

India's Quotidian Constitution

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ROHIT DE. *A People's Constitution: The Everyday Life of Law in the Indian Republic*. Princeton, NJ: Princeton University Press, 2018.

Although it is still too soon to say, the study of constitutional law may be undergoing something like an “ethnographic turn.” Such a turn does not imply the rejection of doctrinal scholarship, so much as a growing interest in the place of constitutional law in everyday life, outside the elite worlds of constituent assemblies and supreme courts. It also implies the embrace of new methods and sources. In his 2014 state-of-the-field account of comparative constitutional law, *Comparative Matters*, Ran Hirschl (2014) invited such a turn, encouraging scholars to engage with a greater variety of research methods, including fieldwork and archival study. He even gave this multimodal approach a new name: rather than comparative constitutional law, he called it comparative constitutional studies.

Hirschl's provocations built on the earlier interventions of Kim Lane Scheppele (2004), who defended the importance of taking a fine-grained, qualitative approach to studying constitutional law. Designated “constitutional ethnography,” Scheppele's preferred method deliberately eschewed large normative questions about the reliability of specific constitutional features and focused instead on examining “the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements” (Scheppele 2004, 390).

A People's Constitution is an outstanding example of how and why scholars should engage in comparative constitutional studies and constitutional ethnography. It stands as an exemplar of rigorous, insightful, engaging scholarship that bridges multiple sub-fields: socio-legal studies, legal history, and comparative constitutional studies. Rohit De is a legal historian, well known to many in the fields of socio-legal studies and legal history. Yet his volume will offer impressive insights to multiple audiences—from cultural historians, to sociologists, to legal theorists and others.

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ELITE AND EVERYDAY ELEMENTS IN INDIA'S CONSTITUTION

A *People's Constitution* is, in the most basic sense, an account of how India's independence Constitution affected the lives of ordinary citizens from the document's enactment in 1950 to the end of the Nehru period in 1964. The Indian Constitution is, itself, a fascinating subject for research. It is both the longest constitution in the world and the longest-lasting among all postcolonial charters. It is also impressively democratic. Compared with other mid-twentieth-century constitutions, many of which were drafted by outgoing colonial elites, India's charter was designed by an elected constituent assembly and includes a strikingly progressive set of provisions, including a wide range of social and economic rights.

In spite of these unique features, scholars of Indian constitutional history have often taken a rather conventional and conservative approach to the topic. They have relied largely on official, public legal sources, mostly Supreme Court judgments and debate transcripts. They have also tended to take a normative or teleological bent, concentrating on the roles played by elite actors (usually judges or lawmakers) in shaping the content and meaning of the constitution. This approach is best embodied in what was, for many years, the best known and most cited volume on Indian constitutional history, Granville Austin's (1966) *The Indian Constitution: Cornerstone of a Nation*.

A People's Constitution breaks decisively with this approach. For the most part, the main characters in this book are not elite actors but ordinary citizens. De offers a history of constitutional law that hinges less on the top-down manipulations of legal professionals than on the bottom-up actions of ordinary individuals, often from marginalized groups. The protagonists here are not chief justices or ministers but otherwise unremarkable persons with quotidian goals: Parsi professionals in Bombay who want to consume alcohol; Marwari traders who want business permits; Muslim butchers who want to continue selling beef; sex workers whose livelihoods are in threat from anti-trafficking laws. De selects these actors and events—each of which forms the basis of a chapter—not because of their enduring significance or notoriety but, rather, because they constitute some of the very earliest instances of citizens appealing to India's courts to challenge the actions of state officials.

We have in these chapters four compelling accounts of everyday citizens using constitutional principles and new legal remedies to express their grievances and fend off governmental intrusions on their lives. In this way, De finds both eliteness and non-eliteness in constitutional law. Acts of constitutional and legal design, he concedes, are elite activities. Yet acts of constitutional litigation are not. In De's words, "[t]his book provides evidence that electoral minorities—that is, members of communities that were unlikely to represent themselves through electoral democracy because of class, sex, or race—were overrepresented before the courts in constitutional cases" (17).

Through this process, De argues, the opposing interests of elite lawmakers and non-elite citizens came to be palpable in the "tension between legislation and judicial review" (17). It is in this tension, for De, that one sees the true role of constitutional law as a complex and energetic site of contestation between the state and its subjects rather than a mechanical check on executive power or an instrument for advancing

elite interests. In fact, at times, De seems to treat constitutional litigation as a kind of special arena in which otherwise voiceless groups in India are able to make themselves heard in impactful ways. “Litigation” De insists, invoking Gayatri Spivak’s famous phrase, “was also one of those rare instances in which a subaltern would appear to speak” (213).

The idea that constitutional law can be in the hands of the people—that it also has a quotidian life in litigation—is central to this book. For this reason, the sources that De uses span well beyond the official archive of judicial decisions and ratified legislation. De’s sources are drawn from what I have elsewhere referred to as the “expanded archive” of constitutional law, a broad and varied collection of written, recorded, and visual sources that testify to the Constitution’s wider impact on everyday life—from newspaper accounts, to political cartoons, to television and films (Schonthal 2016, 18). This broad approach even extends to De’s use of court records. Rather than simply consulting published opinions, De sought out the original case files, containing all records and submissions related to a particular litigation. Although this is a technique used by other legal historians (for example, Sharafi 2014), the approach can be very labor intensive, given the size and fragile condition of these files, and all the more so in the setting of India’s Supreme Court Record Room, which, De discloses, contains no formal procedures for requesting files or for interfacing with visiting researchers (16).

THE POWER AND PROMISE OF WRITS

If there is a Geist that animates De’s history of constitutional law, it is the newfound importance of the judiciary and the compelling attractiveness of its novel powers to issue writs. In De’s telling, constitutional culture after 1950 emerges alongside the growing popularity of writ petitions, which came to be a preferred mode of legal activity due to their faster speed and lower cost *vis-à-vis* other forms of legal action (11). Writ petitions also provided a new way for citizens to impact local, state, and national governments—a way of pressuring the state to “discipline *itself*” (219; emphasis added).

As De explains, the colonial legal system gave little power to regional courts and largely shielded the executive from litigation. By contrast, India’s independence Constitution gave the country’s high courts broad jurisdiction over all manner of legal rights along with the power to issue prerogative writs. What brought constitutional culture to the people, then, was not so much the rousing language of its directive principles or fundamental rights but, rather, the procedural rules that it embedded alongside its appeals to national goals and citizens’ freedoms. That is to say, demands for rights did not arise in 1950. (Colonial subjects in India, as in other parts of the British Empire, used rights talk as a way to challenge colonial governments [28].) What shifted after 1950, for De, was the sudden presence of accessible *remedies*. *A People’s Constitution* is, in this way, the story of constitutional law as told through the promise of constitutional remedies. It is a story told through the hopeful eyes of writ petitioners and the anxious eyes of legislators and officials whose actions were suddenly subject to greater judicial scrutiny.

THE SUCCESS OF FAILED LITIGATION

Importantly, *A People's Constitution* is not simply a story of how successful legal challenges can tame an overreaching state. In fact, many of the litigants that De discusses failed to win in the courts. Nevertheless, as he points out in almost every chapter, constitutional claims impacted society even when the petitioners did not convince the court to issue a writ. Instead, what made a difference was the gradual crystallization of a constitutional consciousness within a given population. Petitioners' "victory" lay in the recognition that, post-1950, they now had a language (the constitution) and a venue (the court) for "challeng[ing] the democratic legitimacy that was enjoyed by the state" and a way of "fractur[ing] the state's authority and coercive power" (72).

Consider, for example, the various writ petitions made to High Court in Calcutta and Allahabad by Muslim shop owners and butchers, which De describes in chapter 3. In each of these cases, the petitioners sought to challenge a local ban on the sale of beef by appealing to constitutional protections (for religion, trade, or equality under the law). In each case, petitioners failed to convince the court to quash the law. Nevertheless, as De points out, regardless of the majority decision, the very act of making a writ petition empowered petitioners to challenge the municipality and to inject the language of fundamental rights into local debates. According to De's reading of the well-known *Hanif Qureshi* decision of 1958,¹ even if the court did not impugn the constitutionality of laws prohibiting cow slaughter, it nevertheless limited the types of bovines that qualified for legal protection (excluding bulls, non-breeding cows, and buffalos). This, in turn, opened up slightly more space for butchers to practice their trade (164). Partial successes like these are often ignored in conventional approaches to constitutional history, which tend to privilege the major points of doctrine contained in the majority opinion. By looking beyond these points and considering the impacts of judgments on the ground, however, De gives the reader a more holistic account of the many ways that constitutional claim-making impacted the everyday realities of ordinary individuals.

Outside of De's forceful illumination of constitutional law in action, readers will also find many other significant contributions to scholarship. *A People's Constitution* contains fascinating histories of law and regulation in India: a genealogy of alcohol regulation and "test cases" in chapter 1; the history of commodity controls, administrative law and "socioeconomic offenses" (hoarding, tax evasion, and so on) in chapter 2; the development of the cow protection movement in chapter 3; and a history of sex work and its criminalization in chapter 4. In addition, De's chapters offer explanations of why particular communities in India served as compelling litigants when it came to particular offences: Parsis as challengers to prohibition laws, Marwaris as a "suspect community" (99) when it came to commodity controls, the Qureshi community as challengers to cow protection laws; and low-caste women as opponents to laws against prostitution and trafficking. Caste, the reader learns, is crucial here. "The introduction of liberal democratic processes in India [including judicial review]," De shows, "have not eradicated caste but have been mediated by it" (224).

1. Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731.

THE PEOPLE'S CONSTITUTION IN INDIA AND ELSEWHERE

The significance of *A People's Constitution* extends beyond the history and law of India. De's emphasis on the everyday life of constitutional law is, I would suggest, evocative for other constitutional settings. In Sri Lanka, for example, one can find similar dynamics operating after 1972, following the ratification of a new constitution with strong fundamental rights and new protocols of judicial review. In Sri Lanka, as in India, constitutional claim making became an effective way for relatively ordinary citizens to either fracture or call forth state power within their everyday lives. It also became a way for marginalized voices within non-state organizations (such as the Buddhist monkhood) to challenge the voices of established elites (Schonthal 2017–18). Malaysia stands as another example in which constitutional law has had a powerful presence in everyday life. Tamir Moustafa's (2018) recent work on religion and constitutional law in that setting highlights a similar history in which constitutional language and litigation directly altered the worldviews and lives of everyday citizens.

I would even go further. The popular life of constitutional law—De's "people's constitution"—might be found wherever one finds constitutions with judicial review, prerogative writs, and broad interpretations of legal standing for would-be petitioners. In these jurisdictions, viewing the people's constitution depends less on the institutional dynamics of the legal system itself and more on how one approaches constitutional history: in formalist, top-down ways or more "everyday," bottom-up ones. What Alexis de Tocqueville (1838, 1:261) once said about America, one might also discover about other constitutional cultures—namely, that law has the capacity to become "a vulgar tongue," which, although "produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that [a] whole people contracts the habits and the tastes of the magistrate."

This being said, there are certain ways in which the Indian case stands out from others. In its design and implementation, India's Constitution was deliberately interventionist. Rather than guarantors of individual liberties, the drafters of India's Constitution—and many of its later judicial interpreters—aimed to reshape social life and reform institutions (Sen 2010; Acevedo 2016). One can see this impulse, among other places, in the Indian Constitution's provisions for religion. Rather than simply guaranteeing the freedom and independence of religious institutions, India's Constitution empowers judges and officials to regulate the financial activities of religious institutions and to figuratively "[throw] open" the gates of Hindu temples to make them accessible to Hindus of all castes (Article 25(2)(a), (b)). Compared with other constitutional cultures, India might be seen as a jurisdiction that celebrates constitutional action and legal intervention in an unusually explicit way.

ADVANCING THE ETHNOGRAPHIC TURN IN CONSTITUTIONAL LAW

The history of constitutional law in India is, for this reason, a perfect setting for advancing the ethnographic turn in constitutional studies. It is also a perfect setting for investigating other major questions about the everyday life of constitutional

law—questions that De’s work provokes even if it does not fully answer: how does constitutional literacy grow in a given community; how does a “a shared popular understanding” (216) of constitutional law evolve; how might would-be litigants develop “constitutional consciousness” (10)? Moreover, to what extent can scholars reconstruct this consciousness using archives that are themselves the products of an already-rendered legal subject?

It is a good sign when scholarly works raise as many questions as they resolve. And this book is full of stimulating and thought-provoking passages. It helps that, aside from his impressive skills as a researcher, De also stands out for his skill as a writer. His prose is, quite simply, a pleasure to read. And read it you should. *A People’s Constitution* is one of the best books written on constitutional history in South Asia. It is sure to become a classic. De has produced something very special, which one hopes will inspire a new generation of constitutional ethnographers to undertake similar studies in other parts of the world.

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