

70 Years of the Indian Constitution

Theorizing Indian Democracy*

Abstract

The following essay offers an overview of the different ways in which scholars have approached the theorization of Indian democracy. It then critically assesses the arguments proposed in *Robit De's* "A People's Constitution: The Everyday Life of Law in the Indian Republic". It finds that while *De* fails to make a convincing case that people from the margins of Indian society impacted and shaped constitutionalism in the first decades after India's independence, his book still constitutes an important addition to the canon of writing about Indian democracy.

I. Introduction

Gathered in the newly-built Parliament House, a spaceship-like circular structure in Delhi's warded-off administrative zone, in early December 1946, the framers of India's constitution were faced with disaster. On the first day of the Constituent Assembly's proceedings, the All India Muslim League had opted for a boycott. *Muhammad Ali Jinnah*, its spokesman, now argued strongly in favor of a separate Muslim homeland on *Hindustani* soil.¹ Where India was to be secular, Pakistan was to be Muslim; where India was to derive its sovereignty from the people, Pakistan was to anchor sovereignty squarely in Allah; where India was to strive to keep colonial governance structures alive, Pakistan was to embrace a peculiar futurism untethered to notions of historical continuity.² Despite the League's withdrawal, some framers hoped for reconciliation. "I want Mr. Jinnah and the League Members to be here, and I want them to come here to take part in the framing of the constitution of India", *James Joy Mohan Nichols Roy*, a

* I warmly thank *Armin von Bogdandy*, *Mariam Chauhan*, *Thomas Clausen*, *Malthe Hilal-Harvald*, *Adam Lebovitz*, and *Siraj Khan* for their help.

¹ I partly follow the reconstruction of events by *Maulana Azad*, then president of the Congress Party, which was later fleshed out in more detail by *Ayesha Jalal: M. A. K. Azad, India Wins Freedom: An Autobiographical Narrative*, 1988; *A. Jalal, The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan*, 1999.

² The concrete political demands of *Jinnah* have been laid out in *F. Devji, Muslim Zion: Pakistan as a Political Idea*, 2013.

delegate from Assam, pleaded urgently.³ Others embraced more traditional forms of conflict resolution. “Jinnah goes on throwing the challenge of civil-war”, *Dambad Singh Guran* from the Punjab growled, “I ask the country-men to accept that challenge and let us fight it out”.⁴

Jinnah may have talked of civil war but he was clear-headed in his substantive legal criticism of the Assembly.⁵ For him, the Assembly suffered from a glaring legitimacy deficit. “How is the Constituent Assembly a sovereign body?”, *Jinnah* probed at a League rally in Bombay, when it had been “summoned by the Viceroy” and most of its members were “appointed by the British Government”.⁶ It lacked the legitimizing whiff of universal suffrage. Nor could the Assembly point towards a communal, revolutionary struggle for nationhood from which legitimacy might have instead be derived. To establish rights in a country so deeply fissured across ethnic, linguistic, cultural, and religious lines, *Jinnah* scoffed, more would be required than “[t]he bravado and the childish sentiments of Jawaharlal Nehru”.⁷

This legitimacy conundrum haunted the framers throughout the four-year period of deliberations.⁸ When *Bhimrao Ramji Ambedkar*, the constitution’s chief architect and a member of the lowest caste (*dalit*), reluctantly presented the draft of the constitution in 1948, his deep distrust in Indian society sealed his conviction that a referendum would prove futile.⁹ For him the constitutional project was “only a top-dressing on an Indian soil which is essentially undemocratic”.¹⁰ Yet, *Ambedkar’s* deep mistrust towards an autocratic undercurrent dwelling within Indian society was accompanied with his more hopeful musing that, with a strong constitution in place, India would one day produce a *constitutional morality* standing above mere

³ *J. J. M. Nichols Roy*, Constituent Assembly Debates, 18.12.1946.

⁴ *D. Singh Guran*, Constituent Assembly Debates, 19.12.1946.

⁵ For a change in *Jinnah’s* political thinking from contract to sacrifice: *A. Hussain*, The Shahidganj Mosque and Muslim Nationality in Late Colonial India: From Law to Sacrifice, *Pakistan Journal of Historical Studies* 3 (2018), 80 et seq.

⁶ *A. C. Banerjee/D. Ranjan Bose* (eds.), *The Cabinet Mission in India*, 1946, 36.

⁷ *A. C. Banerjee/D. Ranjan Bose* (note 6).

⁸ See only *R. Bajpai*, *Debating Difference: Group Rights and Liberal Democracy in India*, 2011, Ch. 2.

⁹ On *Ambedkar’s* political and legal thought more generally see: *M. C. Nussbaum*, *Ambedkar’s Constitution: Promoting Inclusion, Opposing Majority Tyranny*, in: *T. Ginsburg/A. Huq* (eds.), *Assessing Constitutional Performance*, 2016, 295 et seq.; *S. Kapila*, *Ambedkar’s Agonism: Sovereign Violence and Pakistan as Peace*, *Comparative Studies of South Asia, Africa and the Middle East* 39 (2019), 184 et seq.

¹⁰ *B. R. Ambedkar*, Constituent Assembly Debates, 4.11.1948.

casteism; a morality that would wash away its dated social structures and perhaps even end caste discrimination.¹¹

Anti-colonial nationalism had produced strange bedfellows in the Indian Assembly. Sundry liberals were seated next to spiritual Gandhi-ites, chauvinistic Hindu nationalists, and the occasional communist. With the British gone and the country violently partitioned, these ideological discrepancies became accentuated. So why did the constitution proceed to ratification despite the Assembly being composed of dissenting ideological factions? This was due in part to *Ambedkar's* negotiating talent.¹² It may also have had to do with what *Tarunabh Khaitan* calls “calibrated accommodation”, where statements about individual and group entitlements are enshrined in the constitution’s preamble, albeit as non-enforceable rights.¹³ This allowed ideologically dissenting groups to continue dreaming that the ratified constitution would eventually turn into the cornerstone of their vision of how society should be structured and governed.¹⁴

Conflicting ideas about what a “good life” constitutes also fueled a “transformative constitutionalism”, a trendy way of saying that the constitution’s meaning is not set in stone but open to gradual change over time.¹⁵ Fresh views on key issues that plague Indian society are timely, *Khaitan* in-

¹¹ Until this utopia materialized, *Ambedkar* was content with driving Indian Muslims from the new Republic. The argument that should convince all Indians of Pakistan’s viability, *Ambedkar* maintained, was that Muslims could not be trusted to side with their homeland in the case of a Muslim invasion: Indians “must take note of the fact that the Muslims look upon the Hindus as *kafir* (unbelievers), who deserve more to be exterminated than protected. For *Ambedkar*, Muslim loyalty towards Delhi was artificial, and their true allegiance would be with Mecca. To *Ambedkar's* credit, what may have pushed him to this undeniably grim conclusion may have been his conviction that upper caste Hindus would only devote serious attention to the untouchables plight once the Muslim question been solved; and regardless of where one stands on the issue of *batwara* (partition), Pakistan has to be seen as one viable path to protect minority rights. See: *B. R. Ambedkar*, *Thoughts on Pakistan*, 1941, 91.

¹² *C. Jaffrelot*, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste*, 2005, 106 et seq.

¹³ *T. Khaitan*, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, I.CON 16 (2018), 389 et seq.; On the role of preambles in constitutions more broadly see *L. Orgad*, *The Preamble in Constitutional Interpretation*, I.CON 8 (2010), 714 et seq.

¹⁴ In India this technique of accommodating ideological dissent (without altering the political meta structure) has a longer pre-colonial history: *T. Singh*, *Imperial Sovereignty and Local Politics: The Bhadauria Rajputs and the Transition from Mughal to British India, 1600-1900*, 2019, 1 et seq.

¹⁵ The Chief Justice of the Republic of South Africa, *Pius Langa*, is commonly credited for coining the term “transformative constitutionalism”. As he elaborated during a lecture at the University of Stellenbosch, this intervention-happy form of constitutionalism entails a strong drive of the Courts to establish a “truly equal society” by ensuring “the provision for socio-economic rights”. *P. Langa*, *Transformative Constitutionalism*, Stellenbosch L. Rev. 17 (2006), 353.

sinuates, since in the early days, a number of delegates confused the Assembly with a gentlemen's club: women's rights? "We really need protection against women because in every sphere of life they are now trying to elbow us out";¹⁶ Muslims asking for reserved seats in parliament? "[F]orget the past: try to forget it. If it is impossible, then the best place [for you] is [Pakistan] where your thoughts and ideas suit you."¹⁷; universal suffrage? "If a person is illiterate, he should not be granted the right to vote".¹⁸

Others were against the very idea of parliamentary democracy; still others against a written constitution. "My voice almost appears as a voice in the wilderness", the communist *K. T. Shah* mourned after the circulation of the first draft of the constitution, "but [...] [parliamentary democracy] is not a very healthy example that we are copying". The reason parliamentary democracy had worked in Britain, *Shah* was quick to educate his colleagues, was a spirit of "evolving constitutional conventions, supported by centuries of usage".¹⁹ A different genius reigned in India. Here, *Shah* predicted, party politics would sooner or later infiltrate and corrupt the Supreme Court and with it, the entire constitution. *Gandhi* did not expect much from a document drafted in English either.²⁰ For *Gandhi*, it was a "matter of sorrow that while we have freed ourselves of English rule, we have not been able to free ourselves of the impact of English culture or language".²¹ The document written in the language of the colonizer concerned itself "with the world outside of India", *Gandhi* sighed, but it had little to do with the people living within it.²²

In spite of, or perhaps because of its colonial origin, India's constitution looked like a civilizational achievement to liberal internationalists.²³ A few days after the constitution was enacted in January 1950, *S. Ram Sharma*, an Indian journalist, stoked liberal hopes in Foreign Affairs by gleefully predicting that the world would now witness India "espousing international causes in her own right"; an India "fighting battles for humanity and peace

¹⁶ *R. K. Chaudhury*, Constituent Assembly Debates, 22.11.1949.

¹⁷ *V. Patel*, Constituent Assembly Debates, 26.5.1949.

¹⁸ *D. Bhargava*, Constituent Assembly Debates, 4.1.1949.

¹⁹ *K. T. Shah*, Constituent Assembly Debates, 10.12.1948.

²⁰ On *Gandhi's* political thought see only: *U. Singh Mehta*, *Gandhi on Democracy, Politics, and the Ethics of Everyday Life*, *Modern Intellectual History* 7 (2010), 355 et seq.; *F. Devji*, *The Impossible Indian: Gandhi and the Temptation of Violence*, 2015.

²¹ *Gandhi* at Constructive Works Committee meeting on 11.12.1947, reprinted in *Gandhi Collected Works*, Vol. 90, 1984, 256.

²² *Gandhi* (note 21).

²³ On the fragmented history of liberal internationalism, see *B. Jahn*, *Liberal Internationalism: Theory, History, Practice*, 2013, 1 et seq.

after her own fashion”.²⁴ Under *Nehru’s* leadership bloody battles were indeed fought, but not to establish humanity and peace in foreign countries as liberals craved. They were fought over territorial sovereignty.²⁵ Immediately after its inception, India’s dream of a model constitutional democracy came into sharp conflict with realities on the ground. Maoist insurgents were driven into the jungle or shoved into jails. Secessionist movements were brutally mowed down in Kashmir, Manipur, and Hyderabad.²⁶

This excessive use of state force was made possible through the retention of most colonial tropes of governance in the newly formed Indian Republic.²⁷ Emergency power provisions that the colonial state had enshrined in the Government of India Act of 1935 found their way unaltered into India’s new constitution. *Anil Kalhan* has therefore argued that the formalization of the constitution did little to restrain the state. For *Kalhan*, the reason anti-democratic tendencies continued to flourish in Indian institutions (and laws) was due to the “colonial legacy’s persistence”.²⁸ *Kalhan’s* view gels well with the self-understanding of the Supreme Court at the time. Just a few days before the constitution came into force, India’s first Chief Justice, *Harilal Jekisundas Kania*, cautioned the members of the Assembly to make use of their legislative power with restraint: “[t]he British have given us a fine system of judiciary on a platter. [...] You may alter it somewhat, without destroying the structure as a whole.”²⁹

Where *Kalhan* sees continuity, others see rupture. Clear-eyed that India lacked any meaningful social and political upheavals that could be conveniently captured in a new constitutional order, the political theorist *Uday Singh Mehta* has imaginatively flipped this weakness into strength. *Mehta* argues that it is the “constitutional moment [itself] that is revolutionary and rupturing”.³⁰ In *Mehta’s* telling, what made this moment revolutionary was the agenda of the constitution itself. India’s constitutional framers aspired towards “undoing the stigmas of casteism, improving public health and ed-

²⁴ *S. Ram Sharma*, India’s Democratic Constitution, *Foreign Aff.* 28 (1950), 499.

²⁵ On *Nehru’s* political thought, particularly as it relates to violence and transformation: *S. Purusbotam*, World History in the Atomic Age: Past, Present, and Future in the Political Thought of Jawaharlal Nehru, *Modern Intellectual History* 14 (2017), 837 et seq.

²⁶ *P. Anderson*, *Indian Ideology*, 2013, Ch. 3.

²⁷ *A. Jalal*, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective*, 1995, 13 et seq.

²⁸ *A. Kalhan*, Constitution and “Extraconstitution”: Colonial Emergency Regimes in Postcolonial India and Pakistan, in: V. V. Ramraj/A. K. Thiruvengadam (eds.), *Emergency Powers in South Asia: Exploring the Limits of Legality*, 2010, 92.

²⁹ *P. Jaganmohan Reddy*, *The Judiciary I Served*, 1999, 42.

³⁰ *U. Singh Mehta*, Constitutionalism, in: N. Gopal Jayal/P. Bhanu Mehta (eds.), *The Oxford Companion to Politics in India*, 2010, 22.

ucation, building large industry, facilitating communication, fostering national unity, and, most broadly, creating conditions for the exercising of freedom” and in so doing broke off their colonial ties.³¹ In similar spirit, though not strongly wedded to the idea of a clear break with the past, *Amartya Sen* also assesses India’s democracy as an overall “success”.³² For *Sen*, India’s ancient culture of debating in public – Indians are argumentative, he says – made it easy to embrace democratic governance.

There is, however, a third way of writing the history of Indian democracy. Beginning in the early ’80s, a movement that went by the name “Subaltern Studies Collective” challenged both the celebratory mythmaking of liberals and the rigid Marxism of communist historians by placing the spotlight squarely on people at the margins of society. *Ranjit Guha*, one of the founders of the collective, outlined that theirs was a project to explore the lives of people who had found no place in India’s “civil society”. More still, the lives of these *subalterns* were systematically erased in historiographical accounts. Even works ostensibly benign to people on the margins, like *Eric Hobsbawm’s* *Primitive Rebels*, the accusations of the movement went, had ultimately denied them political maturity.

Hobsbawm had slotted bandits into a pre-political sphere; he described them as lacking political maturity and therefore as being wholly inapt to perform any meaningful revolutionary action.³³ For scholars of the subaltern collective Indians were not stuck in a pre-political cage. They argued that the revolutionary consciousness of bandits was very much alive, even before they came in contact with colonial modernity. More still, it was not just the authoritarian structures of colonialism that offered the breeding ground to kindle the revolutionary consciousness in ordinary Indians, democracy too had largely separated the elite from the masses in most spheres of life. This meant that those excluded from Indian democracy had yet to *consent* to their subjugation. In more technical language, India’s democratic elite, just like the colonial state, had failed to produce *hegemony* in a Gramscian sense;³⁴ the dominance exerted by the Indian republic remained deeply authoritarian in nature.

Guha, for one, blamed the Indian bourgeoisie for failing “to speak for the nation” and distributing the bounties of democracy evenly amongst India’s citizens. The lives of those excluded from capital (in all its different guises),

³¹ *U. Singh Mehta* (note 30), 20.

³² *A. Sen*, *Argumentative Indian*, 2005, 194.

³³ *E. Hobsbawm*, *Primitive Rebels: Studies in Archaic Forms of Social Movement in the 19th Century*, 1959, 2.

³⁴ On the concept of *hegemony*, see only *J. V. Femia*, *Gramsci’s Political Thought: Hegemony, Consciousness, and the Revolutionary Process*, 1987, 23 et seq.

his main argument goes, were still running “parallel to the domain of elite politics”.³⁵ Concurring with this view, *Partha Chatterjee*, also of the subaltern massive, summarized the entire postcolonial experiment in the following gloomy way: “India lacked foundation in popular consent”. Thus, it was only a question of time for observers to witness that “the facade of electoral democracy would be thrown aside once more should it become inconvenient again for the rulers”.³⁶

II. Making India Democratic

At first blush, *Robit De's* “A People’s Constitution: The Everyday Life of Law in the Indian Republic”, sits comfortably with the subaltern subsection of scholarship on Indian democracy. This is not surprising. *De's* book project grew out of a dissertation that he wrote under *Gyan Prakash* of Princeton’s History Department, an early member of the subaltern studies collective. Similar to traditional subaltern studies scholarly endeavors, *De* sources the subjects of his narrative from the margins of society. He also embraces the subaltern position that India’s ruling class largely failed to make governance more hospitable to disadvantaged people. And, like his subaltern studies predecessors, *De* too is driven by the want to knight ordinary people with political maturity and frame them as important historical actors in their own right. But *De* pushes the subaltern movement’s argument to its logical conclusion: where subaltern scholars had stoically maintained that Indians possessed a revolutionary consciousness without any meaningful contact with colonial modernity, *De* suggests that Indians may well possess democratic maturity without any meaningful pedagogic contact with democracy.

This is a big claim. To substantiate it, *De* rightly departs from the subaltern movement’s pessimistic reading that Indian democracy had failed to establish hegemony and was ruling over its subjects through dominance alone, perpetually failing, as it were, to draw consent from society’s bottom strata. Against this reading *De* posits the equalizing forces of the *bazaar*. The economy, he writes, opened up a space for a fruitful conversation between the rulers and the ruled. As the markets were under heavy state regulation, this conversation often took place in the language of administrative law and, at times, crystallized in Supreme Court litigation. This led courts to emerge as the key arbiters for resolving conflicts between citizens and the

³⁵ *R. Guha*, On Some Aspects of the Historiography of Colonial India, in: *R. Guha* (ed.), *Subaltern Studies I*, 1982, 4.

³⁶ *P. Chatterjee*, After Subaltern Studies, *Economic and Political Weekly* 47 (2012), 45.

state: they provided the arena where, in *De*'s evocative words, "class struggles [could] increasingly morph into class action cases".³⁷

Zooming in on four Supreme Court cases from the *Nehruvian* period, *De*'s self-declared aim is to unravel "constitutional consciousness as it exists in people's minds".³⁸ To achieve this goal, he selectively looks at how Indian Zoroastrians fought back against the Prohibition laws in Bombay (*Behram Pesikaka v. State of Bombay*, 1954); how Marwaris, a trading caste from Rajasthan, challenged the Essential Suppliers Act, which had barred them from moving commodities without a proper license (*Hari Shankar Bagla v. State of Madhya Pradesh*, 1954); how Muslim butchers from Bihar questioned the validity of the cow slaughter prohibitions (*Mohammad Hanif Qureshi v. State of Bihar*, 1958); and finally, how a prostitute sought redemption to continue practicing her trade without harassment from the state (*State of Uttar Pradesh v. Kaushaliya*, 1963). Since all cases were largely decided in favor of the state, scholars had tended to overlook their real significance: ordinary citizens from the margins of society were taking the state to court for violating their economic rights. For *De*, this in itself shows that the constitution's promise for economic equality had spread far and wide in the minds of ordinary Indians.³⁹

As one of the first scholars, *De* labored through bundles of case files stocked in the cellars of the Supreme Court. With a learned eye, he looked closely at the submitted writ petitions that have so far evaded scholarly scrutiny. Like the best revisionist narratives, *De* carries these archival finds lightly and offers the reader a very rich and readable tapestry of the four cases. Employing these stories as his narrative background, *De* convincingly shows that the Nehruvian state's restrictive economic policies triggered waves of litigation, not just from rich traders, as common wisdom would suggest, but from sections of Indian society that were struggling to negotiate the changing political landscape. Their engagements in legislation at the Supreme Court proves, *De* concludes, that India's constitution was made up just as much through contestations from the ground as it was from discourses taking place at higher levels of state governance.

In contrast to colonial India, where *De* views that legal conflicts were resolved primarily through a mix of muscling street action and backroom politics, a different spectacle played out in postcolonial India with the enactment of the constitution. "[T]housands of citizens began invoking the Con-

³⁷ *R. De*, *A People's Constitution: The Everyday Life of Law in the Indian Republic*, 2018, 3.

³⁸ *R. De* (note 37), 10.

³⁹ *R. De* (note 37), 21 et seq.

stitution when challenging state action”, *De* finds.⁴⁰ But why did a marginal subset of the population come to seek the protective shield of the courts (or the constitution) against the state? *De* answers this question counterintuitively by a recourse to their marginality. He argues that they put their trust in the law precisely because they lacked any political patronage. Since ordinary people lacked the resources to lobby politicians to intervene on their behalf – a practice still widespread in developing countries today – the laws emerged as a remedy of last resort. *De* shows that more people than conventionally thought were making use of legal instruments to challenge administrative action, which may be connected to their understanding of having become stakeholders in the democratic project. In highlighting how the Court admitted and adjudicated their cases, *De* unsettles the standard view that India’s Supreme Court only began to embrace the proletariat with the emergence of Public Interest Litigation, a way for Non-Governmental Organizations (NGOs) and private individuals to file claims on behalf of disadvantaged people, in the ’80s.

Rohit De’s telling of the economic and constitutional entanglement also provides a plausible answer to the legitimacy question that has long haunted India’s constitution. Even after the constitution was finalized by the Assembly, it had not been put to a popular vote. *De* suggests that while ordinary people were barred from voicing their consent through proper representation, let alone through a referendum, they may have signaled it by turning into litigious citizens – by using the constitution to restrain the state from clawing into the market.

In chapter three, perhaps his most ambitious chapter, *De* reconstructs the wider background and implications of India’s first class-action suit: three thousand Muslim butchers from Bihar, who challenged their state’s strict prohibition of cow slaughter and the consumption of beef in the late ’50s. Bihar, along with a number of other north Indian states, had built their cow slaughter ban on a provision in the Directive Principles. Article 48 of the Constitution’s non-enforceable preamble nudged federal states to take steps for “prohibiting the slaughter, of cows and calves”, a concession framed on economic grounds but one which looked back to a highly charged communal history of Hindu-Muslim disputes over conflicting religious practices.

In line with majority political sentiments, the Court upheld the largest chunk of the cow slaughter laws, reasoning that in postcolonial India the issue of cow slaughter was now linked to national economy concerns and not, as it had been during colonialism, in the balancing of religious rights, with Hindus upholding that it was their religious obligation to protect the

⁴⁰ *R. De* (note 37), 4.

cow and Muslims arguing that it was theirs to slaughter them. Yet the Court struck down some aspects of the law. Slaughtering unproductive cows and aged bulls could not be outlawed by the states, the Court ruled. To most observers the Court's decision looked like a victory for Hindu majoritarianism, which had successfully taken on, they quibbled, the garb of secular constitutionalism to further a populist agenda. It did not help that all justices were upper-caste Hindu men.

Rohit De disagrees with the reading that the Court's intervention was only cosmetic. By snubbing an outright ban of cow slaughter and permitting Muslims to butcher cows that were of old age and therefore less economically useful, the Court had, in fact, forced cow-protectionists to "perform rhetorical cartwheels to continually show why the cow was economically important".⁴¹ Even in cases where the cow slaughter laws were violated, *De* opines, "the courts were prepared to give moderate sentences".⁴²

De's argument that marginality leads to rights-consciousness perhaps works best in his fourth chapter, "The Case of the Honest Prostitute". Since the sex trade was seen as operating at the fringes of legality, prostitutes came into frequent contact with law enforcement agencies. In the process, they developed more rights-awareness than, say, the chaste rule-abiding middle-classes. With such street smarts in tow, *Husna Bai*, a Muslim prostitute from Lucknow, challenged the new regulations that came into law through the Suppression of Immoral Traffic in Women and Girls Act (SITA) in 1956. Her grievances against this piece of legislation were rejected by the Court, which found that her constitutional right to trade or a profession, or even to freedom of movement around the country had not been violated in the enactment of SITA. The merits of the case should, however, according to *De*, not be limited to the concrete outcome alone; rather one should focus on how the adjudication and media coverage of *Husna Bai's* case threw "politicians, bureaucrats, and middle-class women's activists" into "deep anxieties".⁴³ The case too goes a long way to prove, in *De's* view, that the constitution emerged as a lingering "background threat for the state", and that the origins of constitutional consciousness amongst marginal citizens became visible in their litigious performance.⁴⁴ Prostitutes used the language of constitutional law to talk back to moral-interventionist efforts by elite women.

In chapter one, *Rohit De* explores Bombay's inability to find a graceful stance after translating Article 47 of the Directive Principles into draconic

⁴¹ *R. De* (note 37), 167.

⁴² *R. De* (note 37).

⁴³ *R. De* (note 37), 10.

⁴⁴ *R. De* (note 37), 20.

Prohibition laws. While Article 47 encouraged the states to “bring about a prohibition of intoxicating drinks and drugs which are injurious to health”, there was a widespread flaunting of this legislation, especially from the lower classes.⁴⁵ Two resolutely middle-class Parsis – one journalist, and one high level government employee – questioned the invasive powers of the state to impede their consumption habits. The Court did not sack the state laws. Yet they made it a lot more difficult for the police to snoop around and introduce incriminating evidence of liquor consumption in court. In chapter two, *De* outlines the trials and tribulations of Marwari traders that faced a serious blow to their business because of regulations restricting them to transport (and sell) garments beyond state lines without a special license. This law too was upheld but, as *De* points out, the greater development pointed in a clear direction: in each instance, the Court made it a little bit more difficult for the state to intervene into the lives of its citizens.

The impact of *De*'s book stretches well beyond Indian constitutional history. Other nation states and international organizations, after all, have had a bumpy relationship with legitimacy too. The European Union, for example, is yet to ratify its constitution through popular vote. Still we find people from all sections of society fighting cases in large number in front of the European Court of Justice, demanding all sorts of rights, from equity at the workplace to economic freedom in conducting trade. Looking at the ways in which citizens engage with these constitutions may give us a different paradigm to assess what constitutes a legitimate structure of governance.

III. Lingering Questions

Subaltern history writing has long been haunted by the criticism that their subject of analysis could always be replaced by another, more marginal set of actors. *De* circumvents such infinite regress quarrels by anchoring his protagonists within the history of Supreme Court litigation: as there is only a fixed amount of cases that were brought in front of the bench, his subjects probably withstand easy replacement. But did the subjects *De* has chosen for his study really constitute the margins of society? Here *De* struggles to find a clear answer. Though he emphasizes that his litigants “were marginalized both socially and economically”, his Marwari traders, Zoroastrians, and to some extent even the prostitute, were – strictly economically speaking – resolutely middle class.⁴⁶ His argument that they were socially ostracized, in that they were written out of the moral language of nationalism is

⁴⁵ *R. De* (note 37), 40.

⁴⁶ *R. De* (note 37), 27.

correct. Zoroastrians, Marwaris, and Muslims engaged in trade or consumption practices that the majority community considered morally corrupting to the idea of a “good” citizenry.

Yet, moral stigmatization in itself is not a useful category for determining marginality in liberal democratic systems. Entire communities can be written out of the moral story of the nation and yet continue to operate as central actors in the governance and economic sectors. Far from pressing them to the margins, liberal democracy can elevate minorities to take on roles quite disproportionate to their numerical strength. *John Stuart Mill* famously argued that what makes a democracy liberal, is the idea that the majority can be restrained through laws and institutions to prevent the “tyranny of the majority”.⁴⁷ Critics of liberal constitutionalism have pointed out that minority groups with strong ethical convictions, at times, face little resistance when outflanking the moral sentiments of the majority.⁴⁸ Thus moral stigmatization by the majority does not make *De*’s subjects marginal by default. What seems to have rendered them marginal, however, is the story *De* outlines wonderfully in his book: their desperate recourse to litigation and their collective failure to win cases at the Supreme Court – despite possessing strong constitutional provisions in their favor.

To outline the ways in which litigious (marginal) citizens object to administrative acts that violate their economic rights, may also be an inaccurate indicator for measuring the spread of democratic principles. The act of challenging economically burdening administrative measures engages with a more predictable normative side of the state; it converses with positive laws that the state has decided to uphold. Yet, this relative stability in the economic sphere tells us little about the prerogative side of the state, where decisions are made on the basis of political utility and are much less predictable.⁴⁹ It is easily conceivable to imagine a state operating under a decorative democratic shell, where citizens from the margins of society are free to challenge invasive administrative acts that intervene in the market, while at the same time having their other fundamental rights eroded. In such a “dual state”, to use a concept developed by the German jurist *Ernst Fraenkel*, the bureaucracy and judiciary can continue to operate according to positive rules under authoritarian regimes even when these regimes systematically violate other civil liberties.

⁴⁷ *J. Stuart Mill*, *On Liberty*, 1880, 3.

⁴⁸ See only *E. Posner/A. Vermeule*, *Tyrannophobia*, in: T. Ginsburg (ed.), *Comparative Constitutional Design*, 2012, 317 et seq.

⁴⁹ *E. Fraenkel*, *The Dual State: A Contribution to the Theory of Dictatorship*, 1941.

Keeping *Ernst Fraenkel's* case study of Nazi Germany in mind, one would be hard-pressed to extend *Rohit De's* argument – that the engagement of marginal citizens with administrative and constitutional law puts them at the center of producing constitutionalism – to Jewish inmates in German concentration camps. That a handful of German Jews successfully challenged their tax returns in German courts, hardly means that they had a strong sense of trust in the constitution, or, say, that by taking the state to court they were consenting to *Hitler's* authoritarian rule.

What further diminishes much of the force of *De's* argument is that he almost entirely relies on documents written in English, a language that few of his historical subjects speak. *De* seems to have confused the intentions, motives, and strategies of his litigants with the opinion held and put into writing by their lawyers. His study would have done well to explain how butchers, who, in *De's* own telling, were “socially and educationally ‘backward’” effortlessly argued in court that “total prohibition on their trades was not a reasonable restriction in the interest of the general public as contemplated under the Constitution.”⁵⁰ Or how an illiterate sex worker boldly “demanded that the new law, enacted to meet the constitutional promise to ban trafficking in human beings, be declared ultra vires because it violated her fundamental right to practice her profession as a prostitute, which was guaranteed to her under Article 19 of the Constitution”.⁵¹ It is sensible to presume that all human beings possess reason, yet quite bizarre to follow the assumption that they possess the ability to speak like seasoned lawyers with years of experience in Supreme Court litigation.

While it is casual custom for judges to unproblematically ascribe a legal petition drafted by a lawyer to the party they represent, an academic study that explicitly embarks to uncover the rights-consciousness of marginal segments of society cannot conveniently muddle the two. What *Rohit De's* study lacks, in short, is an illumination of the interactions that took place between his marginal subjects and their lawyers. This would have also allowed him to take a critical look at the ways in which lawyers transformed, structured, and, most importantly, *translated* the administrative anguish of their clients – most likely expressed in the vernacular – into the language of constitutional law.

⁵⁰ *R. De* (note 37), 149.

⁵¹ *R. De* (note 37), 169.

IV. Conclusion

The idea that rights bearing-individuals could file legal claims against the state has a longer history than Indian democracy; it has to be traced at least to the late eighteenth and early nineteenth century, when Indian liberals wrestled with concepts of individuality, rights, freedom, and justice. Rights consciousness amongst Indians – with individuals as bearers of rights – can be traced through *Dadabhai Naoroji* and *Bankim Chandra Chatterjee* to *Syed Ahmed Khan* and *Ram Mohan Roy*.⁵² If we put *De*'s book in the context of this wider history of rights in India, it would read less like a story of democratic triumphalism. After all, under colonial rule ordinary people engaged with the constitution as well: publishers challenged censorship, prisoners railed against inhuman treatment, and small landowners questioned the colonial state's right to take away the little possessions they had.⁵³

The four cases *De* brings into conversation with the Indian constitution of 1950, may well be connected to the British Raj's Constitution of 1935, or for that matter even the Government of India Act of 1858, which first rolled up the operations of the East India Company and placed India directly under the sovereignty of the crown.⁵⁴ This would also make the articulation of rights claims immediately after independence a lot more plausible, as the constitution's promise would not spring out of an empty space but would draw its strength from a legal history that had developed over at least a century.

Yet the argument that the discourse on individual rights and notions of citizenship and belonging has to be traced back to colonialism (and legal tradition more widely) is under siege. In "The Transformative Constitution: A Radical Biography in Nine Acts", *Gautam Bhatia* claims that a clear conceptual break happened at the precise moment when the Constituent Assembly rejected that it owed its legal existence to the colonial state and mustered courage to "declare itself sovereign".⁵⁵ *Jinnah*'s mockery that the As-

⁵² C. A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire*, 2012.

⁵³ See only *N. G. Barrier*, *Banned: Controversial Literature and Political Control in British India, 1907-1947*, 1958; *C. C. MacRae*, *Report of the Proceedings in the Case of Ameer Khan and Hashmadad Khan*, 1870; *S. Haroon*, *Custodianship of Shahidganj in Colonial Lahore: Land, Land Use and the Formation of Religious Community, 1850-1936*, *The Indian Economic & Social History Review* 54 (2017), 183 et seq.; *M. Sharafi*, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947*, 2014.

⁵⁴ *A. Chandra Patra*, *Landmarks in the Constitutional History of India*, *J. Indian L. Inst.* 5 (1963), 81 et seq.

⁵⁵ *G. Bhatia*, *The Transformative Constitution: A Radical Biography in Nine Acts*, 2019, 3.

sembly lacked the legitimacy to declare itself sovereign is not treated seriously in *Bhatia's* narrative. Rather, *Bhatia* declares that the transformative constitution produces the preconditions to shape public will, while at the same time emerging from said public will. One is reminded of *Baron von Münchhausen's* boastful anecdote that he had saved himself from drowning by pulling on his own hair.

Perhaps uplifting narratives about India's constitutional history are in high demand at a time when the Supreme Court is under the suspicion of having systematically favored the haves over the have-nots. Corruption scandals, allegations of sexual misconduct, and tempering of cases under political pressure have tarnished the reputation of the bench. Roughly 70 years after the constitution was enacted, India's parliament has also started to look a lot like what *Muhammad Ali Jinnah* prophesized. Rampant majoritarianism, the open embrace of *Hindutva* ideology, and the establishment of new oligarchs have aligned India with the global turn towards populism. Therefore the key concern today is not so much if the Court has a history of safeguarding the rights of the poor and marginalized – but if the bench considers this its constitutional duty today and in the future.

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