸

⁶ First published in 1981, the novel expressly narrates Indian political events between 1947 and 1976, and in 1993 was voted the “Booker of Bookers” (as the best novel to have won the Booker prize), further reifying its status in postcolonial literature.

⁷ Here Rushdie directly echoes Jawaharlal Nehru’s speech on the granting of Indian Independence, August 14, 1947. Speech in Brian McArthur, *Penguin Book of Twentieth Century Speeches* (London: Penguin Viking, 1992), 234-237.

⁸ Joshi, *In Another Country*, 241.

I relate Saleem Sinai's inability to fully narrate his tale, with the real constraints of narrating this particular event. The chronological rupture effected by the Emergency is central to the historical periodization this study seeks to make evident. The Emergency is an event without clear hermeneutic contours and poses a tough challenge for Rushdie's omniscient narrator to negotiate the clearing-house of history's stories.

The Legitimacy of the Postcolonial State

"The achievement we celebrate today is but a step, an opening of opportunity, to the greater triumphs and achievements that await us. Are we brave enough and wise enough to grasp this opportunity and accept the challenge of the future?"
 (- Jawaharlal Nehru)⁹

The difficulties faced by Rushdie's storyteller relate not only to the ambiguous information still circulating on the facts of the Emergency, but also to the disruption this cataclysmic event produced within the broader social imaginary. While this study demonstrates how social imaginaries (such as Nehruvian and Gandhian imaginaries) do endure, the Emergency of 1975 effectively performs a schismatic break in the *narration* of postcolonial Indian history, and underscores the necessity of distinguishing between considerations of the nation from the state.

The period of the Emergency brought into relief the plain fact that while the Indian state was willing to go any lengths to deliver to its people a developmentalist vision of progress, Indian citizens were not quite as eager to incur the loss of their

⁹ "Tryst with Destiny," *Mirrorwork: 50 Years of Indian Writing*, eds. Salman Rushdie and Elizabeth West, (New York: H. Holt & Co., 1997), 3-5.

freedoms as adequate payment for such progress.¹⁰ The desirability of such progress was strongest at the time of Independence when the Nehru government benefited from the euphoria of recent decolonization and governed with the security of public sanction. The world promised by the dawn of independence was not merely one of formal self-rule, but *swaraj* by way of Independence was envisaged as the autonomous basis necessary for actualizing democracy and social justice. Judith Brown in *Modern India: The Origins of an Asian Democracy* writes that for Gandhi, “*swaraj* was far wider than mere constitutional arrangements. . . His *swaraj* bore three hall-marks—unity among Indians of all religions, the eradication of untouchability and the practice of *swadeshi*.”¹¹ Given the enormity of the task of social-reform that lay ahead, the state’s attempts at actualizing *swaraj* were demonstrated in its economic monopoly over more than four decades of mixed socialism emanating from, what Akhil Gupta refers to as, “the chief reason of state: developmentalism.”¹² Gupta argues that development “served as the cornerstone of the legitimation efforts of the postindependence Indian state,”¹³ given that development was a crucial “form of identity in the postcolonial world.”¹⁴ However, eventually the harsh image of the developmental state, as this study demonstrates, compromised that state’s ability to

¹⁰ For further discussions on the relationship between development and the Indian state during the Emergency period see Emma Tarlo, *Unsettling Memories: Narratives of the Emergency in Delhi* (London: C. Hurst, 2003).

¹¹ Judith Brown, *Modern India: The Origins of an Asian Democracy* (Delhi; New York: Oxford University Press, 1985) 207.

¹² Gupta, *Postcolonial Developments: Agriculture in the Making of Modern India*, (Durham N.C.: Duke University Press, 1998), 33.

¹³ *Ibid.*, 88.

¹⁴ *Ibid.*, 11.

draw from developmentalism as its main source of legitimacy. The consequences of the decline however did not challenge the fundamental viability of the state itself, and this fact reinforces the need for a cultural attention on the state.

It is my argument that the event of the Emergency transforms the modes of modernist narration—what Charles Taylor names as revolution, nation and progress—into new modes of postcolonial narrations centering on freedom, government and community. The new narrative modes emanate out of historical shifts which divide the time of voluntary and ebullient national belonging from a more banal time of involuntary “belonging” within a state. While the time of the former resonates with the promise of a self-guided future, the time of the latter is stained by disillusionment and the experience of subjection under arbitrary power. This distinction is also buoyed by the changed face of the state in the twenty eight years that separate the Emergency from Independence. These modes of narration also crucially precipitate the state’s quest for a new mode of legitimation, and I argue that this source is eventually borrowed from practices of democracy.

How does it come to pass that the exuberant expressions of national freedom are eventually transformed into bitter discontent at freedom deferred? Not only are there literal state strictures against narration during the 18 months of the Emergency, but after the suspension of this prohibition, the old modes of narration no longer suffice. Three factors guide this characterization: the suspension of democracy effected by legal Constitutional provisions and the accompanying suspension of fundamental rights which marked this event embody the disillusionment with the nature of postcolonial freedom as guaranteed by the state; the Emergency underscores

the need for a savage scrutiny of the institution of the state and the substance of popular sovereignty; and, the harsh experience of the Emergency inaugurates a new basis for the deliverance of postcoloniality itself by relating the cost of freedoms to the price of national development.

Several imaginaries sought to capture the essence of what freedom ought to resemble after the end of British imperialism, but the state's monopoly of this vision while not exclusive, was certainly overwhelming. Sudipta Kaviraj argues that the state is central to the story of modernity in India.¹⁵ Since Indian modernity precedes the postcolonial period, the story of the state's profound influence on culture is not only coincident with the post-Independence period. It is however an influence that is differently signified in this period due to the Constitutional sanction that enshrines its role with the authority of popular will. Simply put, the opening words to the Preamble, "We the People of India" are sufficient grounds for the understanding to follow that since Independence, the state is no longer merely an official seal of hollow proxy rule, but an actively *preferred* source of rule for which colonialism was defeated and popular sovereignty instated.

While this is evident, (as is the unsurprising continuity of state forms which originate in the colonial period), what is left out of formal Constitutional arrangements but persists equally significantly after Independence is a legacy of anti-colonial techniques of appeal and subversion that eventually come to be deployed against the

¹⁵ "Modernity and Politics in India," *Daedalus*, 129:1 (2000), 137-162.

postcolonial state instead of the colonial one.¹⁶ This practice crucially tempers the nature of postcolonial democracy in India and strongly features in shaping the technologies of witness and the many literatures on democracy in this period.

Through the lens of democratic theory, it is easy to view democracy in colonized countries as a legacy of colonial liberalism. The danger of such an argument is to assume that because democracy as rule of law has assumed one form in the West, the success or failures of post-colonial democracies need to be gauged by a comparison to their western predecessors. Even as I refrain from such a derivative appraisal of Indian democracy, I acknowledge the considerable influence of social imaginaries and practices which originated in the context of colonialism.

The precursors of Indian democracy are formed as much by a repertoire of anti-colonial legacies as they are by colonial liberalism.¹⁷ Several contemporary practices of democracy utilize the substantive democratic instruments made available through Constitutional procedures and instituted systems. Judith Brown notes that when the Constituent Assembly, acting as a provisional parliament in 1947 laid down the Constitution, “it drew very heavily on the 1935 Government of India Act, taking from it about 250 articles virtually unchanged.”¹⁸

¹⁶ Atul Kohli summarizes the discussions on Indian democracy’s lineages from Myron Weiner’s thesis of democracy as a legacy of colonialism ((1989) to nationalist versions in Barrington Moore (1966) and Ashutosh Varshney (1998). See in Atul Kohli, *The Success of India's Democracy*, (Cambridge: Cambridge University Press, 2001).

¹⁷ See, by R. J. Moore, *Liberalism and Indian Politics: 1872-1922* (London, Edward Arnold, 1966) and, Uday Singh Mehta, *Liberalism and Empire: A Study in nineteenth-century British liberal thought* (Chicago: University of Chicago Press, 1999) for more on liberalism in the colonial context.

¹⁸ Judith Brown, 343.

While not losing sight of the significance of postcolonial legal borrowings, less codified legacies of anti-colonial strategies are equally noteworthy.¹⁹ I stress that facets of democratic culture in India found in practices inspired by anti-colonial nationalist techniques, continue to remain in use both by and against the state. These deployments attained a critical momentum by the time of Indira Gandhi's tenure at the center. While her specific terms as Prime Minister were characterized by the successful leveraging of "plebiscitary politics" since the 1970s, her customary use of directly populist measures foisted on the state a version of anti-colonial calls to justice.²⁰ However, the overzealous application of this principle during the period of the Emergency aided and prompted the erosion of the Indian state's claim to staking an inheritance on this legacy.²¹

This shift has deeply impacted the career of Indian postcoloniality compelling an attention on the relationship between the state and culture. In that sense, this project reunites the concerns of the political and postcolonial, through an exploration of the

¹⁹ See Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (Minneapolis: University of Minnesota Press, 1993).

²⁰ To describe the electoral ratifications of state legitimacy, the descriptive "plebiscitary politics" is used by Lloyd I. Rudolph, and Susanne Hoebler Rudolph, *In Pursuit of Lakshmi: the Political Economy of the Indian State* (Chicago: University of Chicago Press, 1987), 137. For more on Indira Gandhi's populism, see Kohli (1987) and Frankel (1978).

²¹ The fact remains, as Atul Kohli points out, that the effect of democratic politics and competitive mobilization aided in the erosion of the "corporate cohesiveness of India's social structure" (qtd. in Zoya Hassan, *Politics and the State in India* (New Delhi: Oxford University Press), 211. I would extend Kohli's argument about corporate erosion to also imply the erosion of the idea of state inscrutability. The crisis of legitimacy can also be related to the clash of interests represented by different "demand groups." Paul Brass' taxonomy (follows the Rudolphs' designated "demand groups" in 1987, and divides "organized interest groups" (trade unions etc.); "demand groups" (student/peasant movements) and "influence groups" (105). Sudipta Kaviraj identifies four groups that the 'big-state' came to gain support from: Business, entrepreneurial and contractual interests; the rich-farmers lobby; the self-serving managerial and bureaucratic personnel; and the organized sections of the working class ("The Modern State in India" eds. Sudipta Kaviraj and Sunil Khilnani, *Civil Society: History and Possibilities* (New York: Cambridge University Press, 2001).

basis of Indian democracy and by essentially querying what the impact of the state has meant for cultural expression since the constitutional sanctions formalizing freedom.

While a simple answer might seem to gesture in the direction of procedural democracy, a closer attention to the heterodoxy of postcolonial cultural practices points to legacies that are much more varied. In the attempt to explore the cultures of postcolonial democratic instantiation, the text of the Constitution of India, a document formalizing democracy in India offers an appropriate beginning.

The Constitution as Ur-text of the Postcolonial Indian State

PART D AMMENDMENT OF THE SCHEDULE

- (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.*
- (2) No such law as mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of article 368²²*

In considering the basis of postcolonial deliverance, the foundational letters that promise freedom are to be found in the Preamble to the Constitution of India (See below). To acknowledge the significance of Constitutional amendments made during the Emergency we can begin to distinguish the study of a new phase of Indian history and a distinct account of freedom since decolonization. Given the crucial nature of the amendments made to the Constitution during the period of the Emergency, which

²² Government of India, Ministry of Law, Justice and Company Affairs, *The Constitution of India* (New Delhi: Government of India Press, 1999). The text of Part D in the Fifth Schedule [Article 244 (1)], pertaining to “Provisions as to the Administration and Control of Scheduled Areas and Scheduled Tribes,” reads thus-“In this Schedule, unless the context otherwise requires, the expression ‘State’ does not include the States of Assam, Meghalaya, Tripura and Mizoram” Article 368 relates to the power of Parliament to amend the Constitution. All subsequent references to the Indian Constitution are from this edition.

effectively suspended all claims to fundamental rights, this study posits that 1950 and 1975 offer up two inaugural moments to understand how Constitutional inscription and re-inscription create distinct modalities circumscribing the possibility for freedom. Thus, Constitutional changes of the second inscription of 1975 altered the possibilities of freedom creating a variance in expressions of postcoloniality since the time following decolonization. To consider the Constitution of India as the ur-text of literatures on Indian democracy requires a reading which applies the critical tools usually reserved for the study of fictional works (such as literary texts) towards this solemnly non-fictional document. In the course of this study, the need for such an attention will also be corroborated by the technologies of witness. In their pointed focus on the state they all refer their gaze to this founding text bearing the state's imprimatur and guarantee of freedom:

THE CONSTITUTION OF INDIA

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;
and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO

OURSELVES THIS CONSTITUTION.²³

What is most evident from an initial glance at these opening words is the text's act of *constituting* a people under one nation through the assumed sovereignty of a collective. This act is made manifest by the choice of the active verbs used—resolve, constitute, secure, promote, and assure. The Preamble is evidence of the created artifice of contract which unites a people through an application of integration based on a promise. And the promises made in the Preamble soar towards a horizon of near impossibility. These promises were formulated after over twenty months of deliberation by the Constituent Assembly, culminating in the Indian constitution's passage granting the Indian republic a legal basis on January 26, 1950.²⁴

However since the time of this formal enactment, the failure of the state to secure in practice the fraternity of the nation through justice, liberty and equality for *all* its citizens, is borne out by history, and this occasions reflection on the original terms of the contract. The dangers that threaten the republic's implosion are virtually presaged in the numerous guarantees of equitability and impartiality, which in their stated aim to reorder society also acknowledge the spheres of extant inequality and injustice that prompt such promises. The members of the Constituent Assembly, acting as India's first legislators, offered up an unprecedented promise in writing on their citizen's behalf. Indeed, it is the writing of the Constitution that renders imparity illegal and unnatural to the contractual terms between a state and its citizens.

²³ Ibid.

²⁴ For more on this see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New York : Oxford University Press, 1999).

That is to say, once the Constitution comes into force postcolonial demands within the Indian state for devolving power and decentering sovereignty, whether expressed by ethnic secessionist movements or by appeals for local autonomy are rendered void. The constitutional imperative to honoring all citizens by promising a secular stance towards all religions and a proactive undertaking to equalizing all classes is made amply clear in its text. In no uncertain terms, the very Preamble to this defining and law-making text invokes a justice that is not only social but also economic, and even as it guarantees an express aim to *secure* liberty and equality, it implicitly concedes that disparity exists in the nation's social fabric. Consequently, the basis of the nation is transformed into the state's explicit goal to "promote" fraternity amongst its citizens.

Notwithstanding Constitutional assurances, the fact of additional affirmative re-inscription during the legal revisionism of the Emergency strikes an odd note. Why did the Indira Gandhi government during their period of free-reign in 1975 choose to amend the Constitution by specifically adding the words "socialist" and "secular" to the text of the Preamble? In some measure, the promises of equality of opportunity and liberty of faith and worship already seemed to provide for these guarantees. Put differently why did the Indian Republic, which in 1950 was already ratified as sovereign and democratic, decide to perpetuate the Emergency's amendments and long after 1975's legal re-writings were unwritten, continue to narrate the state as a "sovereign, *socialist*, *secular*, democratic republic"?

The answer to the question (of why add the words, "socialist" and "secular," when such connotations are already manifest in the text) cannot be sought by parsing

through the pages of the Constitution. Reading the Preamble to the Constitution requires attention beyond the words of its text, because the Constitution of a state is formally limited in its narration. As Owen Fiss writes in “Objectivity and Interpretation,” “A too rigid insistence on positivism will inevitably bring into question the ultimate moral authority of the legal text—the justness of the Constitution.”²⁵ The functions of the language, rhetoric and legitimacy of the Constitution are consequently to be found more in the force-field of power it relays than in the words contained in the document itself. Subsequently, in viewing literatures on Indian democracy, we are required to hold on to the text of the Constitution as the promissory note of postcolonial freedom. By so doing, we can begin to assemble the range of political imaginaries that refer to it in their exploration of the deferred dream of postcolonial freedom through an immediate interrogation of the terms of democracy.

Notes on Indian Democracy

“When nations are still simple in their manners and fervent in their beliefs, when society rests gently upon an ancient order of things, whose legitimacy goes uncontested, this instinctive love for one’s country reigns supreme.”

(- Alexis de Tocqueville)²⁶

Anti-colonial cultural legacies fueled inquiries of the Indian state, reaching a crescendo during the period of the Emergency when such a questioning was itself prohibited. My project begins in the period of the Emergency since this episode served

²⁵ In Steven Mailloux, ed. *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston: Northwestern University Press, 1988), 240.

²⁶ Alexis de Tocqueville, *Democracy in America* (New York: Penguin, 2003), 275.

as a crucial test for democracy in India. I begin by probing the relation of this event to the fundamental interrogation of the Indian state's legitimacy, by political by-standers and hapless victims of the Emergency, who subsequently sought to protest the state's excesses. By analyzing primary literatures from this period and analyzing their circuits of transmission, this project attempts a broad survey of a large body of Emergency literature. It documents, for instance, how these writings render varied discourses on democracy, and establishes the extent to which state mandates effected cultural possibilities. The Indian Emergency of 1975, as evidenced by the state's pre-censorship practices and extreme developmental agenda, was a period of high statism.

It is my argument that since the 1980s, the state has sought to replace a developmental paradigm whose legitimacy was severely depleted by Indira Gandhi's Emergency state, by eclipsing the limited successes of developmental logic with a justification of state function in terms of the defense of democracy. To substantiate this claim, I read literatures of democracy to provoke cultural attention on the state. In making a case for an attention on the cultural significance of the state, I would briefly like to point to some central paradoxes entailed by a contemporary focus on the state:

1. Without denying the radical shift between colonial and postcolonial periods, effected by the writing of the Indian Constitution, it is striking that many features of the postcolonial state are formally indistinguishable from the colonial state.
2. Since the limited success of mixed socialism and developmental policies, there has been an increased disenchantment with the state's mantle of implementing and guaranteeing equality in the face of severely slow social change, precipitating a crisis of the state, and

3. In the face of contemporary globalization, the centrality of the state is eclipsed to a large degree by private capital, making this an odd time for such renewed attention.

In foregrounding these paradoxes against my study, my own attempt joins the readings of “culture as politics” alongside an understanding of “politics as culture” in asserting the continuity of the primacy of postcolonialism as self-determination. While the state is seen to be compromised by the intensification of global forces, it continues to offer the possibility for “self-determination” (evidenced by the recent proliferation of mass movements aimed at capturing state power, or what Christophe Jaffrelot calls India’s “silent revolution.”)²⁷ Procedural practices conceived in the written text of the Indian Constitution endorse the continuity of the state in the form of Indian democracy.

My attention on democracy and the Constitution as the “pre-text” of the state seeks to displace the culturalist turn that has emphasized the nation over the state in mapping postcolonial formations. Notwithstanding the paradoxes mentioned above, this turn has been made possible because of a significant body of scholarship, especially the work done through the Subaltern Studies Collective, which focused on unearthing the micro histories of nationalism—of occluded oral histories and neglected signs. In fact, it is because of the presence of such solid subaltern scholarship that the possibility of reviewing the state’s role and re-placing the state at the center of discussions on culture offers vital prospects. What I am attempting through a demonstration of how democracy replaces development as the logic of the

²⁷ Christophe Jaffrelot, *India’s Silent Revolution: The Rise of the Lower Castes in North India* (New York, NY: Columbia University Press, 2003).

state is to also renew an identification of Indian political imaginaries in terms of an anti-colonial repertoire that is particularly timely for this historical juncture of neoliberal globalization. It is the fact of decolonization that gave new postcolonial states their legitimacy,²⁸ and in the case of India it is this same fact that has also been a powerful source for criticisms of failures of the postcolonial state. In such times, understanding the significance of this legacy enables insight into how postcolonial nation-states gain legitimacy even in, and especially in these times of rapid globalization.²⁹

Towards such a view, it is crucial to mark the specific circumstances of postcolonial democracy in distinct detail from western liberal democracies. For this study of the Indian state, I attempt to highlight how democracy is made local by referring to a distinctly Indian genealogy – an indigenous social theory as it were. This articulation is to emphasize the point that political, social and cultural theories when yoked together yield an understanding of practices and institutions underlying the production of culture, and provide much in the way of formulating an ethics of reading.

²⁸ This argument is also made in another postcolonial context by Pierre Englebert in *State Legitimacy and Development in Africa* (Boulder, CO: Lynne Rienner Publishers, 2002), 125-153. He discusses Kalevi Holsti's concept of "vertical legitimacy" which estimates the strength of the relationship between society and political institutions, or consensus on the content of the social contract, as well as "horizontal legitimacy" which establishes a link between the population and the territory of the state, i.e. an agreement about who participates in the social contract.

²⁹ The concept of legitimacy reinforces the fact that the state does not have the sole prerogative in constructing the category of the citizen, since the citizen consensus equally constructs the legitimacy of the state. The Weberian definition of the state has been reinforced even by the World Bank which in 1997 refers to the state as "a set of institutions that possess the means of legitimate coercion." This dialectic is central to viewing the interplay of capital globally and locally in the case of postcolonial societies.

Reading Liberation

Fundamentally, postcolonial theories and literatures are preoccupied by the central problematic of freedom—its acquisition, its meaning and its overdetermination by colonialism. Recently, in *Spectral Nationality: Passages of Freedom from Kant to Postcolonial Literatures of Liberation*, Pheng Cheah has analyzed the philosophical structure of postcolonial nationalism through a constellation of concepts (freedom, culture, organic life) by attending to the writings of Fichte, Kant, Hegel and Marx.³⁰ Even as he sets out to trace the long durée of this dense conceptual cluster, Cheah states that “the postcolonial condition emphatically underscores the point that culture is the paradigm for the political.”³¹ By heeding his axiom, and admitting the variance in the philosophical contexts of postcolonial freedom, my attempt is to resist a derivation of a theory of postcolonial freedom from Foucauldian, Hegelian, Aristotelian, Rousseau, or Hobbesian frameworks alone, and to instead situate an understanding of postcoloniality within the framework of the very cultures of Indian democracy.³²

Undoubtedly, the fact remains that the history and practice of nationalism and state-hood in India cannot be derived only from Western formulations. The

³⁰ Pheng Cheah, *Spectral Nationality: Passages of Freedom from Kant to Postcolonial Literatures of Liberation* (New York, NY: Columbia University Press, 2003).

³¹ *Ibid.*, 237.

³² A discussion of Pheng Cheah’s 2003 work is warranted here. Since Cheah writes that philosophically, both nationalism and cosmopolitanism articulate universal, institutional models for the actualization of freedom, he is led to address the problems of postcolonial nationalism through an analysis of the “broader issue of the actualization of freedom itself” (3). Cheah also foregrounds a claim for the failure of decolonization. As stated, my own attempt deals with democracy and the inheritance and creation of state. A concern with decolonization could be seen to contain a more retrospective gaze than mine, and so lies in a different direction.

philosophies of nationalism have long genealogies which are also manifest in modern versions of nationalism. Since an “archive of democracy” is significantly constituted by non-fiction writing, much of which is political, it is hard to ignore the ongoing invocation of historical precedents in arguing for different political strategies, solutions and procedures. In my study, the archive I compiled on literatures on democracy most frequently reflected the following social theories implicit in the practices carried out during the course of Indian political history: These strategies range from Gandhian resistance (satyagraha), Nehruvian statism (socialism), and Ambedkarite constitutionalism to Naxalite ambush (revolution).³³ My study is informed by both the implicit social theories inscribed in the literatures on Indian democracy (and their elaboration of the imaginaries originating in the careers and philosophies of Nehru, Gandhi, Ambedkar and Naxal revolutionaries), and also by Foucauldian formulations on technologies of governmentality integral to modern state power. I will briefly lay out the architecture of this project.

Preamble to the Study

In the attempt to capture various facets of the state’s impact on culture, this study attempts readings of cultural expressions which feature the state through commentaries on democracy. The Preamble to the Constitution of India proposes the

³³ What is different about the legacies of anti-colonial resistance in terms of civil society and militant or secessionist movements? While I trace the belief in a state/system to more non-violent tendencies, perhaps the violent strains of resistance from the Gadar party to Subhash Chandra Bose find a different outlet. There may be a case possibly argued for the links between the early 20th century Gadar resistance and a later Khalistani resistance, but that would be the subject of a separate work. Similarly which, if any connections, link the ULFA/Bodo movements to Subhash Chandra Bose are the subject of another exploration. It is important to distinguish between the violent militant resistances of postcolonial India and the more democratic processes adopted to display resistance. The technologies of witness used to contest the state remain the focus of this work.

aspiration to achieving democracy in the forms of justice, liberty, equality and fraternity. Consequently, in assuming the conversation between the cultures of democracy and the ur-text of the Indian state, the chapters reflect the progression of the Preamble. The themes in this study move from the critique of insufficient liberty under the Emergency state to the nominal nature of justice granted by the developmental state. While dignity is fostered through the fraternal cultures sanctioned by the Constitution, the demand for justice produces a reevaluation of distributive policies of the state. Finally, I argue that even as the limitations of decolonization are revealed, democracy critiqued, and the state exposed, the discourse of democracy helps the state to acquire a new legitimacy through its formal responsiveness to the demand for accountability. Ultimately, this reinforces the desirability of state continuity in guaranteeing postcolonial democracy.

My thesis bridges studies of governmentality and citizenship, and the state and public culture, through an analysis of democratic witness between 1975 and 2001. Its focus is on the disjunctions between the dissemination of state culture in India and its contestation by Indian citizens. This focus propels a reading of various forms of political publicity (in terms of genre and technological media) through the concept of technologies of witness. To situate the basis for this formulation, the points of convergence between Indian democracy and forms of modern state power is in order.

Technologies of Witness

In *Society Must Be Defended*, Foucault elaborated on the origination of modern state power that emerged in the 18th century through bio-political disciplinary

technologies, which both individualize the body and also aggregate it biologically.³⁴ Since 1978, when Foucault's in his lectures characterized this as "governmentality," the term was widely circulated to describe the changing form of liberal governments that originated a specific regime of government and administration in early modern Europe. Today, the term "governmentality" has itself become short-hand as a global description of the modern "étatisation of society," or of the state's rationale in ordering the regulation of populations.³⁵ The concept of governmentality has proven useful to studies of politics and political institutions across disciplines, and given that it is indispensable concept to understanding state power, is assumed as the basis for this study as well. However, another concept relevant to governmentality also closely inspires the study's formulation of the category of "technologies of witness."

Shortly before his death in 1984, Foucault proposed a book to further his ideas and to detail what he termed "technologies of the self." Since he did not live to complete that work, three editors transcribed the lecture notes Foucault had intended to use, and they issue a transcribed volume of this unfinished project. They write,

In many ways, Foucault's project on the self was the logical conclusion of his historical inquiry over twenty five years into insanity, deviance, criminality and sexuality. Throughout his works Foucault had concerned himself largely with the technologies of power and domination, whereby the self has been objectified through scientific inquiry and through what he termed "dividing practices. By 1981, he became increasingly interested in how a "human being turns himself into a subject."³⁶

³⁴ Michel Foucault, *Society must be Defended: Lectures at the Collège de France, 1975-76*, eds. Mauro Bertani and Alessandro Fontana; Trans. David Macey (New York: Picador, 2003).

³⁵ For an elaboration of governmentality in the Indian context see Stuart Corbridge et al., *Seeing the State: Governance and Governmentality in India* (New York: Cambridge University Press, 2005).

³⁶ Martin Luther, Patrick Hutton, and Huck Gutman in *Technologies of the Self: A Seminar with Michel Foucault*, (Amherst, MA: University of Massachusetts Press, 1988), 3. These themes can be traced in Foucault's works from *Madness and Civilization* (1961) to *Discipline and Punish* (1975, trans. 1977).

Since Foucault's focus drew from the early Greeks to the Christian age, that is an explicitly "Western ethical tradition" his designation of technologies of power must also be specifically situated in that cultural context.³⁷ However, the insights Foucault offered for studies of governmentality and forms of modern state power have shed light across many contexts. While this study is informed by Foucauldian reflections on governmentality alongside his explicit imperatives for genealogical criticism, in situating the examination of subject-formation within the culturally specific context of India, a necessary shift occurs. A discussion of subjects within the Indian state precludes an exclusive elaboration through the singularly reference of governmentality. The career of Indian democracy displays uneven adaptations of liberalism by the modern Indian state, and a refraction of liberalism through communitarianism and socialism. Consequently while benefiting from Foucauldian insights the study relates his observations on subject formation to the Indian circumstances of localized democracy. For instance, the consequences of my own uneven adaptation lead me to extend Foucault's explications of technologies of the self and power to a focus on community. In accounting for the different technologies of self that follow from the inter-play between state power and indigenous social theories, the category of "technologies of witness" enables my own study.

In alluding to the act of witnessing, I am enlisting those aspects of democracy that generate visibility— these include the actions of state-publicity, the public demand for accountability and the individual impetus to testify. My aim is not to detail the responsibilities of specific individuals in government—i.e. state actors, such as

³⁷ Ibid., 4.

bureaucrats and politicians. Instead, following a Foucauldian attention on structures of the state that administer governmentality, I proceed by moving my gaze between the embodiments of state power to institutional structures involved in the deliverance of democracy. As a result, I examine the influence of specific contestations to statist discourse against a backdrop of a range of imaginaries in literatures on Indian democracy. Consequently, in assembling an archive of literatures on Indian democracy since 1975, this study begins in the period of the Emergency.

The Architecture of the Present Work

The study of technologies of witness in literatures on Indian democracy starts in the period of the Emergency. Chapter 1 documents in detail the disjunctions between the dissemination of state culture in India, and its contestation by Indian citizens. I seek to show how literature circulated during the Emergency, and spoke to power (often anonymously) in the name of the people. Archival research for this chapter sought to assemble a body of “Emergency literature:” writings in or about the time of suspended democracy beginning in 1975. Emergency literature is constituted mainly by a survey of poems published through underground media, prison diaries written during the event of the Indian Emergency between 1975 and 77, and novels that cast a look back at this period.

My account begins in the period of the Emergency when the narration of the nation was suddenly interrupted by the prohibition of free expression producing forth the testimonies of *samizdat* literature. In appraising these writings, I soon realized how

similar they were to literatures of testimony.³⁸ It is my aim to meaningfully formulate this category of writings, which bear direct witness and often risk testimony outside of the cover of the fictional. In dark times, the claim to bear direct witness is burdened with at least as much risk as the politically satirical or indirectly analogical claims of the fictional. The category of “Emergency literature” captures the nature of writings which attempt to speak to power in times fraught with risk and so this category also accommodates non-traditional literatures of witness. For instance, the political prison diary displays a function similar to that of the nationalist autobiography, by bearing both retrospective and prospective witness. By underscoring the need for examining these texts, I hope to establish the usefulness of a mode of analyzing “emergency literature” for future studies of writings produced during or about politically contentious times.

The focus on liberty in Chapter 1 pertains to a basic understanding of freedom enshrined in all indigenous conceptions of democracy, which is the imperative for self-rule and consequent freedom of expression. Even in the Gandhian conception of *swaraj* which outrightly rejects the modern state, the provision for fundamental liberty is assumed. In chapter 2, I subsequently examine a different conception of democracy instantiated through a view of justice in the paradigm of Nehruvian statism. I elaborate on the period in the immediate after-math of the Emergency, and focus on forms of witness against the state when public representation was expanded by an activist

³⁸ For instance, Mary Pratt categorizes testimonials as auto-ethnographies, and John Beverly asks if Rigoberta Menchu is the compiler or the narrator of her tale, thereby asking the question of whether “testimonio” can be considered literature. See, John Beverly, *Testimonio: The Politics of Truth*, (Minneapolis: Minnesota University Press, 2004).

judiciary. Through a judicial expansion of the concept of *locus standi*, after 1977 in India, media reports were admitted to move the courts, and the notion of an aggrieved “proper party” was liberalized. The focus in this chapter is centered on the literature authored by the state alongside a brief history of political trials and challenges to Nehruvian statism. I close-read writ petitions of judgments pronounced in public interest trials, and compare the exceptional legal treatment of certain individuals following Giorgio Agamben’s arguments in *Homo Sacer*.³⁹ Court cases relating to political corruption, electoral malpractice and abuse in prisons; and, legal commentaries and Inquiry Commission reports attest to the excesses of the Emergency. An analysis of some of these legal narratives is followed by a reading of Nayantara Sahgal’s novel, *Rich Like Us*⁴⁰, which in a different genre conducts a similar exercise of showing how different characters in their everyday behaviors expand or limit the ambit of *locus standi*. The modern circumscriptions of subaltern testimony can thus be understood as definitions of the idea of “public interest,” and further analyzed through forms of relay.

Just as democracies formally constitute political communities by electing their representatives, the literary and cultural sites I examine also relay democratic representation. In this context, instances of testimonial representation directly engage a question critical to postcolonial studies, which was starkly posed by Gayatri Spivak

³⁹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1995).

⁴⁰ Nayantara Sahgal, *Rich Like Us* (New York: New Directions, 1985).

in 1988: “Can the Subaltern Speak?”⁴¹ While Spivak engages the question of the possibility of subaltern representation from a theoretical point of view, my project attends to the circumstances impinging on subaltern relay and expression. I frame Spivak’s question against a backdrop of democratic practices and state strictures which circumscribe the very possibility of subaltern speech. The constitutionality of democratic rights would seem to enshrine subaltern possibilities, but on closer inspection, the issue of political mediation complicates a straightforward causality.

The theme of relay is also relevant to the mediation of politics. While political intermediacy is not a recent development, the mediation of political communities through the democratic process and via media technologies is a narrative that is still unfolding. New media are being used to produce testimony, exposé and witness—through spy cameras, streaming online video, digital images, and satellite television—adding to the archive of democracy that needs to be explored. In this regard, I query how media activates new modes of citizenship through the correspondence between democracy and visibility. Since political witnessing was hardly inaugurated by the advent of new media, to underscore the changes wrought by new media, I elaborate on an earlier history of political witnessing, and inquire into varied forms of testimony produced by public, legal, and media trials. I focus my inquiry on the political imaginaries of civil society in India through an exploration of the connection between democracy and visibility, by tracing the uses of various technologies of witness. I use the term “technologies of witness” in reference to both the media and the actors who

⁴¹ Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in *Marxism and the Interpretation of Culture*, eds. Cary Nelson and Larry Grossberg (Urbana and Chicago: University of Illinois Press, 1988), 271-315.

make the state visible. Following McLuhan, I advance an embodied view of media, and argue for an attention on *techne* to narrating the career of Indian democracy.

The effects of witnessing provide evidence in the public sphere, which in turn both shapes and constitutes political possibility. To historicize the precursors of political witnessing in Indian democracy, I survey various attempts at such witness. The research for Chapters 3 and 4 examines citizen diaries, and media exposés to explore democratic contests to the state, and similarly discovers innovative claims to citizenship through various media. These claims must be read against the limitations the state imposes through its ownership of public cultural institutions and the economic constraints against formal participation in the Habermasian public sphere.

Chapter 3 lays out a present-day context for examining the dimensions of relay which dominate democratic culture, and offers a critique for elaborating on the authorship of relays. By explicitly situating the impact of the developmentalist state on postcolonial democratic culture, against the imaginary of empowerment in the philosophy of dalit leader, B R Ambedkar, the documentary diaries of politician Jaswant Singh, and journalist P. Sainath instantiate the limited translations of the state's practices.

Corresponding to the state's limitations in delivering on the imaginary of social uplift, Chapter 4 focuses on the demand for state accountability in campaigns against state secrecy. Since the Bofors and Tehelka operations implemented guerilla attempts at exposing the state's corrupt inner workings, a more systemic claim to make the state answerable is evidenced in the social-legal movement campaigning for the national right to information (RTI). The need to make the state visible is here linked to

the procedural demand to make the state accountable.

Practices of visibility are related to structures of legitimacy and my study traces the changing relationship between the Indian state and its citizens from the Emergency of 1975 up to the period after economic liberalization since 1991. By spanning this time-period, my project constructs an archive of democracy to examine democratic literature and culture in postcolonial India for the purpose of surveying forms of democratic representation in order to appropriately convey the historical narration of government, freedom and community.

The aim behind such a study of technologies of witness is to generate a language with which to discuss the changes since 1991 in India, to fully substantiate an argument about nationalism and globalization's impact on the relationship between democracy and visibility, and what all this might portend towards thinking about the conditions for free expression in post-Independent India, and their implications on postcolonial culture.

It is no doubt necessary to foreground the paradox of studying democracy and the postcolonial state during a time of intensified transnationalism. However, chapter 5 displays the need to delimit a discussion of communitarian culture as relevant to states by describing the specific activation of freedom through individual confluences with community. This project aims to account for multiple cultural manifestations of the state by developing an understanding not only of recent changes in witnessing globalizing India but also to training an eye on the continued specificity of the state in postcoloniality.

Finally, I assert that even as this thesis takes “India” as a delimited category defining national legal contests, the different relation of new media-spaces to territorial sovereignty has changed democratic cultural politics. In theorizing the officially opaque and clearly visible records of an archive of democracy, this project explores the constitution of political community routed through the state. My claim is that since the declined legitimacy of the state, varied technologies of witness instantiated by practices of democracy have in fact served to *offset* the waning hold of the state. The entrenchment of democracy since the period of the Emergency requires reflection on the binds forged between state culture and democratic culture. The increased vigilance of the media aided by new technologies, the increased momentum of the social movements like the Right to Information campaign, and the deepening of transnational solidarities has led to a widening distance between the vision of the state and alternate political imaginaries. The far-reaching impacts of spectacular democratic practices are demonstrated by how the media have served as an important site of public “trial,” on lines parallel to state trials.

Since the intensification of the demand for state accountability, free expression has come to be seen as the expression of defiance against the state. Here, my initial claim that a significant legacy of democratic culture in India draws from anti-colonial strategies is borne out. Historically, the very grounds for fair confrontation with government were sanctioned by fundamental rights enshrined in the Constitution, and earlier to that, were wrested from the colonial state. In post-Independence India while such rights may be legal assumptions, their actualization is far from obvious. Thus, the study of democratic culture requires a critical reassessment of the legacies of

liberalism and anti-colonialism. Given that this project demonstrates how the Emergency in India schismatically divides the concerns of recent decolonization from the concerns of democratic activation, since the discrediting of a utopian postcolonial teleology of liberation, the disillusionment of the postcolonial promise of freedom needs to be distinctly theorized.

Since democratic culture imposes limitations on subaltern speech, commentaries on overcoming this challenge abound. The cultural and economic constraints on the actualization of democracy also feature in the writings on caste by B. R. Ambedkar (the chief architect of the Indian Constitution) and in the philosophies espoused by the Naxalite movement on revolution. While my inquiry into the postcolonial condition is guided by the need to exhaustively constitute literatures on the subject of postcolonial witness and democracy, I take the implications of such a study as useful to understanding postcolonial cultural formations. The relationship between democracy and technologies of witness is contextualized by the discussion on social imaginaries, which are seen to adapt to the shadows of declining state legitimacy. My conclusions are further contextualized through the debates around subalternity, the crisis of governability,⁴² and nuanced analyses of postcolonial democracy. My interest in such a study is prompted by a curiosity about the influence of the state on postcolonial culture, and the profusion of multiple minor forms of

⁴² Atul Kohli, *Democracy and Discontent: India's Growing Crisis of Governability* (Cambridge: Cambridge University Press, 1991). In comparing the empirical study of three state governments since the late 1970s in India, Kohli identified that India was characterized by a "crisis of governability." This he wrote stemmed from three main causes: the absence of enduring coalitions, policy ineffectiveness, and the incapacity of the state to accommodate political conflict without violence. In the case of Indira Gandhi's emergency, the violence was pre-empted by preventive detention and an iron rule.

biography and history, which complicate our received understanding of the category of “postcolonial literature.”

In reading Indian democracy’s instantiations through cultural responses which respond to the state, my project offers a context for an examination of the implications of studying postcoloniality in light of the Emergency. By attending to the interplay of state and democratic culture through a historical examination of varying technologies of witness, this study produces a fuller understanding of the many forms of postcolonial culture in India.

CHAPTER 2

**DEMOCRATIC PRACTICES: JUSTICE, PETITIONS AND
PUBLIC INTEREST LITIGATION**

“Legality is not legitimacy anymore for the masses of Indian people.”¹

“In the event, the Constitution which they finally promulgated on 26 November 1949 did say that India was to be a ‘sovereign democratic republic,’ but the words ‘socialist’ and ‘secular’ were only introduced into the preamble of the Constitution much later, as a result of cynical amendment passed during the period of ‘Emergency Rule’ of Prime Minister Indira Gandhi between 1975 and 1977”²

“The order obviously came from the top. You know perfectly well everything is controlled by one and a half people. Any other kind of decision-making went to pot ages ago. Long before this ridiculous emergency.”³

The Circular State

In the 1984 film, *Mohan Joshi Hazir Ho* (A Summons for Mohan Joshi), Bhishan Sahni poignantly renders the plight of Mohan Joshi, the eldest member of a joint family that reside together in a decrepit chawl in Bombay. As a retired senior, Mohan takes it upon himself to claim his rights as a tenant living in a structurally unsafe building, and unwittingly embarks on a protracted legal battle with his absentee landlord.⁴ When it becomes clear that the landlord refuses to improve living conditions because he hopes to indirectly force eviction and tear down the apartment house, Mohan tries to organize his neighbors into a rent strike. Out of fear, they refuse to ally with him, compelling Mohan to continue this as an individual battle. By hiring an

¹ Upendra Baxi, *The Crisis of the Indian Legal System*, (New Delhi: Vikas, 1982) 77.

² Stuart Corbridge, and John Harriss, *Reinventing India : Liberalization, Hindu Nationalism and Popular Democracy* (Cambridge ; Malden Mass.: Polity Press, 2000), 21.

³ Sahgal, 32.

⁴ *Mohan Joshi Hazir Ho!*, prod.and dir. Saeed Mirza, 2 hr. 10 min., Bambino, 1984, videocassette.

attorney, the old couple, Mohan Joshi and his wife, are sucked into the labyrinths of a legal system and become doubly aggrieved by the tragedy of both the bureaucracy of the system itself and of the impossibility of receiving justice in a corrupt country. The ensuing lawsuit and a community of rapacious lawyers wipe out Mohan's life-savings in a short period of time. Moved by his persistence, Mohan's neighbors finally rally around him, only to discover that the Indian legal system is a formidable third contestant between them and their ruthless landlord. Fortune eventually smiles on the dedicated residents, and a proactive judge takes it upon himself to personally visit the chawl to verify the state of affairs for himself. The impending denouement propels the landlord to spruce up the chawl in time for the judge's visit, eliminating all evidence of neglect. In a final act of desperation, Mohan Joshi in a bid to furnish proof of their abject living conditions to the judge gives up his life. In the last scene, we see Mohan Joshi push at a weak pillar which barely held up a part of the roof. This cursory construction that had been out of the judge's view finally comes to his attention when the roof lands on an ageing Mohan and kills him on the spot.

It is interesting that this film was released in 1984, around the time when what was termed social action litigation augured a new era after the Emergency. The plot of this film exemplifies the logic of the Indian courts of the time, when getting one's day in court was more symbolic of the rhetoric of social justice than a means for the deliverance of justice itself.

The circularity of such justice was already portended by the events that went into making the Emergency a legal possibility. The Emergency Proclamation was approved on July 23 1975, and the "emergent session" took place between July 21st

and August 7th 1975. A collection of speeches given during this short period is found in the emphatically entitled “*No Sir*” by P.G. Mavalankar. Another reason that makes this a collection interesting work for that unlike the memoirs or novels expressly written to record subjective impressions of a time, this is a record of speeches in *dialogue* with an opposition, spoken on the floor of the Lok Sabha. The parliamentary possibility of personal address makes these records particularly urgent and pointed. To add to the unreality of the emergency when even its date of proclamation was under debate, Mavalankar adds “My feelings and my charge are that this emergency is unreal, that there is no threat to the security, that the threat is all imaginary, that this is a wanton abuse of the constitutional powers and that this is a fraud on the constitutional power and so it should not be approved by this honourable House”⁵

The arrests and detentions without trial that followed in the wake of the Emergency completely violated the procedural legal norms furnished by a democratic constitution. In his prison diary, Hardwari Lal chronicles the fact that there was no legal standing for the arrests even though lists of who was to be arrested were made long before the Emergency was declared. “Even the destinations of where the detained were to be sent to was decided prior to the declaration, but the specific charges remained unclear. . . As it turned out, we got something more than marital law; we got an absence of all law, the law of the jungle.”⁶ The questions raised by this event are dispersed across texts in many forms. Malkani similarly wrote in his prison diary, “We had so much come to accept the democratic system as our permanent political

⁵ P.G. Mavalankar, “*No Sir*” 21.

⁶ Lal, 4.

framework, that I had never given credence to reports of impending political disaster.”⁷

Even as the acceptance of democracy was tested during this period, the real surprise was that the Emergency’s promulgation was routed constitutionally, and the legality of rewriting the Constitution granted the Emergency a stamp of formal approval. That the Constitution was itself amended so that legally there was no need to even provide grounds for detention, personifies the circulatory nature of formal parliamentary democracy. In several political tracts the need to convert democracy’s formal features into more substantive rights is a theme that often comes up. Mavalankar is acerbic in his critical description of the emergency as surpassing the worst humiliations of British rule, especially with regards to the practice of detention.⁸ In noting that the Constitution is itself premised on guaranteeing democracy, he reminds the house:

The founding fathers of the Constitution wanted India to be a sovereign democratic republic. They did not say merely sovereign republic. They also said sovereign democratic republic. Sir, in the debates of the Constituent Assembly you will see, at one time the word used was ‘independent’ and not ‘democratic.’ The word ‘independent,’ however was sought to be replaced by the word ‘democratic’ because the word ‘sovereign’ implied independent. Therefore, they said India is constituted into a sovereign democratic republic and not just sovereign republic.⁹

In light of such circularity, the event of the Emergency provides an opportunity to interrogate the very *democratic* circumstances and conditions which enabled it. Thus,

⁷ Malkani, 10

⁸ Mavalankar compares British rule with Indira Gandhi’s Emergency reign thus: “Whereas in the dependent India the detenus were treated more liberally and humanely” (23).

⁹ Ibid., 10.

while the Emergency can be fairly assessed as a departure from the otherwise smooth flow of democracy, by locating its emergence from a wellspring of democratic culture, “the paradox of how freedoms can produce fascism needs to be addressed.”¹⁰

The extreme inscrutability of the government had a corrosive impact on the public image of the judiciary. From the Allahabad High Court’s stay order with regard to Indira Gandhi’s electoral malpractice in 1975, the unprecedented scale of preventive detentions during 1975-77 and the apparently legal means through which the Emergency was instituted, the sequence of events sullied the courts’ role in preserving democracy. The experience of the Emergency had furthered this perception that even the courts were not to be trusted since they had virtually handed over the seat of power to Indira Gandhi despite the taint of electoral malpractice. Consequently, in the aftermath of the Emergency, the courts expanded the notion of “locus standi” to accommodate various kinds of public interest litigation (PIL). A number of legal trials around the freedom of expression and Constitutional rights took place in the early 1980s. In a sense, this period was a formal recourse to exorcising the excesses of the Emergency, but this means fell short of actually vindicating the aggrieved through substantive recompensation.

The Emergency also puts in scrutiny the question of how state liability is produced. The excesses perpetrated through the abuse of state power in a time of suspended democracy led to the Janata government (subsequent to Indira Gandhi's regime) instituting a commission of inquiry into the events. The Shah Commission compiled five volumes worth of documentary and oral testimonies on the event, and

¹⁰ Uday Singh Mehta, Oral communication. “The Peculiarities of Indian Democracy” Conference (The University of Chicago, Chicago, May 15, 2004).

submitted its report to the government in April 1978. By May 15, 1978, the Desai government informed Parliament that it had “Accepted the findings, observations and recommendations” of the Shah commission in the “Memorandum of Action Taken,” but the resignation of Prime Minister Desai in June 1979 and Indira Gandhi's subsequent reelection in 1980 mitigated the findings of the Shah Commission and the prosecutions based on its recommendations.¹¹

Typically, as seemed to be the fate of all governmental commissions¹², there were no consequences to the production of the truth. Often, the state circular is merely issued to circle the state. In the case of the Shah Commission, official secrecy was contested through countless testimonials and the production of evidence. But, the meaning of evidence can range from proof to illustration. Since the trials and inquiries proved ineffective, it is this second order level of drawing attention to a broader context outside the Emergency, that gains significance in characterizing witness through not only state reports but also the PILs, which contextualized its aftermath.

Legitimizing Legality

The range of proofs offered up by technologies of witness collaborate the claim that the perceived lack of state legitimacy can be offset by the practices of democratic expression. It is interesting that seldom does the state's hearing of complaint produce action, but in the instance of airing the grievance there is a perception of democratic practice that I argue grants the state renewed legitimacy.

¹¹ See, John Dayal and Ajoy Bose, *The Shah Commission Begins* (New Delhi: Orient Longman, 1978).

¹² See an assessment of major inquiry commissions in Shiv Visvanathan and Harish Sethi, *Foul Play: Chronicles on Corruption*, (New Delhi : Banyan Books, 1998) 18-45.

Emma Tarlo in looking at the urban resettlements that took place during the Emergency draws out the event of the Emergency as a high moment of development, in a time when the equation of *development as democracy* received widespread legitimacy. She writes, “Officials would eagerly clarify what didn’t add up in paper. Like the ominous nature of voluntary sterilizations during the Emergency”¹³ Tarlo is prompted to comment on the fragile nature of what she calls “paper truths” invoking Primo Levi’s reminder that the “distortion of the fact” is often limited by the objectivity of the facts themselves. In researching the demolitions in Delhi, Tarlo characterizes even photographs as mere paper truths. The retrospective evaluation of the facts of the Emergency, through a revisiting of government files and Inquiry commission records is consequently marked by the ambivalent nature of the officially legal fact that needs to contend with the unofficially legitimate fiction.

This is instanced by reversing the characterization of legal and illegal subjects during the Emergency, as for instance in the case of the state and MISA detenus. When we see Indira Gandhi’s government as illegitimate in the wake of the Allahabad High Court decision, which declared electoral fraud due to her misuse of state officials in the Congress election campaign, we recover the logic propelling amendments to the Constitution. Gandhi is exonerated under the new letter of the law, which no longer recognizes her previous actions as illegal. In light of this, we can now view MISA itself as a law enacted by an illegitimate government. The legal order is then thrown into crisis when we perceive the state’s actions as criminal and the MISA detenus as

¹³ Tarlo, 80.

legitimate citizens who were acting under the powers granted to them by fundamental rights written into the Constitution.

In this regard, Upendra Baxi writes,

If legality was all there was in the province of the Krishna Iyer court, how is it that the Justice proceeds to declare that the appellant may continue as the Prime Minister? . . . It is clear that Justice Krishna Iyer could not wholly confine himself, though he purported to bind himself by 'precedents' concerning the distinction between 'absolute' and 'conditional' stay. J Krishna Uter clarified his use of the term 'extra-legal' considerations. Legality is within the court's province to pronounce upon, but canons of political propriety are polemical issues in which judicial silence is the golden rule.¹⁴

Political theorist, Javed Alam also clarifies how legality as injunction is distinct from legitimacy which he describes as "an active and willing endorsement of something desirable."¹⁵ He states, "Legitimacy for democracy means in other words that it has acquired social roots. This in turn implies that legal and constitutional guarantees are not the only sources for the practice of democracy"¹⁶ In the context of the recent electoral trends and shifts towards increased democractization, that he ascribes to a powerful mix of incentives provided by capitalism and the politics of dignity, Alam writes, "the popular mood now is its chief foundation. All this suggests that democracy now in Indian society is a model morally approved by the people."

While Alam argues for the firm entrenchment of democracy since the late 1990s, in the 1970s Rajni Kothari argued that the Indian political model that has informed the path to democracy involves the primacy of the political and a redefinition

¹⁴ Baxi, *Crisis*, 320.

¹⁵ Javed Alam, "What is Happening Inside Indian Democracy," eds. Rajendra Vora, Suhas Palshikar, *Indian Democracy: Meanings and Practices*, (New Delhi: Sage, 2004) 97.

¹⁶ *Ibid.*, 86.

of the boundaries of the political.¹⁷ Democracy was not the goal—it was the instrument of realizing all the other goals simultaneously. These insights illuminate why the autocracy of 1975, even when legally and institutionally sound, was met with ambivalent memorialization. Just as the legitimacy of development had yet to become fully illegitimate, the legality of detention provoked comparisons to colonial illegitimacy. I argue for recognizing the historical period of the Emergency as originating the distinction between the developmentalist and democratic sources of state legitimacy. In this regard, A R Desai’s chronicles of state perceptions of public protest are especially salient. He writes,

The issue of “Public Protest in Parliamentary Democracy” in Post-Independent India was viewed as disturbances caused by parochial, caste, linguistic, ethnic or other backward-looking, traditional, ascriptive groups creating problems of “Law and Order” for the State and thereby obstructing the State from pursuing the developmental policies to evolve Indian society from a traditional-ascriptive one to a modern achievement-oriented one.¹⁸

The force of the developmental state eroded popular support for such aggressive policies. The aftermath of the Emergency itself demonstrates how the democratic paradigm was assisted by courts that apparently undid their own complicities and helped inaugurate a different form of state populism.

The focus in this chapter is centered on the literature of the state. In effect, a survey of most legal cases which were aired in the post-Emergency courts did not have a satisfactory ending from the point of view of those aggrieved by the

¹⁷ *Politics in India*, (New Delhi: Orient Longman, 1970) 276.

¹⁸ A R Desai, ed. *Violation of Democratic rights in India* (Bombay: Popular Prakashan, 1986) ix.

Emergency.¹⁹ However, what is significant about these trials is that they allowed for a form of confession by producing testimonials and public evidence on the excesses of the Emergency. These trials, I argue, are the exemplary form of contests between the state and citizens. But later on, because of their perceived inability to grant actual relief or expand technologies of witness, such symbolic contests begin to occur by other means—they are displaced by battles in the media which mimic court trials, and in the ways that they seek to produce evidence also create politics by other means.²⁰ This is not to say the history of public interest litigation is bereft of any achievement, but that in the symbolic contests to the state, the media prove to be a more animated battleground for the clash of different political imaginaries.

This chapter approaches the significance of narrating the state through the question of technologies of witness and political imaginaries by examining the new role of the courts in the post-Emergency period. By looking at the production of evidence through acts of witnessing in a formal framework, I argue that even though the effectiveness of public interest litigation proved to be limited, state procedures for redress and public acts of testimony allowed for the state to gain a limited legitimacy by fostering dissent through democratic means. Lloyd and Susanne Rudolph claim that “Because the court’s PIL version of judicial activism suited Indira Gandhi’s (1980-4)

¹⁹ A comparative view yields the “successful” resolution of high profile cases on the issues of fundamental rights: Examples include *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, which related to the refusal of the state to grant her a passport. Her right as such was restored, but the point here is also that the adjudication of such case on individual bases performed a symbolic restoration of legitimacy over meaningful restorative justice in a compensatory or redistributive sense.

²⁰ During the very infancy of satellite television in India, Zee TV received tremendous viewership for a show that put politicians in the dock. Moderated by Rajat Sharma acting as the people’s lawyer, hard hitting questions were publicly posed on the program entitled, *Aap Ki Adalat*, (“your court”).

and Rajiv Gandhi's (1985-9) populist agendas, the two Congress prime ministers did not perceive PIL as a threat to their government's claim to parliamentary sovereignty early 80s and then 1993."²¹

This new role of the federal state may be linked to the state's crisis of legitimacy since the 1970s, but the concurrent increase in the institutionalization of democracy needs to also be accounted for. The question I seek to raise pertains to a new discourse of rights that relates to the pervasiveness of democratic ideologies, and that has sought to challenge the perceived lack of legitimacy of the state through the following means: by gaining momentum from international discourses of civil and political rights; through moving the courts for action against the state and in the public interest; and, by seeking to use media technologies to document illegitimate actions of the state: in sum, by demanding increased accountability of the state through measures aimed at securing transparency.

I argue that in the period since the Emergency, we see an upsurge of rights based discourses which perform complex negotiations with the state—what is noteworthy in this regard is that these negotiations are being premised not on traditional communitarian bases, or even on the old “demand/influence” groups’ model, but on the basis of citizenship. Several cases argued since the period of the Emergency, in the model of social action litigation, have sought to seek justice that is symbolic to the defense of democracy. Upto the period of the mid-70s, questions of legitimacy were resolved by two means: one, that the legitimacy of state rule was resolved by the possession of indigenous rule, and two, through the transfer of

²¹ “Redoing the Constitutional Design: From an Interventionist to a Regulatory State,” in Kohli, *Success of India's Democracy*, 127-162.

personal charisma to state institutions as described by Paul Brass.²² After the decline of state legitimacy (that derived from the mandate of decolonization) however the question of state legitimacy acquired new meaning—at first, it pertained to the degree of representative-ness elected officials possessed and subsequently also to the scrutiny of the state’s effectiveness.

The rise of discourses of citizenship during and after the period of the Emergency needs to be historicized, and the next section will explain the precedents to statism in anti-colonial times and how that subsequently impacts discussions of Indian democracy.

Antecedents of Statism

*“The conscientiousness of civil servants knows no bounds. Austerlitz and Dachau, emergencies and genocides are on record to prove it.”*²³

Following Gandhian satyagraha as both a technology of witness and social imaginary that rationalized decentralization, Nehruvian statist accommodation provided for another possibility. Harold V. Sare, in *Nehru and the Rise of the Modern State in India* writes, “Despite Nehru’s socialistic thinking he joined neither the Communist nor the Socialist party.”²⁴ While Paul Brass and the Rudolphs refer to Nehru’s brand of governance as Nehruvian socialism, in consort with several other

²² Paul Brass outlines the process whereby political leaders such as Indira Gandhi and Nehru transferred their charisma to state institutions, imparting their own legitimacy to them, in *The politics of India since independence*, (New York: Cambridge University Press, 1990), 32.

²³ Sahgal, 52. Spoken by the character Kachru, a bureaucrat of the Emergency state.

²⁴ The Emporia State Research Series, vol. 6, no. 3 (Emporia, KS : Graduate Division, Kansas State Teachers College, 1958), 14.

commentators on Nehru, in this project it would be more accurate to describe Nehruvian ideologies as statist over socialist. Particularly given the failure of centralized planning to deliver the promise of social justice and equity, the socialism of Nehruvian thought pertained more to the functioning of the state and Leninist planning than the ideas of large-scale social change attained through popular empowerment.

Subrata K. Mitra notes that many regard the 1950s as a period of high legitimacy in Indian politics. “The real irony of the situation is that the uncritical acquiescence in Nehru’s brand of parliamentary democracy following Independence finds a parallel in the pre-independent refusal of the colonial power to recognize the indigenous people’s ability at sustaining self-rule. No attempt was this made to derive government out of the cultural and institutional heritage of governance in pre-colonial India.”²⁵

Interestingly, this faith in the state can even be seen to precede the postcolonial era. Several instances during the independence movement point to the pervasive faith—even of colonial subjects—in the rule of law, and the effectiveness of state-sponsored reform. The participation of nationalists of all hues in provincial elections,²⁶ the very instantiation of which Bose and Jalal point to as a colonial tactic for diverting attention away from the center to the provinces, can be construed as the fool-hardy optimism of the moderates, but on closer inspection can also be seen as proof of an

²⁵ Mitra, 17.

²⁶ Increased participation was progressively granted by the Indian Councils Act of 1861; Morley-Minto reforms of 1909, and the Montagu-Chelmsford reforms of 1919.

enduring faith in the rule of law.²⁷ Additionally we see that concurrent with the practices of boycott and even the “Quit India resolution,” people continued to court arrest (and serve their sentences). Nehru and Bhulabhai Desai’s legal volunteerism in the INA trials of late 1945 indexes the degree to which several nationalists had been trained—in a colonial state—to become practicing lawyers, prompting some British officials to caricature the prospect of “vakil raj.”²⁸ During the period of the Emergency, the voluntary aspect of courting arrest can also be seen to stem from this legacy.

By focusing on these instances, I do not attempt an easy characterization of radical/conservative nationalist reactions based on easy notions of legality/illegality of the (il)legitimacy of colonial rule. However, when the question of legitimacy is tied to the question of legality, some of these nationalist actions can be seen as contributing to the reification of colonial state institutions. This brief point does not detail the disagreements between nationalists—for example, Gandhi and Bose, about tactics for gaining independence—but the question remains about whether such actions resulted in endorsing the legitimacy of colonial rule, by taking recourse to apparatuses of the colonial state, or whether they served to underscore a faith in the institutions of governance, even as they questioned the illegitimacy of colonial rule. The implications of distinguishing between institutions and forms of state-power also find their way into India’s postcolonial history, and pertain to the legacies of political modernity.

²⁷ Bose and Jalal, *Modern South Asia*, 129.

²⁸ *Ibid.*, 127

In the framework of identifying the varying social theories underwritten by different democratic acts and practices, this chapter focuses on the apparatus of Nehruvian statism. The Nehruvian period in Indian history coincides with the image of a benevolent state, when the euphoria of freedom after colonization was expressed by a concomitant *faith in the state* and its ability to execute the task of social justice. While Nehru's dream of factories and mills as the "temples of Modern India" indicated a particularly scientific means to achieve social progress and advancement, such a vision was held by many of the middle-class who saw modernization theory as logical to stepping out of a third-world status handed down by colonialism. Overarchingly, this faith in the deliverance of the state could be seen as manifested in the judiciary to deliver justice.

The faith in the state was a function of a broader philosophy of statism that acknowledged the desirability of institutions, processes and procedures even as there could be a parallel criticism of the injustice of colonial rule. This perhaps is the central paradox of the move from colonial to postcolonial governance—the irony of a continuity of proceduralism, where the fact that the architecture of power continued on from colonial to postcolonial times, but was assumed to be less significant to the question of who occupied the seat of power. Later on, this irony was severely mocked by several critics of this form of postcolonial democracy. Apart from the Gandhian resistance to the state in toto, what can be called "Nehruvian statism" was the dominant postcolonial ideology deployed in the power politics of postcolonial India. In "The State, Participation, and Constitutionalism: Political Crises and Democracy in India, Ahrar Ahmad states, "the forces generated by the independence movement also

contributed to the conditions enabling the success of a democratic state. The protracted anticolonial struggle consistently demanded the expansion of civil rights and liberties relating to the rule of law, a free press, and political participation. Its pre-eminent leaders were mostly nurtured in, and inspired by, parliamentary, legalist, and Fabian traditions of social democracy.”²⁹

Individual Precedents

*“The sovereign nomos is the principle that, joining law and violence, threatens them with indistinction”*³⁰

The colonial state and Nehru’s faith in the promised reinvention of postcolonial statist institutions generated a variety of responses. A distinctive Nehruvian brand of statism is seen to emerge against a comparative backdrop of trials in the colonial state. Through the pleas of nationalist witnesses, we see a range of imaginaries contend with the imaginary of statism.

One of Nehru’s harshest critics was M. N. Roy, a figure Lenin once referred to as the “Oriental Marx.” Roy founded the Communist Party in India in 1920 while in exile in Russia. He led an interesting and expansive life and from being a school dropout who sought to overthrow British rule through armed insurrection, went on to establish a school of thought called “Radical Humanism.” Like his journeys through 17 countries in 15 years, Roy started out as a revolutionary Marxist and is arguably credited with establishing the Communist Party of Mexico in 1917—the first Communist party to be established outside the Soviet Union, and strangely pioneered

²⁹ Ahmad Arrar, *Asian Affairs: An American Review*, Vol. 26, Issue 3, September 1, 1999.

³⁰ Pindar qtd. in Agamben, *Homo Sacer*, 31.

by an Indian even before the establishment of the Indian Communist Party. At the behest of the Comintern, Roy was sent to China to transform the Kuomintang into a revolutionary instrument. His internationalism also extended to friendships with Gramsci and Einstein, and Roy was severely critical of Nehru in several writings accusing Nehru of not being a really socialist. Some of his writings are scathing, as in his monograph on Jawaharlal Nehru published in 1945. In the preface, Roy states, “The purpose of this small book is to focus attention in the more significant of Nehru’s public pronouncements after his release from detention. As usual, he has spoken almost about everything and expressed emphatic, though often contradictory opinions. A critical examination of those pronouncements reveals the direction of his political development, which also indicates the direction of the development of nationalist thought.”³¹ This comment penned in August 1945, two years before the attainment of Indian Independence is significant because already Nehru was being equated with the dominant face of the nationalist movement was well entrenched.

This is surprising when one accounts for the fact that Gandhi’s spiritual leadership of the nationalist movement was a far cry from Nehru’s persona, and that the Gandhian and Nehruvian approaches, on an initial examination, do not seem to bear much immediate resemblance. This is especially true in the case of their attitudes towards the modern institution of the state. M. N. Roy is highly critical of the paradox he perceives in Nehru’s claim of loyalty to Socialism and at the same time claiming a legacy of Gandhian ideals, stating that in either case, Nehru is being dishonest: “But logic has never been the strong point of Nehru. Otherwise, he could not be the heir-

³¹ M N Roy, *Jawaharlal Nehru* (Delhi: Radical Democratic Party, 1945), 2.

designate of the most successful prophet of irrationalism of the twentieth century.”³²

In his emphatic style, Roy charges both Gandhi and Nehru with misguided political visions. However, the fact remained that under the colonial state all subjects, no matter what their individual political persuasion, were equally liable to be tried for disobeying the vision of the colonial state.

In this regard, the trials of Tilak in 1908 and Gandhi in 1922 offer an interesting contrast in their defenses against sedition. A brief detailing of their testimonies offers a striking comparison with Nehru and Indira Gandhi’s attitudes to institutions of the law, even though there is a crucial difference between the charges brought against Indira Gandhi, as a sitting Prime Minister accused of electoral fraud, and nationalist heroes accused of breaching English law in advancing the cause of Indian freedom.

Justice Davar declared of the firebrand nationalist, Gangadhar Tilak, in trying him for sedition a man “with a diseased and perverted mind.”³³ In the proceedings, Justice Davar reportedly said to Tilak: “You hail the advent of the bomb in India as if something has come to India for its good. I say, such journalism is a curse to the country.” To this, Tilak memorably replied, “All that I wish to say is that, in spite of the verdict of the jury, I still maintain that I am innocent. There are higher powers that rule the destinies of men and nations; and I think, it may well be the will of Providence that the cause I represent may be benefited more by my suffering than by

³² Ibid.

³³ Ram Gopal, *Trials of Jawaharlal Nehru* (Bombay: Book Centre, 1962) v.

my pen and tongue.”³⁴ In contrast to Tilak’s response, Gandhi in pleading guilty to sedition said, “as a man of responsibility, a man having received his fair share of education and experience of this world, I should know the consequences of my acts. I knew them. I knew that I was playing with fire. I ran the risk; and if I am set free, I would do the same.”³⁵ It is interesting for the purposes of understanding the dynamics of legality and illegality in the postcolonial period to compare Gandhi’s case to Tilak’s as a contrast to Indira Gandhi’s situation vis à vis the inquiries conducted by the Shah commission.

It is significant that Tilak and Gandhi had been schooled by a western liberal education, but did not continue their professional training to service the imperial power and instead directly took on that very system. Tilak took to a provocative journalistic career, starting up newspapers to air his critical views and also undertook the task of education reform. Gandhi eventually gave up his legal practice for complete absorption in the freedom struggle.

Nehru however continued to don lawyer’s robes when duty called. Interestingly, Nehru the practicing lawyer was the one defendant who despite being an active legal professional refused to dialogue with the British government when he himself was put in the dock. In comparison to Tilak and Gandhi, Nehru refused to recognize the authority of the British in his first trial in 1921.³⁶ Similarly in his second

³⁴ Ibid.

³⁵ Gopal, 67.

³⁶ Under the Criminal Law Amendment Act of 1908, Section 17 (2) Nehru was punished for unlawful association and arrested for distributing handbills that called for suspension of activities to boycott the visit of the Prince of Wales. Despite the fact that section 17 did not provide for punishment of an act

trial,³⁷ “he ridiculed the application of various sections of the Indian Penal Code”³⁸ refusing to plead, and exhibiting a similar symbolic disregard for what he deemed an illegitimate legal system, while at the same time using these official opportunities to make public statements that would go on record. In subsequent litigation³⁹ prosecuting Congress challenges to the Salt Law, Nehru did not defend himself stating that “the idea of defence even when it was manifestly permitted seemed almost indecent.” Perhaps, in light of his views it is no surprise that Nehru spent a total of nearly ten years in jail.⁴⁰

Being sentenced to prison by an unjust colonial state undoubtedly added to the moral force of anti-colonial nationalists. The Judge’s pronouncement in Gandhi’s case serves as a fascinating comparison to Tilak’s case, not least because the end effect was the same in both situations-Tilak and Gandhi, despite pleading not guilty and guilty respectively to their individual charges of sedition, received the exact same sentence: six years in prison. Under the laws of the time, the judicial rationality displayed in their sentences is consistent. However, compared to the judge’s opprobrium in Tilak’s

like distributing handbills, the magistrate interpreted its provisions liberally, and Nehru was sentenced to six months in prison (Ibid.).

³⁷ Nehru’s second trial involved charges of picketing shops that sold foreign cloth, and this act was construed as criminal intimidation since peaceful picketing itself was permissible under the law. (Ibid.).

³⁸ Gopal, vii.

³⁹ In his analysis of Nehru’s trials, Ram Gopal writes, “A close examination of most trials of Congressmen would lead one to the conclusion that the decision to convict preceded the trial, and what remained was to find out a law or laws under which conviction could be justified.” On the judiciary’s stretched interpretations of several sections of the penal code, such as transpired with Nehru’s first and second trials, the author writes, “Their cavalier attitude towards the law was unwittingly encouraged by the Congress policy of not participating in the proceedings of the trials and not preferring appeals against the convictions.” (xiv).

⁴⁰ 3,262 days according to Gopal, xi

case, Justice Broomfield attempted to invoke the time-honored ethics of lawfulness exemplified by the tradition of British justice. His remarks note that Gandhi as lawbreaker presents an unusual quandary, but the Judge defers in favor of upholding the system. He deems the case, “as difficult a proposition as a Judge in the country could have to face. The law is no respecter of persons. Nevertheless, it would be impossible to ignore the fact that you are in a different category from any person I have ever tried or am likely ever to try. It would be impossible to ignore the fact that in the eyes of millions of countrymen you are a great patriot and a great leader”⁴¹

In declaring, “It is my duty to judge you as a man subject to the law,” Judge Broomfield admitted, “I am trying to balance what is due to you against what appears to me to be necessary in the interest of the public.” Consequently, he followed the precedent of the

case, that was decided some twelve years ago, the case of Mr. Bal Gangadhar Tilak, under the same section. The sentence passed upon him as it finally stood, was a sentence of simple imprisonment for six years. You will not consider it unreasonable, I think that you should be classed with Mr. Tilak; and that is the sentence—two years’ simple imprisonment on each count of the charge, —six years in all, which I feel it my duty to pass upon you. . . If the course of events in India should make it possible for Government to reduce the period and release you, nobody would be better pleased than I.⁴²

By equating Gandhi and Tilak’s acts of sedition, Justice Broomfield in effect erases the distinct moralities which animate their decisions to declare themselves guilty and not-guilty. While the overall effect of such judgments did much to fuel the impression that a colonial judicial system would rule against Indian subjects, the idea

⁴¹ Gopal, 67.

⁴² Ibid.

of individual exceptionalism when it came to trying the cases of public figures was what haunted the Indira Gandhi trial after the emergency.

Exemplary Individuals on Trial in Exceptional States

Giorgio Agamben notes that a witness speaks for those who cannot speak.⁴³ The acts of witness performed by Roy in his critique of Nehru, Tilak in his deliberate confrontation with the British state, and Gandhi in volunteering blame are exemplary in Agamben's sense. So what do we make then of the silences of Nehru and Indira Gandhi? When does silence signify resistance and when does it signify compliance? Simply put, in Nehru's case he may have generated legal meaninglessness in reading off sections from law books during his time in the witness stand. But as a practicing lawyer, his conception of justice was at stake in his performance as witness. Justice Broomfield, acting as a witness speaking for a part of the British polity that had no official voice, was also giving voice to the voiceless. But, the crucial precedent that distinguished the positions of Nehru and Gandhi from that of Indira Gandhi was the interpretation of exceptionalism as exemption. Under a colonial state, Judge Broomfield could go so far as to declare Gandhi morally superior to his legal defiance, but Gandhi was still duty bound to six years in prison. Similarly, like Tilak, Nehru may not have recognized the legitimacy of the colonial court but he heeded the legal sentences it laid down for him. In the case of Indira Gandhi, the exceptionalism accorded to a figure like Gandhi during colonial rule was interpreted by her as the right of the sovereign in the postcolonial period. And in essence, it is this antecedent

⁴³ Agamben, *Homo Sacer*, 146.

of exceptionalism as exemption which makes high profile corruption a challenge to justiceability in societies that wrest sovereignty from colonial states.

What also distinguishes these trials of sovereignty, as such a case may be made to view them distinctly, is the fact that Tilak's not guilty plea, and Gandhi's admission of guilt on the allegation of sedition violently contrasts with Indira Gandhi's inscrutable silence against Justice Shah's demand for her witness. As a non-speaking witness, Indira Gandhi portrayed her defiance of a Janata government court. Whereas in the cases of Gandhi and Tilak, when such charges of sedition added to their political aura, in the instance of Indira Gandhi, being exempt from trial fortified her political inscrutability while also unfortunately serving as a legal antecedent for a particular narrative of corruption. Subsequent to the lack of action taken on the recommendations of the Shah Commission, we see an endless tangle of red tape obscuring the possibility of justiceability that follows the reportage of scams, political scandals involving corruption charges. So while I am arguing for the fact that public interest litigation in the post-Emergency period served as heavily symbolic dialogue to making the state more responsive to subaltern issues, it is interesting to note that the powerful classes seek and receive exemption from such judicial symbolism.

In the case of Indira Gandhi, what is fascinating about her path from the Allahabad High Court judgment to the Shah Commission proceedings is that though she was initially held up on technical grounds in the electoral case, where the popular perception was that the charges were minor, she ultimately committed far more egregious acts under the device for political survival designed through the stratagem of the Emergency. Ironically, why no one was really brought to justice after the

Emergency ended has much to do with the unofficial positions of its worst offenders. Sanjay Gandhi, for instance, held no office but was specifically named by the Shah Commission for being the main accused in the events. Justice Shah recorded his assessment of the events in the following words: “It is a matter of concern to the Commission that the prevailing acts of impropriety and immorality were not considered improper and immoral by the authorities. It came to be accepted as a new concept of propriety and a new morality.”⁴⁴ Following this assessment of the Emergency, this period in Indian democracy can be read through Agamben’s thesis of how decadent modern democracy gradually comes to converge with totalitarian states, making the event of the Emergency a par exemplar instance of “a post-democratic spectacular society.”⁴⁵ In his discussion, Agamben characterizes the logic of sovereignty thus: “the sovereign is the point of indistinction between violence and the law, the threshold on which violence passes over into law and law passes over into violence.”⁴⁶ Perhaps of all the figures who ever faced trial, in the last instance, Agamben’s words hold most true for Sanjay Gandhi, who in this narrative emerges as *Homo Sacer*.

⁴⁴ Qtd. in Visvanathan, *Foul Play*, 45.

⁴⁵ Agamben, *Homo Sacer*, 10.

⁴⁶ *Ibid.*, 32.

The implications of the Emergency on democratic procedure

“India’s legal schemes have been inspired by embarrassment rather than imagination.”⁴⁷

Notwithstanding the exceptional re-writing of the Constitution that allowed for the excesses of the Emergency, such as the resettlement of 700,000 people in eight months, the schismatic effect of the ‘75-‘77 Emergency is crucial to understanding the declined legitimacy of the state. Most strikingly, the excesses of the emergency led to a situation of self-vigilance: for example, the suffocation of the media led to self-censorship and contributed in no small measure to Indira Gandhi’s misconception of her actual popularity and led her to declare elections. This behavior was equally true of the courts that diminished their own powers during this time. The lack of redress also related to an absence of records. A R Desai, a compiler of such violations noted,

The growing assault on the movements of people, generated an awareness of the importance of the issue of democratic rights among the unprivileged or under-privileged strata and their spokesmen, much before the declaration of emergency. However, their struggles and records remained relatively unknown. The data generated by these groups and sections, were in the form of circulars, leaflets, pamphlets and other forms of mimeographed or printed material, which were not preserved properly, or were destroyed or confiscated by the authorities.⁴⁸

The legacy of M Kumaramangalam’s marxist legal theory that argued for parliamentary sovereignty over judicial review, unfortunately aided Indira Gandhi’s authoritarian tendencies. The specific precedents of cases that established

⁴⁷ Rajeev Dhawan qtd. in Sara Hossain et al., *Public Interest Litigation in South Asia: Rights in search of remedies* (Dhaka: University Press, 1997) 153.

⁴⁸ Desai 10.

parliamentary sovereignty over constitutional authority (the Golak Nath case etc.) had also aided Indira Gandhi's rewriting of the Constitution to make her acts legal. In this vein, Giorgio Agamben's argument that the sovereign is outside the law was almost proved conclusively true in the *Allahabad High Court judgment*.

The debate between parliamentary sovereignty and judicial review, prior to the emergency (in the Kesavnanda Bharati and Golak Nath cases) is a historical aspect of politics that reignited a commitment to constitutional rights. In the post-Emergency period, the value placed on fundamental rights can be seen to trump the actualization of "socialist" interests at any cost. The judiciary smarting from its downsized rule during the Indian emergency sought to turn around its public image. In framing its account as a direct contest, *The People Versus Emergency* records that

[t]he group of fearless, selfless judges—Jagmohan Lal Sinha, H R Khanna, V D Tuljapurkar, Govind Bhatt, R P Bhatt, U R Lalit, V R Krishna Aiyar, D P Madan, M H Kenia and 35 'penalised' High Court judges including Seth of the Bhumiputra case. Rang Rajan and R N Agrawal of the Kuldeep Nayar case, and Chandrasekhar and Sadanand Swami of Bangalore—all played a glorious role.⁴⁹

At the time of suspension of the Emergency, these judges sought to reclaim their authority. Though the Rudolphs declare the limited effectiveness of public interest litigation⁵⁰ citing Justice V K Krishna Iyer's argument that the frame-work of the Indian legal apparatus in India, having derived from a British system is contaminated by a particular set of class-interests, the initiative of the courts raised an interesting

⁴⁹ P G Sahasrabudde, *The People versus Emergency*, 15.

⁵⁰ Rudolph, *The Pursuit of Lakshmi*, 132.

question: whether or not the same can be said of the power of post-colonial legislation.

Prasenjit Maiti reflects this line of enquiry:

Governance as a leitmotif of Indian politics has only been problematized since the late 1980s and early 1990s—this is paradoxical, however as there was a preoccupation with India's governance as a postcolonial political system since 1947. Earlier literatures used to casually refer to governance while addressing issues like state building, nation and identity formation, development and modernization, state-society interface and the like. But the Emergency (1975-77) imposed on Indian's democratic polity by Prime Minister Indira Gandhi changed this state of affairs. It was a critical juncture when the resilience of India's democratic institutions was confirmed beyond doubt. The Emergency as political trauma helped transform the nature of discourses on India's problems of governance from a normative exercise to an empirical analysis.⁵¹

One of the indirect consequences of the Emergency was the advent of public interest litigation (PIL) or social action litigation (SAL) that came about in its wake. Many of the early PIL cases had a direct bearing on the Emergency and detailed conditions in prisons, and instances where fundamental rights had been abused. Justice Bhagwati in 1982 said of PIL cases (that had been ongoing since 1979) that "Public interest litigation is brought before the court . . . to promote and vindicate public interest which demands violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially and economically backward position should not go unnoticed and underdressed."⁵²

By 1985, S K Agrawala in *Public Interest Litigation in India, A Critique*

lamented that interest in pro bono work has waned, and that,

it is essentially directed towards governmental lawlessness [matters of treatment in prisons, detention] (i.e. gross violation of the basic rights of

⁵¹ Prasenjit Maiti, *Problems of Governance in India Since Independence: The Bengal Success Story* (New Delhi: Vedams, 2002), 43.

⁵² AIR 1982 SC 1473 qtd. in Hossain, 45.

people by official agencies due to negligence, callousness, indifference or inaction). The actions are as much against the non-performance of constitutional and statutory obligations as against mis-performance.⁵³

He argues against the distinction proposed by legal theorist, Upendra Baxi between Social Action Litigation (SAL) and Public Interest litigation (PIL). Baxi claimed that PIL activism in the US had not generated structural change, and ended up serving the ideologies of interest groups. S. K. Agrawala claims that such a critique of a failed overall structural impact of so-called SAL in India elicits parallel observations, negating the need for any distinction. “A philosophy of SAL as something completely distinguishable from PIL has first to be developed, before any meaningful purpose is served by replacing the widely used and understood nomenclature PIL by SAL.”⁵⁴

Another observer of the judicial activist movement, A R Desai, in his exhaustive compilation on human rights violations in India sharply indicts the state in these words: “the state and its executive, legislature and even judicial arms create conditions where human rights cannot even be availed of by scores of people.” He elaborates on how the rights and freedoms sanctioned by the Constitution are not substantially permitted arguing that it is the rulers who violate the rule of law. He adds that the fundamental problems concern “rule of law” and the character of the state which claims to be democratic.⁵⁵

⁵³ S K Agrawala, *Public Interest Litigation in India: a Critique* (Bombay, N.M. Tripathi: 1985) 46.

⁵⁴ Agrawala, 8.

⁵⁵ A R Desai, 3.

Similar accusations of false democracy are signaled by Upendra Baxi as he terms the “Crisis of the Indian Legal System” the inclusion of a parallel “Preventive Detention System” which is enshrined by the Constitution, and negates the provision of rights in the Preamble and Parts III and IV of the Constitution. This relates to what A. R. Desai terms “government lawlessness,” or the denial or non-implementation of rights through the Government’s legislative enactments. Desai remarks, “The exploited and oppressed segments of the Indian population are not accepting this situation passively. . . These struggles take on various forms. They manifest themselves in constitutional court battles, processions, strikes, dharnas, satyagrahas and militant individual and mass action.”⁵⁶

The exemplary sites of the constitutional court battles undoubtedly occurred in the form of public interest litigation or PIL. Sangeeta Ahuja, a compiler of all PIL cases since the 1970s to the late 1990s notes,

Groups working for civil liberties and activist organizations for the working and living conditions of people with meager resources had gained strength in opposition to authoritarian tendencies in politics. . . In tandem with the growth of activist groups concerned with issues relating to the poor, investigative journalism began to expose some of the injustices that were to become the bases for many PILs.⁵⁷

⁵⁶ Ibid., viii.

⁵⁷ Ahuja, 5.

Symbolic Justiceability

*“It’s no use taking him,” said Rose, “he’s not even a whole man. He won’t count.”*⁵⁸

In addition to the expansion of *locus standi*, another unique feature of the post-Emergency courts was their admission of media reports as evidence. The use of newspaper reports, as “state of the nation” accounts to be used in court was a result of public interest both inside and outside the court-room. However, the classification of such reports as “evidence” was subject to intense scrutiny by the courts. In the 1988 case of *Siddha Raj Dhadda v. State of Rajasthan*, the high court referred to an earlier 1984 SC ruling that stated newspaper clippings may not be a reliable source of evidence, but went on to use the report to appoint a committee of inquiry into medical conditions at SMS hospital in Jaipur. Similarly, a PTI news report, “Gang rape in Kokrajar village” was the basis for filing a petition at the Chief Justice of Guwhati HC’s instance to enquire into the rape of a Bodo woman by policemen.⁵⁹

Such public-interest issues of legal redress and political participation are based on their common origins in a politicized civil-society, and their congruous campaigns against a political culture of secrecy. Though the fourth estate in India has an illustrious history of political exposé, the quest for a new source of state legitimacy also aided the inclusions of newer technologies of witness as legal evidence. The varied impact of journalistic investigations and the rise of new media technologies

⁵⁸ Sahgal, 81.

⁵⁹ Ahuja 125.

which seems to offer ever more ways to document the opacity of state-functioning will be discussed in Chapter 4.

This section attends to the writ petition and judicial opinion as forms of democracy that offer evidence towards understanding the public perceptions of the state. On the issue of judicial and literary interpretation, Ronald Dworkin and Stanley Fish have participated in a lively public debate. When Fish took issue with Dworkin's "Law as Interpretation,"⁶⁰ the question focused on the source of interpretive authority. Using literary interpretation as a model for legal interpretation, Fish compared the artistic hypothesis in the former as analogous to a manifest political hypothesis in the latter. James Boyd White suggests in *Rhetoric and Law* that "the most important 'result' in an opinion is not the judgment it reaches on a particular issue but the character the court gives itself in its writing and the opportunities for thought and community it creates."⁶¹ He writes,

To read the legal text as a composition made by one mind speaking to another. . . The kind of reading I describe is profoundly antibureaucratic. . . The judge is always a *person* deciding a case. . . He is always responsible as a composer for the composition that he makes. One great vice of theory in the law is that it disguises the true power that the judge actually has, which it is his true task to exercise and to justify, under a pretense that the result is compelled by one or another intellectual system.⁶²

⁶⁰ This exchange initially appeared in the journal, *Critical Inquiry* and was subsequently anthologized in *The Politics of Interpretation*, (Ed. W. Mitchell, Chicago: University of Chicago Press, 1983) with Fish's reply entitled, "Working on the Chain Gang." That same year, Dworkin's, "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity any More" was followed by Fish's "Wrong Again" which appeared in the *Texas Law Review* 62 (1983) : 299-316.

⁶¹ James Boyd White, "The Judicial Opinion and the Poem," ed. Lenora Ledwon, *Law and Literature : Text and Theory Law and Literature* (New York: Garland Pub., 1996), 17.

⁶² *Ibid.*

Consequently, White argues for a view of judicial opinions as socially constitutive literature and this characterization is helpful in deciphering the limits of symbolic justice in the history of public interest litigation in India. Though the PILs filed in Indian courts did not guarantee dramatic results, it would be misleading to construe citizen interest in PIL purely symbolically as a metaphoric form of direct democracy. The following instance in particular will clarify how the need to move the courts originated in the search for justice and not symbolic democracy.⁶³

In this instance, the civil rights groups, the People's Union for Democratic Rights and the People's Union for Civil Liberties, filed a petition filed under Article 226 of the Constitution demanding an inquiry commission into the Sikh riots that occurred between October 31st and November 11th 1984, in the Kalyanpuri and Sultanpuri neighborhoods in Delhi, which took place in the wake of Indira Gandhi's assassination. The petition was a pragmatic response to the immediate events, but the court's judgment consigned the case to a symbolic level. The pragmatic demands demanded by the petitioners related to the urgent need to restore law and order in the areas by specifically requesting the court to direct the executive magistrate to maintain order, to hold and identify those accused by riot victims, ensuring that evidence would not be lost in this regard, and to guarantee the creation of an atmosphere of security by preventing the accused from entering the named areas. Justice Kirpal and Justice Dayal concurred in their order dismissing the petitions on the contradictory basis that the Constitutional provisions invoked were misleading and the acts and sections of the

⁶³ Between 1980 and 1982, approximately 75 PIL cases were filed in the Supreme Court by activists and lawyer's groups. (Ahuja, 103).

penal code were incorrectly cited. At the same time, they paradoxically declared the petition redundant since the police were already deployed there to conduct an investigation.⁶⁴

It bears some attention, that the riots of 1984 were uniquely kindled and perpetrated in the post-Independence period. The riots had been ignited by a heinous act committed by men in uniform—in this case Indira Gandhi's trusted Primer Ministerial Sikh body guards, who had a reputation for loyalty and military lineage. To avenge the death of a sovereign as long-ruling as Indira Gandhi had been to the Congress leadership, Congress party workers were baying for Sikh blood in revenge for her assassination. Given that Indira Gandhi held a special position in the post-'67 Congress system, popular knowledge at the time pointed to the well known fact that the retaliatory killings were committed with the collusion of statist forces. For party workers to have carried out their mercilessly efficient campaign of retribution, an effective garnering of state forces was imperative. It was *the police* who were known to turn away as Sikhs, singled out on the basis of state electoral rolls, were hung with burning tires and pulled out of their homes to be publicly murdered in broad daylight. Within a week's span, 3000 Sikhs had been killed, 150 of them while in uniform.

In light of this, the matter in court demanded immediate action. The case of *Peoples Union for Democratic Rights v. Ministry of Home Affairs* was never intended for a merely symbolic hearing. However, the judgment effectively rejected the watchdog cries of these civil rights groups by defending state-functions. The decision implied that not only had the appropriate authorities not been approached, but also that

⁶⁴ Ahuja, 102.

court interference would interfere with the workings of the government and cause political confusion. Justice Dayal even went to the extent of separating this case from other PIL cases, saying that there could be no precedents in public interest litigation as each case is based in its own peculiarities, and that the procedure adopted by the Supreme Court or any other court in any such litigation is not necessarily binding on others. Referring to the Supreme Court's orders in *Bandhua Mukti Morcha* and *S. P. Gupta*, Justice Dayal stated,

The Courts should not have an attitude that they alone are protectors of fundamental rights of citizens and a democratically elected government has no such feeling or inclination. Initial attitude of the courts vis-à-vis the executive organ of a state should not be of suspicion in this behalf. Of course, if the Court after inquiry and due scrutiny finds the state not performing its duty it can and should step in to protect and enforce fundamental rights to the extent it can give relief. The attitude ought to be of trust and not always of confrontation. . . the condition which must be fulfilled before PIL is entertained by a superior Court is that the courts should be in a position to give effective and complete relief. If no effective and complete relief can be granted, the Court should not entertain PIL.⁶⁵

It is revealing to compare notes with another PIL case, subsequently tried in 1988. In this case also, Article 226 of the Constitution was invoked by a veteran Gandhian associated with the Sarvodaya movement, who on the basis of media reports on the malfunctioning of a government hospitals, had approached the courts seeking an enquiry into the matter. In the case of *Siddha Raj Dhadha v State of Rajasthan*, the courts did comment on the discretionary powers available to the legislative branch of government under the Commissions of Inquiry Act, 1952. However, in cognizance of the specially affected parties represented in the case (named as “the poor and downtrodden weaker sections of society who by and large come to the hospital”), the

⁶⁵ Ahuja, 278-9.

court offered a creative solution. Imaginatively, the court interpretation expanded the possibilities available to the judiciary as allowing for the possibility to appoint a fact-finding investigation, and entertaining the scenario for the Commissioner/s of the investigation to submit the report recommending remedial measures to the government. Arguing that “The Court cannot be a silent spectator and should, rather must, intervene,” a commission with two doctors and one lawyer were assigned to investigate the state of the Rajasthan hospital incidents.⁶⁶ The consequence of such rulings greatly aided the petitions sent to the courts to enquire into matters of public interest. However, the sheer volume of such appeals limited the effects of the rulings creating a situation of what was once feared as “vakil raj,” and now came to be embraced as epistolary justice.

Epistolary Justice

*“Job is all very well. What about their ‘omes?” came from mother-in-law.
 “They have all been given compensation,” repeated the host, testily.
 “And I suppose it would be all the same to you if a bulldozer came along and
 leveled this ‘ouse and you were given com-peng-say-tion?”⁶⁷*

In August 1985, Chief Justice Bhagwati established a PIL cell in the Registry of the Supreme Court for attending to the letters sent to the Court to potentially be selected for PIL petitions. While the staff would determine which letters could be treated as petitions, a Judge appointed to deal with PIL matters would eventually

⁶⁶ Ahuja, 398.

⁶⁷ Sahgal, 13.

decide if a petition was admissible.⁶⁸ In 1991, a resolution was passed by the All-India Chief Justices Conference directing the establishment of a PIL cell in each state High Court. It is interesting to note that while the resolution was not made public, the state High Courts that responded to this directive were the same states that took the lead with implementing regional empowerment through State Acts for the Right to Information. A progressive Justice P. P. Desai had initiated the procedure to record letters seeking PIL petition status in 1985 and continued entering applications after the 1991 resolution. On these lines, Maharashtra similarly transformed its early efforts in the form of a Public Grievances cell begun in 1986 ; Madhya Pradesh and Andhra Pradesh commenced efforts in 1991; and, Assam, Tamil Nadu and Karnataka in 1992; At the national level, from 4 letters converted into writ petitions in 1984, a dramatic increase was noted by 1986, when 166 letters were converted into petitions. By 1988, this number had dropped to 46. Between April 1988 and May 1995, approximately 160,000 letters were collected of which 94,832 were chosen for action. Of this number, only a total of 480 writ petitions were filed from all the letters received.⁶⁹

Sangeeta Ahuja's two volume *People, Law and Justice: Casebook on Public Interest Litigation* and Jagga Kapur's four volume *Supreme Court on Public Interest Litigation: Cases and Materials, The Debate over Original Intent*, both published in 1997 were pioneering case law collections which specifically compile PIL cases in India. In his review of these six volumes of case law compiling primary source

⁶⁸ As a central government agency, the Supreme Court would restrict itself to correspondence written in the official languages of the government at the center: Hindi and English. All other letters were initially discarded. Ahuja, 774.

⁶⁹ <http://law.indiainfo.com/> (15 March 2004)

materials containing the full orders and judgments on PIL cases since their inception in 1979, Wouter Vandenhoe summarizes the commonly accepted procedural features of PIL as an expansion of rules of standing. The epistolary jurisdiction was a unique feature of a communicative state, and in this regard, he writes

Those without the resources to file proper petitions were allowed, even encouraged, to write letters or telegrams to the courts. Innovative directions were made and the Court began to monitor the implementation of its own directions and to appoint commissions to inquire into the facts of cases. By 1979, a recognizable alternative to established patterns of litigation had begun to emerge.⁷⁰

Many petitions have been filed on the basis of newspaper reports such as *Vypeen Vishamadhya Koottakola*, *Virudha Samithy*, *Vasudeva Pai*, “*Niyamakendran*,” *P.K. Martiyani*, *Ram Pyari* and *Brijithamma*.⁷¹ The need for both parties to “set out their case, as in adversarial proceedings, was replaced by a more inquisitorial procedure. As petitioners were often unable to collect all the necessary information, as seen in *Social Action and Legal Aid Society*, newspaper articles were accepted as the basis of complaints, and the onus was with the Court to evolve methods of resolving a case with disputed facts. It evolved mechanisms with less emphasis on strict procedure, for example by the appointment of independent commissions of inquiry for fact finding, by monitoring the case, by the expansion of the scope for litigation, or by the nature of the directions given.”⁷² Investigative litigation was another such feature distinguishing the post-Emergency courts, and of this Vandenhoe says,

⁷⁰ Wouter Vandenhoe in *Human Rights Quarterly* 22.4 (2000) 1110-1114.

⁷¹ Ahuja, 613.

⁷² Ahuja, 787.

Many of the PIL cases demonstrate the reluctance of the State to co-operate in the provision of rights to certain groups of people. Because of the imperative of providing social justice, the courts needed to extend the ways in which they could decide cases. Already the need for a formal petition had been disregarded. The Supreme Court became a court of record for PIL cases by taking upon itself the role of investigator.⁷³

In extrapolating from Ahuja's casebook, he writes on remedies without rights,⁷⁴

Ahuja emphasizes that PIL-cases have failed in bringing about real social change. If decisions or judgments have been sympathetic or beneficial in certain circumstances, they have never managed to have an impact on social reality due to lack of implementation. Thirdly and finally, deficient statutes and laws have hardly been questioned by the courts, thus leaving the oppressive legal structure unattended.⁷⁵

The failure of epistolary justice through PIL or what Upendra Baxi terms SAL in India can also be read through a unique perspective offered up by Baxi in his essay, "From Human Rights to the Right to Be Human." Baxi argues for a less procedural and more embodied view of the imperative to dispense justice. He radically rethinks alterity stating that it is not a mere excess of sympathy that is in need of kindling for change to be effected but more a sacrifice in a zero sum game that will effect real change. Following Baxi's injunction that beyond the glib rhetoric of human rights stands the paramount right have one's humanity recognized, Nayantara Sahgal's novelistic cast of characters in *Rich Like Us* offers up such a view.

The post-Nehruvian Dawn

Rich Like Us, Sahgal's Sinclair Prize winning novel, takes the Emergency as the backdrop for a complex exploration of postcolonial society. Even as a relative of

⁷³ Vandenhoe, 1112.

⁷⁴ Vandenhoe, 1113.

⁷⁵ Wouter Vandenhoe in *Human Rights Quarterly* 22.4 (2000) 1110-1114

the Prime Minister, Sahgal in her other works, *Freedom After Dusk* and *Prison and Chocolate Cake*, has also been an outspoken critic of Indira Gandhi's policies. In *Rich Like Us*, a range of social imaginaries are personified in a cast of urban personalities, and their revealing conversations line the edges of this chapter. Sahgal's cast confronts a corrupt postcolonial system damaged by the whimsy of privileged classes. The unexpected correspondence offered by the two main characters, Rose and Sonali, suggests ways to redemption by individuals who refuse to yield to these structures of violence, and who mark out their choices as exceptions.

In the time of the novel, Rose, an English woman of Cockney extraction is in her twilight years. In her youth in England, Rose meets Ram, the Hindu son of a frontier trader, and after a series of deliberations returns with Ram to his home in India. That during the days of British rule, Rose as a British citizen chooses to forsake a familiar home, and knowingly accept a position in a strange land as Ram's second wife is indicative of Rose's character. Rose overcomes many challenges in her situation as co-wife and step-mother to Ram's only offspring, and the triumphant compassion of her early biography presages her individual gift for compassion.

One such focus of her compassion appears in the figure of a paraplegic beggar, "who can't even wipe his own tears." The tragedy that is his life is related to us by Rose, who in the novel is the only one who even asks him how he came to his condition. The beggar's life story attests to the continued brutality of feudal structures. His attempts to protest the zamindari (feudal) system in his rural village, by joining the Naxalite movement are violently shut down by the landlord who cuts off his arms, and maims the possibility of revolution in the novel. Sahgal's characters emerge and

interact in a credible and profoundly unsentimental fashion, and yet she succeeds in making the beggar a foil for the various attitudes displayed by the characters in the novel.

The novel is set up as a study of contrasting characters, and the attitudes displayed by people from shared backgrounds evidences a dramatic disunity in structures of feeling. The novel opens with Neuman, a business associate of Rose's step-son Dev, through whose eyes we gain a behind-the-scenes view of an outsider in India.

He wondered about the seed he had sown so that giant wheels could turn several thousand miles away, controlled by men in skyscrapers whom those around this table would never see. Across the table from him sat the latecomer, a bureaucrat of importance in the current set-up, Neuman had been told, and part of the conveyor belt that had delivered the cash to the Ministry for Industry, relatively minor graft in terms of a big investment and the returns expected from it. Experience had taught Neuman that key figures were never to be underestimated. (12)

An astute businessman, Neuman is the first character whose eyes seize on the plight of the beggar and his recoil also guides our initial sighting. By cleverly forcing our view of the beggar through Neuman's eyes, Sahgal raises the specter of a complicity that unites the reader and the mercenary foreigner. Neuman's first impression of this character is marked by revulsion and dismissal: "Obviously not a candidate for a job when construction labourers' shanties sprouted, portable slums of thatch and cloth with swarms of ragged children in and out of them. Neuman leaned back and closed his eyes. If they'd do like we do, they'd be rich like us."⁷⁶

⁷⁶ Sahgal, 13-14.

In contrast to the brutal ethical quandaries that compel the self-interested to act in concert with the ruthless powers of the day, Rose's unflinching compassion for the limbless beggar she characterizes as a "magnified spider"⁷⁷ is barely reflected in any of the other characters with whom she shares narrative space:

On Mona's once a week beggar-feeding days Rose had never seen an entirely whole one among them. There was always something major or minor missing or mutilated, always a beggar at the corner of her eye, or the street, a usual enough sight. In fact it was Nishi's penetrating scream the first time this one appeared at the kitchen door, and Nishi's gasp, "Is it human?" after she had controlled herself, that made Rose look examiningly at him. But as she did so she saw reflected in the beggar's eyes the bright blue of colour, the dazzle of ornaments that was Nishi, saw their mutual violent recoil from each other, and told Nishi to stop screaming at once. It was just a poor beggar, Rose said, he had to eat somewhere, and he was going to eat here.⁷⁸

For Rose and Nishi, their ascriptive identities determine their ability to even display empathies of their own accord. As a foreigner, Rose has no role playing to perform since she is a subject without a precedent in that milieu. Nishi, on the other hand, ever afraid of losing her "respectability" in middle class circles shies away from expressing her own humanity. The dissonance between Nishi and Rose's views could be ascribed to not just their dispositions but also their social roles. Rose as a character is perfectly credible in her actions of providing comfort and company to the beggar. Though the figure of Sonali is closest to sharing Rose's sensibilities, as an Indian bureaucrat dutybound to participating in the unforgiving logic of the Emergency state, she is constrained by different empathies.

⁷⁷ Sahgal, 194.

⁷⁸ Ibid.

But how much better were the rest of us, pretending the emergency was an emergency, when civil servants should know what a real emergency is? They've dealt with all kinds, partition, famine, war, refugees on a scale so monumental it made refugees of all disasters till then and many after look like minor migrations. We knew this was no emergency. If it had been, the priorities would have been quite different. We were all taking part in a thinly disguised masquerade, preparing the stage for family rule.⁷⁹

Sonali's insights reveal a profoundly sensitive official of the state and as such her personality reveals itself in stark contrast to characters like her colleague and childhood friend Kachru who having abandoned all idealism after college, is now only able view the personal profits to be had from the efficiencies of a recently empowering state fascism. Kachru despite his exalted stature as a bureaucrat of the welfare-state turns out to be much like a much more obviously despicable character, Dev, Rose's avaricious step son. As the story's implicit morality reveals, the cunning and vile welcome the Emergency as an easy opportunity for self-advancement. The characters poised to reap these benefits are frequently the loudest in singing the virtues of autocracy. Dev sums up the Emergency thus:

The troublemakers are in jail. An opposition is something we never needed. The way the country's being run now, with one person giving the orders, and no one being allowed to make a fuss about it in the Cabinet or in the Parliament, means things can go full steam ahead without delays and weighing pros and cons for ever. Strikes are banned. It's going to be very good for business.⁸⁰

Dev's prospective business partner appears to accept his host's description but Sahgal's narrator reveals otherwise. In Neuman's jaded world, "Almost any shoot-out

⁷⁹ Sahgal 24-25.

⁸⁰ Sahgal, 8.

was labeled revolution, even if all it changed was the clique at the top for another clique at the top.”

Sonali, an Oxford educated bureaucrat in the Ministry of Industry is the emblem of a concerned but quietist approach of a middle-class resolution to social problems. She is quick to reproach herself for continuing to serve a government that has soured her faith: “It was too late for my painful shock to mitigate some fearsome tragedy, but not too late for me to wonder when the saga of peaceful change I had been serving from behind my desk had become a saga of another kind, with citizens broken on the wheel for remembering their rights.”⁸¹ Where Sonali’s first-person narration leads to conflicted reflections on her choice to join the system, her childhood friend and now colleague, Kachru is undeterred by its collapse, sparing no opportunity to maximize his own promotion. Kachru’s counter-point in the novel is located not only in the central character of Sonali, but also via the specter of Sonali’s father, a bureaucrat who witnesses both the euphoria of India’s tryst with destiny in 1947 as well its subsequent failure in a declining political hope. His passing prompts frequent opportunities for Sonali to reflect on what could have been. The period of the Emergency is made all the more poignant by her loss. She ruminates, “And we had a new tradition to create, our own independent worth to prove. Papa, a member of the I.C.S. himself, had said with a pride I was used to hearing in his voice, “Sonali, people like you, especially women like you, are going to Indianize India.”⁸² Such recollection

⁸¹ Sahgal, 227.

⁸² Sahgal, 24

adds to the weight of her Nehruvian legacy, in part because of her allegiance to her father's values and also for the fact of its betrayal.

All would be well because there was a building outside my office called Parliament. Yet an epoch had come to an end in ways we did not recognize. The continuity in affairs that Papa so highly prized had been neatly lifted and tucked like the hem of a garment, while Parliament still stood, the same people met inside it, the surface of Delhi remained unrocked, the sky above cloudless.⁸³

In the figure of Sonali, a national consciousness as well the real politic of the state jostle with each other. She chides herself for her apparent paralysis saying, "Not all of us are passive before cruelty and depravity. He [he father] had not been. Nor the boy in Connaught Place who had struggled desperately all the way to the police van. Nor even Rose's beggar, undaunted by his armlessness."⁸⁴

During the course of her tenure as a bureaucrat of the Emergency state, when Sonali finally runs up against the paradoxes of the ethical and the legal, she is cast out by a government that has no use for unyielding civil servants. However even before her career is prematurely stunted, the grace of her person manifests itself earlier on. The day before Emergency is declared, when Sonali attends JP's rally on June 25, 1975, her thoughts on the event immediately alert the reader to her loyalties. Her reportage of the historic event provokes a nostalgia in her father, prompting her to state, "I knew he must be thinking of. . . the man in the loincloth who had urged, Let's free ourselves without the barrel of a gun, let's soil our hands with untouchable work to free our souls of the canker of caste, and no power on earth shall withstand us

⁸³ Sahgal, 31.

⁸⁴ Sahgal, 136.

afterwards. Papa was thinking of battles for freedom fought and won and all that sacrifice now come to this.”⁸⁵ The statement of decline is unmistakable and by embodying these thoughts in the character of an idealistic bureaucrat, Sahgal declares the bankruptcy of the Nehrvian dream from inside the system.

The Crisis of Legitimacy in Novelistic Relay

In the study of legal documents against a political imaginary, the question of the relationship between the non-/fictional and the imaginary, or the political text as imaginary designates the contours of an ethics of reading. As Hayden White says of Modern Latin American writers, in *Figural Realism*, “Are their novels less true for being fictional?”⁸⁶ Similarly, when reading across fiction and judicial decisions, one could similarly ask, “Are political writings less fictional for being political?”

Upendra Baxi’s pairing of legality and legitimacy opens up a space from which to perceive how when laws are illegitimate, requiring no contravention to circumscribe crime, the concept of visible evidence is thrown into crisis. It is not the presence of the law alone that defines the criminal or legal status of state acts, as the story of Sonali’s suspension from service indicates. In the face of weakly framed guidelines, it is the lack of evidence that begs a different sort of technology of witness (such as in the case of an unspecified guarantee for social justice that can scarcely be invoked when the developmental state fails).

⁸⁵ Sahgal, 156-7.

⁸⁶ Hayden White, *Figural Realism: Studies in the Mimesis Effect*, (Baltimore, Md.: Johns Hopkins University Press, 1999) 13.

In this regard, the failure of public interest litigation to deliver compensation gives rise to symbolic witness by other means. The absence of substantive justice adds credence to the mere fact of witness, since it is the court as a state agency that also now stands discredited and in the meantime there is no source of perlocutionary authority. In this regard to understand the state's influence on postcolonial culture an attention to the ideological underpinnings of developmentalist directives is as important as identifying the matrix of political and economic forces.

Towards this, Ali Eritouni foregrounds the critiques postcolonial fiction mounts against the postcolonial nation-state.⁸⁷ On the subject of these novels' utopian visions he writes, "The visions they propose do not prescribe the ideal commonwealth in the tradition of classical utopias, such as Thomas Moore's *Utopia*; they gesture, instead, towards possibilities and horizons which remain largely fragmentary, undecided and contradictory."⁸⁸ My purpose in relating these instances is to advance the argument that the context for reading the literariness of a novel such as *Rich Like Us* requires a parallel light on non-fictional forms. "Postcolonial novelists cannot, then, be fully understood without accounting for their critique of the postcolonial

⁸⁷ Ali Eritouni, "Nation-states, Intellectuals and Utopias in Postcolonial Fiction." Unpublished Dissertation. For example, in *The Open Sore of a Continent*, Wole Soyinka writes, "We are entering, it must be apparent by now, the possibility—not of a discovery—but of the recovery of a certain historical truth: that nation status has never been an absolute or a constant, that it has ever followed the politics of conflict, interests, alliances, power, and even accident" (24-5). Chinua Achebe in *Anthills of the Savannah*, casts the nation-state as a "false hope" (91). However the novel offers a reprieve through embodiment by centering around key national(ist) figures, infusing in them the agency needed to bring about change

⁸⁸ *Ibid.*, ii.

nation-state, their fashioning an alternative, dissident, intellectual, and their anticipation of a hopeful future”⁸⁹

In continuing on with the story of relay that is central to democracy, I now highlight the limits of middle-class authorship in non-fictional realms.

⁸⁹ Ibid., 40.