

## Review Essay

*A People's Constitution: The Everyday Life of Law in the Indian Republic*

by Rohit DE

Princeton University Press, 2018. 312 pp. Hardcover: £ 38.00 Paperback: £ 25.00

Mathew JOHN\*

*Jindal Global Law School, India*

[mjohn@jgu.edu.in](mailto:mjohn@jgu.edu.in)

---

### I. BACKGROUND

This marvellous book by Rohit De flows from the meeting of two important aspects of Indian constitutional practice. First, the organization of the republic fashioned at independence as an instrument of socio-political change granting the state vast power over social, economic, and cultural activity.<sup>1</sup> Second, a state organized to separate institutional powers and to protect individual freedom in order to check the runaway exercise of institutional power.<sup>2</sup> In De's own words, the book is organised as a 'dialectic between the Indian Constitution as "politics of state desire" and the Constitution as "articulating insurgent orders of expectations from the state."<sup>3</sup> Set against these tensions in Indian constitutional practice, through a set of detailed ethnographies, De foregrounds citizen efforts to defend rights and freedoms that have operated to deepen constitutional culture in the early years of Indian independence.

There is a vast body of scholarship on various aspects of the defence of citizen rights in Indian constitutional law, but this book is no ordinary addition to this field of scholarship. Quite to the contrary, it is special as it is perhaps the most extensive historically located ethnographic account of the practice of rights in India's higher judiciary. Further, through a study of landmark constitutional cases on alcohol prohibition, commodity control, cow slaughter regulation, as well as the regulation of prostitution, as ordinary petitioners have stewarded these cases through the higher

---

\* Professor and Executive Director, Centre on Public Law and Jurisprudence, Jindal Global Law School.

1. See eg Uday Singh Mehta, 'Indian Constitutionalism: The Social and the Political Vision', in Niraja Gopal Jayal & Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford University Press 2010).

2. For a classic example, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966).

3. Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press 2018) 10.

judiciary in India, the book demonstrates the emergence of what it calls the ‘People’s Constitution’. Outlining some of these cases and especially by considering the theoretical assumptions that underpin these ethnographic accounts, the present essay is organized as a response to De’s remarkable efforts.

## II. THE PEOPLE’S CONSTITUTION?

De’s notion of the ‘People’s Constitution’ is framed as a response to two conceptual approaches that have played a key role in understanding the shift produced in 1950, when the new *Constitution of India 1950* (hereinafter ‘the Constitution’) was adopted. The first of these emphasizes the newness of the transformative project that the Constitution envisioned for the Indian people. On the other hand, the second approach foregrounded the largely undisturbed continuity of the colonial state and its institutions – the police, the army, the judiciary, the district administration, and the like – all of which were carried over into the new republic. Not willing to be tied to either the celebratory or the pessimistic vantage points represented by these contending accounts, De makes the methodological move of examining the form in which the practice of the new constitution was enthusiastically adopted by ordinary people in the defence of their rights. In so doing, the book seeks to demonstrate the emergence of the ‘People’s Constitution’ that transformed the contours of everyday life in the new republic.<sup>4</sup>

As a matter of constitutional design, the defence of fundamental rights was facilitated by provisions that ensured access to the higher judiciary, which in turn was empowered to issue writs and other appropriate remedies to address the violation of rights or the abuse of state power.<sup>5</sup> This right to access courts spawned a ‘republic of writs’ or a dramatic increase of citizens who petitioned courts, the study of which makes the beating heart of De’s ‘People’s Constitution’. But in what manner precisely does a court that is increasingly open and accessible to citizens make for the ‘People’s Constitution’?

The search for answers is meandering, as De does not provide a clear answer. Perhaps the book’s strongest attempt to persuade its readers about the ‘People’s Constitution’ is the sheer narrative power of the figures drawn upon as emblematic of the journeys that ordinary people – often minorities – have made to court in trying to make the Constitution their own. Thus, a Parsi journalist who challenged overzealous legislation on prohibition, Marwari traders who challenged draconian restrictions on trade in commodities, butchers who stood up to the threat to their livelihood from cow slaughter prohibition, or the prostitute who challenged restrictions on plying her trade are all poignant instances of citizens who petitioned superior courts objecting to state legislation that potentially violated their fundamental rights. However, even as De’s citizen-litigants are wonderful rhetorical instances illustrating

4. De (n 3) 9.

5. The Constitution of India, arts 32, 226.

legal struggles waged against a powerful and irrational state, one is not entirely sure how these figures stand in as representatives of the ‘people’ who were laying claims to the promise of the new constitution.

If De merely intended to equate the ‘people’ with the persons whose stories he charts, then the book makes for easy judgment as a wonderful instance of the social history of four idiosyncratic cases that are lovingly detailed. However, this is far from the case, as De indicates that his narrative is intended to be a broader comment on the ‘people’ who have animated Indian constitutional democracy. Further, there are various ways in which he characterizes the ‘people’ – a statistical aggregate suggesting that the court had empirically become a court of mass appeal; a marginalized minority voice who found recognition in court; a new constitutional consciousness embodied in the citizen subjects of the new constitution; and even as a collective concern for ensuring adherence to the rule of law and procedure. There are perhaps other related forms of thinking about the ‘people’ that the book details, but a puzzling aspect of this book is its reticence to extend to conceptual argument the care and attention lavished on the ethnographic history of the cases that make up each of the four substantive chapters of the book. Thus, claiming to abjure ‘teleological narrative’, De maintains that his account of the ‘People’s Constitution’ is best understood through the minutiae of constitutional encounters between citizens and the state.<sup>6</sup>

A historian’s caution for grand arguments that fly in the face of his archive is entirely understandable, but facts are always situated in conceptual frames and, in De’s case, one of the most evocative frames of modern politics – ‘the people’. Consequently, even as De seems to equivocate on the issue, it is important to view this book as a contribution to the social and political theory of Indian constitutional practice by pulling together some of the strands of thinking about the ‘people’.

### III. THE PEOPLE AS A NUMBER

One dimension of De’s characterization of the new constitution and its people was the dramatic rise in the numbers of people coming before the courts. Thus, riding on the advantages of lower court fees and the relatively speedier justice meted out in writ petitions, the Supreme Court heard over 600 petitions in 1952, a number which rose to over 3833 by 1962. This number is contrasted with the United States Supreme Court, which heard only 960 cases over the same twelve-year period. The Indian Supreme Court is not a constitutional court that only hears issues of constitutional significance, unlike the United States Supreme Court. That is, the Indian Supreme Court was designed to be an ordinary court of appeals, besides having the jurisdiction to hear writ petitions for the violation of fundamental rights. Even so, the contrast between the courts foregrounds the staggering case load of the Indian Supreme Court and with it, the vastly larger numbers of citizens who could access the Court.

---

6. De (n 3) 18.

This increased access was also in sharp contrast to the colonial state, which had imposed severe restrictions on the jurisdiction of the major high courts, besides granting the government broad immunity from prosecution. Therefore, aspects of Indian constitutional design that allowed citizens to petition the higher judiciary in actions against the government was undoubtedly a major structural shift. Even so, it is unclear whether these developments have made for a ‘people’s court’ in empirical and statistical terms. Offering a qualitative sense of the extent to which superior courts were willing to entertain rights petitions in specific instances, De’s work is necessarily insufficient to make any generalizations on the extent to which the higher judiciary produced a ‘People’s Constitution’. However, the book does rest on the intuition that increased access, and the significant government climbdowns that citizen litigation was able to force, signals the greater confidence that ordinary people had in the constitutional process. This is undoubtedly an important suggestion, but nonetheless one that will have to find greater support from the increasing emphasis on empirical detail in recent studies on the role of the court in the lives of ordinary citizens.<sup>7</sup>

#### IV. THE PEOPLE AS A CONSTITUENT FORCE

Another set of themes about the ‘people’ in the book is organized through the frame of the democratic abstraction that authorizes and legitimates state power. That is the ‘people’ as the constituent sovereign or the wellspring of state power. Of course, it must be mentioned that De does not quite characterize the people as an abstraction at the root of modern political power. As his methodology is rooted in the social history of particular cases, his account is perhaps not easily disposed to thinking of the people as an abstraction. Even so, when he claims that the people he refers to in his chapters are minorities, or groups who fashion a new constitutional identity, or even groups who contributed towards establishing the rule of law and legal process, he is referring to sites on which the identity of the ‘people’ are conventionally understood to unfold.<sup>8</sup> These different conceptualizations of the ‘people’ have to be disentangled from each other in order to consider the specific ways in which they may constitute a ‘People’s Constitution’.

##### A. *The People as the Subaltern*

One of the prisms through which the problem of the ‘people’ is characterized in each of De’s four chapters is the understanding that they are subaltern minorities fighting against an elite constitutional culture. That is, drawing on earlier scholarship that

7. For examples of more recent work in this field see Nick Robinson, ‘A Quantitative Analysis of the Indian Supreme Court’s Workload’ (2013) 10 *Journal of Empirical Legal Studies* 570; Aparna Chandra, William HJ Hubbard & Sital Kalantry, ‘The Supreme Court of India: A People’s Court?’ (2017) 1 *Indian Law Review* 145.

8. See eg Martin Loughlin, ‘On Constituent Power’, in Michael W Dowdle & Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge University Press 2017).

presents the Constitution as a product of an elite consensus, De views the people in the cases he narrates as subalterns or minorities whose active defence of their rights is presented as evidence of the depth of Indian constitutionalism.

Elitism framed through the lens of the dominating and dominated groups in a polity is however a tricky category, and this is especially so in India for the following reasons. First, elites are a constitutive condition of all modern politics. That is, no constitution can work without an elite or some group who asserts power in the name of the 'people'.<sup>9</sup> In this respect, India is no exception. Second, as its corollary, it is only to be expected that enterprising individuals and groups would always make use of available institutional options when their rights are abridged by elite interests. In the case of India, as its constitutional design intended for the higher judiciary to be actively open to petitions claiming the violation of fundamental rights, it is not surprising that a range of groups became active petitioners of courts when they were not able to get their way with the executives and the legislatures. Third, there is the difficulty of explaining the choice of the protagonists who are depicted as the exemplars of the dominated subalterns or minorities of Indian constitutionalism. Thus, as every one of the cases that De describes presents citizens reasonably adept at using the law to interrupt state policy aimed at hollowing out fundamental rights, one is left wondering about how exactly these citizens might be called minorities or subalterns. There is the suggestion that the subaltern is the electorally excluded minority. However, it cannot be automatically assumed that the electorally excluded classes are 'subalterns'. Since the book makes no sustained attempt to explain its understanding of the subaltern, it is difficult to discern how the book ties the subaltern into a broader conceptualization of the 'people'. Finally, and tied to the earlier point, there is the related difficulty of explaining important omissions in the cases chosen to narrate De's argument. Thus, as alluded to in another review of De's book, it is not clear why landmark civil liberties cases which also deal with subaltern citizens, for instance *A K Gopalan v The State of Madras*<sup>10</sup> were excluded from De's narrative.<sup>11</sup>

The distinction between the elite and the subaltern is presumably drawn to suggest that constitutional adjudication under the new constitution inaugurated a new beginning that permitted a more inclusive conceptualization of the people as a whole. However, the idea of a people authoring a new beginning is a conception of the people distinct from the idea of the people as a subaltern. Accordingly, this idea of a new beginning forged by various groups of people must be specifically examined for its contributions to an emerging constitutional practice in the early years of the Indian constitutional republic.

9. Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

10. [1950] AIR (SC) 27.

11. Vikram Raghavan & Lovish Garg, 'The Enduring Constitution' *The India Forum* (4 Jul 2019) <<https://www.theindiaforum.in/article/enduring-constitution>> accessed 8 Jul 2020.

### B. *A New Constitution for a Free People*

The unique avenues of constitutional practice opened up by the Constitution are well described in *Mohd Hanif Qureshi v The State of Bihar*,<sup>12</sup> which holds together De's third chapter. This case is a fascinating account of the manner in which more than 3000 butchers from various parts of the country petitioned the Supreme Court over legislation on the slaughter of cows that had been enacted by a number of provinces in the years immediately after independence. The butchers claimed that the legislation violated their fundamental rights. These statutes were enacted to further the directive principle in Article 48 of the Constitution, which required the government to eventually secure the prohibition of the slaughter of various types of cattle. Opposing these statutes on a range of grounds, including the violation of the fundamental rights to equality, gainful employment, and religious freedom, the butchers' petition organized and brought into being what De calls a 'new bovine order'.<sup>13</sup>

Cow slaughter has been a deeply divisive issue in India for over a hundred years, and it is an issue driven by large sections of mainly north Indian Hindus who believe that the cow is a central feature of their faith. Equally, large numbers of Indians across faiths and social backgrounds (even up to the present day) consume bovine meats. With the coming of independence, the cow protectionists became vastly more electorally powerful and began pushing for changes in the existing approach to the regulation of bovine slaughter. The then-existing approach to slaughter was mindful of customary practices of meat-eating communities, their religious rights to slaughter for meat on special occasions, as well as the right of individuals to peacefully enjoy property, including cattle. It was this regime and its permissiveness towards bovine slaughter that the cow slaughter legislation sought to rework. However, cow slaughter legislation had to be fashioned by balancing it against two aspects of the new Constitution – a secular state that would not permit overtly sectarian policy, and the individual freedom to pursue occupations and to carry on with diets and religious practices which were protected by the Constitution as fundamental rights. It is the way in which the butchers navigated the threat of cow slaughter legislation to their fundamental rights, especially their livelihoods, that De flags as a new way of constitutionalizing people's struggle for rights.<sup>14</sup>

In the new republic, state-imposed restrictions on the slaughter of cattle were justified on the grounds of the significance of cattle to India's predominantly agricultural economy. Correspondingly, those who sought to continue in the trade of cattle slaughter defended it primarily on the grounds of their right to livelihood and employment, and also the grounds of religious freedom. This was a significant transformation of the grounds on which the slaughter of cattle was organized in colonial India, as noted earlier. Having upheld the constitutional validity of these slaughter prohibition laws, the court also reflected this change in the structure of legal justification by emphasizing the usefulness of the cow to the agrarian economy. As a

12. *Mohd Hanif Qureshi v State of Bihar* MANU/SC/0027/1958.

13. De (n 3) 163.

14. De (n 3) 148–68.

corollary, it also held that those animals that were no longer useful to the agrarian economy could be slaughtered, and that an absolute ban on slaughter could not be reasonably upheld.<sup>15</sup> De makes much of this limited victory secured by the butchers against an increasingly majoritarian voice speaking in the name of the Hindu community in the social and political domain.<sup>16</sup>

However, at the level of legal strategy, having decided to constitutionalize the issue and to petition the court, one wonders if either of the parties in the new and secular republic had any option but to adopt the justificatory routes that they adopted? The Qureshi caste of butchers who brought the case to court had their livelihoods at stake, and therefore it was perhaps only to be expected that threats to livelihood and employment would be at the heart of their case. Of course, pulling together 3000 petitioners into what was effectively a class action suit was no mean feat. Even so, besides noting this remarkable aspect of the litigation, De unfortunately does not discuss how this aspect of the case was made possible, and one hopes that De's historical genius will return to this accomplishment in a future telling of the butchers' story.

Most significantly, for all the valiant efforts of the butchers to secularize the dispute along the constitutional orientation of the new republic, the litigation continued to display continuity with important elements of an earlier political imagination where the parties were understood to be religious communities and also contending poles of a sectarian polity.

The most obvious aspect of this continuity with an earlier, sectarian form of legal reasoning is evident in the grounds on which the Supreme Court sought to defend the reasonableness of the slaughter prohibition legislation on the grounds that the cow was venerated in the Hindu religion. In the words of the Court, '[t]hough a constitutional question cannot be decided on the grounds of the sentiment of a section of the people, it has to be taken into consideration, though only as one of the elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.'<sup>17</sup> Similarly, in considering whether the statutes violated religious freedom, the Court did so by examining whether animal sacrifice was enjoined in Islamic doctrine.<sup>18</sup> In both these instances, even though there was no obvious need to justify state intervention in these sectarian terms, judicial reasoning did precisely that and in doing so, drew on and reinforced the sectarian and religious contours of the earlier colonial regulation of religious identities. Thus, even as regulation of cow slaughter has been framed in terms of the effect of slaughter on India's largely agrarian economy, this form of reasoning is perhaps only a fig leaf, hiding a majoritarian legal imagination which the best efforts of the Qureshis have not been able to displace.<sup>19</sup>

De is acutely aware of these aspects of the *Qureshi* case, but it is not clear what he makes of these continuities from the earlier regime regulating slaughter which continue to run

15. *Mohd Hanif Qureshi* (n 12) paras 57–60; De (n 3) 162–63

16. De (n 3) 166–68

17. *Mohd Hanif Qureshi* (n 12) para 32.

18. *Mohd Hanif Qureshi* (n 12) para 12.

19. This might have been the precursor to the more recent absolute ban on cattle slaughter authorized by the Supreme Court in *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* [2006] AIR (SC) 212.

alongside the new beginnings signalled by the case. This intersection of the older and newer forms of legal imagination is not just a feature of this case, but of the other cases in the other chapters also. As much as De says he would like to dispense with conceptual debates on the old and new conceptualizations of the nature of the Indian political union, it seems that his ‘People’s Constitution’ has been unable to break past these problems.

Pushing through these ambiguities regarding a new constitutionalism created by litigating citizens, De foregrounds the orders and directions granted by courts. That is, De demonstrates court orders that have required governments to establish a semblance of legal process and the rule of law even as they validated executive and legislative demands to push forward a programme for social transformation and the abridgement of the rights of citizens. Judicial construction of individual rights as they brushed against the contours of the Indian administrative state is an aspect of the *Qureshi* case as well as the other chapters. Therefore, in recounting the manner in which courts opened space for the citizens of a newly independent India by emphasizing legal process, this essay will now narrate yet another important aspect of De’s book.

### C. *The Procedural Republic*

In each of the chapters in the book, those who petitioned courts did not secure the substantive rights and remedies that they demanded. Yet, as De demonstrates, it could not straightforwardly be said that these petitioners lost the petitions they brought before the court. This was primarily so because, even as the courts upheld state policy, they also required the state to follow certain forms of legal process while pursuing statutory ends. In turn, this opened limited spaces where citizens could continue to pursue activities that statutory policy had sought to abridge. Thus, returning to the example of the *Qureshi* case, even as the Supreme Court upheld the constitutional validity of the cow slaughter prohibition statutes, it required the state to provide criteria through which it would separate cattle valuable to the agricultural economy and those that were not. This allowed the *Qureshi* butchers to continue the slaughter of designated animals, besides taking advantage of the difficulties that the state faced in clearly designating cattle as no longer useful for the agrarian economy. This procedural approach can also be observed in the other chapters. Thus, in permitting alcohol consumption for medical purposes, the courts loosened the severity of Bombay’s prohibition law.<sup>20</sup> Similarly, in holding that essential legislative powers could not be delegated, the courts reduced executive discretion to act without legislative guidance, and with it the severity of commodity control statutes.<sup>21</sup>

It has been pointed out that this emphasis on procedure is inherent in the design of writ petitions in Indian superior courts, which are not designed to assess the quality of factual evidence which is often at stake in writ petitions.<sup>22</sup> This inability to assess factual evidence has resulted in mechanisms like fact-finding committees, *amicus curiae*,

20. De (n 3) ch 1.

21. De (n 3) ch 2.

22. Suhrith Parthasarathy, ‘ICLP Book Discussion: Rohit De’s “A People’s Constitution” – II: The Search for Truth in the Republic of Writs’ (Indian Constitutional Law and Philosophy, 3 Jan 2019) <<https://doi.org/10.1017/asjcl.2020.19>>



and so on which, as recent scholarship has pointed out,<sup>23</sup> has resulted in a form of whimsical and ad hoc justice. But equally, as De's chapters note, in requiring state adherence to some form of legal process, citizen litigation has in many cases also hollowed out the statutory regimes through which the Indian state sought to push for various projects of social transformation. This is not just an interruption of 'state desire', but it has consequences for citizens as well. Thus, even though the Qureshi butchers might have been able to continue to ply their trade, it was not without the constant threat that state officials could challenge their trade as not falling within the narrow exception for slaughter that the Supreme Court had created. Therefore, even as court decisions opened space for citizens beleaguered by state overreach into their lives, it has perhaps also done so by pushing citizens into the shadow of the law, or into the arms of India's vast informal state where rent-seeking and informal negotiation, rather than fundamental rights, define social, cultural, and especially economic activity.<sup>24</sup> Once again, De is not unaware of this aspect of the 'proceduralisation' of rights, but its implications for Indian constitutional democracy remains underexplored and is a topic ripe for further exploration drawing on De's forays. Thus, having covered some of the important conceptual themes along which De discusses the 'People's Constitution', this essay must now draw to a conclusion.

## V. CONCLUSION

As a clear and compelling account of constitutional practice as it existed in the early Indian republic, *A People's Constitution* is a landmark contribution to scholarship on the history and politics of Indian constitutionalism. Its careful ethnographic and historical accounts of pivotal cases in the early years of the new constitution has set the cornerstone around which future work in the same methodological tradition will be organized. It has also sparked a vibrant conversation on the socio-political implications of the stories it narrates and the issues it flags up. In response, this essay has attempted to initiate a dialogue with the book by foregrounding some limitations in the way in which the idea of the 'people' has been deployed in the book. These comments, of course, take nothing away from the achievements of the book, which counts as an essential addition to any shelf of key works on Indian constitutionalism. In addition, the comments and criticisms made in this essay are only intended to add to the vibrant conversation on Indian constitutional democracy that this book has already generated, and will no doubt continue to generate.

---

[indconlawphil.wordpress.com/2019/01/03/iclp-book-discussion-rohit-des-a-peoples-constitution-ii-the-search-for-truth-in-the-republic-of-writs/](http://indconlawphil.wordpress.com/2019/01/03/iclp-book-discussion-rohit-des-a-peoples-constitution-ii-the-search-for-truth-in-the-republic-of-writs/) accessed 8 Jul 2020.

23. Anuj Bhunia, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2017).
24. Barbara Harriss-White, *India Working: Essays on Society and Economy* (Cambridge University Press 2002); Partha Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* (Orient Blackswan 2013).