

CONSTITUTING A PEOPLE: THE CHALLENGE OF THE INDIAN FOUNDING

INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY. By Madhav Khosla.* Cambridge, Mass.: Harvard University Press. 2020. Pp. 240. \$45.00 (Hardcover).

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A mark of a very good book is that it makes the reader think, think differently, and reflect on the application of the insights that it offers in other, broadly comparable, contexts. *India's Founding Moment*, by Madhav Khosla, had this effect on me. I recommend it to anyone with an interest in India, in the challenges that democracies face, in global constitution-making, or in all three.

In *India's Founding Moment*, Khosla explores the challenges that India faced in 1946–1949 in framing a constitution for a people emerging from colonization who were “poor and illiterate; divided by caste, religion, and language; and burdened by centuries of tradition” (p. 6). Khosla gives his account both meaning and depth by focusing on three characteristics of the constitution as it emerged in 1949, in three tightly argued, substantive chapters. These chapters deal, respectively, with the codification of the Indian Constitution, with particular reference to its length, the directive principles and express limitations on rights; with the considerable centralization of power at the level of the state; and with the conceptualization of representation, in the face of problems stemming from sectarianism and communalism. In each case, Khosla examines the explanation of the phenomenon that is standard in the constitutional literature;

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traces relevant strands of the debate in India as the prospect of self-government emerged; and suggests a new perspective that demonstrates how the choices that Indian leaders made contributed to the creation of a “democratic citizen[]” (p. 3).

At one level, the book has value as a fascinating window into the framing of the Indian Constitution. This is not Khosla’s declared intention, however, and the account of the framing does not seek to be comprehensive. Nevertheless, the meticulous research for the three core chapters of the book, themselves dedicated to some of the most difficult questions for the underpinnings of the new constitution, throw light on important aspects of that historical point in time. These include the constitution of the Constituent Assembly; the greater freedom of action that the Assembly, ironically, derived from partition; the manner in which the Assembly went about its task, including as an interim legislature; and the nature and extent of Indian engagement with international constitutional experience.

Importantly also, in this regard, the book engages with the ideas of the Indian leadership throughout the first part of the twentieth century as they evolved and as they interacted with each other. In this way the book is, as Khosla claims, a history of ideas (pp. 24–25). It brings to life the thoughts of members of successive generations of Indian leaders in a way that is not often achieved in drier and less focused accounts. The extraordinary contributions of Nehru, Gandhi, and Ambedkar inevitably are central to the story that Khosla tells. In addition, however, a range of other Indian political leaders and scholars also become familiar through the pages of *India’s Founding Moment*: Ayyah, Khan, Mukerjee, Patel, Rai, Shah, and Visvesvaraya, to name only some of those with whose ideas the book engages.

The principal aim of the book is to present India as a case study in the challenge of making a new constitution for a people unprepared for democratic government. The Indian Constitution-making moment was preceded by centuries of imperial control, in one form or another,² during which government was top-down and exploitative, and religious and caste identities were consolidated and entrenched. Indians had no experience of

2. From the mid-eighteenth century, if the long period of control of the East India Company is taken into account. See WILLIAM DALRYMPLE, *THE ANARCHY: THE RELENTLESS RISE OF THE EAST INDIA COMPANY* (2019).

effective democratic institutions and no understanding of choosing representatives and holding them to account. This, Khosla argues, distinguishes the Indian case from other constitution-making ventures in Europe, North America, and Australia, where there was some familiarity with at least proto-democratic forms, and the primary challenge was to reach sufficient consensus on the design of institutions and levels of government and on the distribution of authority between them.

In India, by contrast, the challenge was to constitute the people, not only in the sense of the formal role played by any inaugural constitution but practically, through the design of democratic arrangements that would both instruct and develop the people as citizens. Hence the themes around which the book is structured. Codification would provide a common conceptual framework of a democratic constitutional kind; centralization would facilitate political, social and economic change in ways that the entrenched practices at more local levels would resist; and representation would develop a new individual identity, of Indian citizen, breaking down the social barriers that divided Indians from each other as the foundation for a new relationship between them.

Khosla's account of these otherwise disparate themes of the Indian founding offers a cohesive conceptual explanation, fits the empirical record and responds to realities on the ground. It makes a thoughtful contribution to the burgeoning literature on the making of the Indian Constitution, with which others in the field will need to contend. By extension, it also makes a contribution to the wider literature on democratic constitution-making around the world, in at least two ways.³ First, it is a reminder that there is more to constitution-making than putting a constitution in place and that the attitudes and capacities of the people a democratic constitution is designed to serve and on whom its effectiveness ultimately depends are critical. The focus on popular participation in contemporary constitution-making practice gestures towards the relevance of the people, but typically is too amorphous to play a substantive constitutive role.⁴ Secondly, the argument in the

3. For a recent addition to this voluminous literature, which takes into account the global range of experiences, see *COMPARATIVE CONSTITUTION MAKING* (David Landau & Hanna Lerner eds., 2019).

4. See Abrak Saati, *Participation—To Unveil a Myth*, in *PUBLIC PARTICIPATION IN AFRICAN CONSTITUTIONALISM* 13 (Tania Abbiate, Markus Böckenförde & Veronica

book points to the reality that constitutions in many states other than India are made for a people or peoples who have little or no familiarity with the norms and practices that a democratic constitution involves, and no civic relationship with each other or, for that matter, with the overarching state.⁵ In many places, as in India, they also are burdened with security, economic, and social concerns that dominate life and inhibit the development of any substantial form of democratic citizenship.

Khosla suggests that the Indian constitution-making experience is more relevant to these states than the North American or European cases that so often are taken as prototypes (p. 6). He is right, insofar as the Indian example draws attention to the challenges of a sudden shift to democratization, identifies ways in which those challenges were tackled during the Indian founding, and shows how they were tailored to Indian conditions. In doing so, the Indian example also draws attention to the advantages of genuinely local ownership and leadership, which characterized the Indian process, but which often is compromised today by the extent of international assistance and intervention.⁶

The particular solutions to which India turned, on Khosla's analysis, are not necessarily suitable to frame transitions elsewhere, however, although they may deserve consideration. Other states have different traditions, historical legacies and socio-economic conditions with which to contend in building a new democratic constitutional order. To take one obvious point of potentially relevant difference: much constitution-making now takes place in states emerging from conflict, from long periods of authoritarian or military rule, or both, rather than in the immediate context of decolonization, as in India. In some respects, also, the strategies that Khosla attributes to the Indian framers have been overtaken by developments in constitutional design. It is now *de rigueur*, for example, to express limitations on rights in a new constitution, although typically, now, through a general limitations clause in a form that calls for proportionality

Federico eds., 2018).

5. Examples might be drawn from many regions of the world including Asia, Africa, and the Pacific.

6. The relevance of national ownership and leadership is noted in, for example, the United Nations Rules of Law: U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes* 4 (April 2009), <https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-united-nations-assistance-to-constitution-making-processes/>.

analysis. Constitution-makers in the early twenty-first century are much more likely not only to consider and include selected socio-economic rights, but also to accept their use in judicial review. A significant measure of centralization and the development of citizenship as primary identity also have been familiar assumptions in constitutional design for much of the latter twentieth century, although their dominance is by no means as secure as it once was.

Khosla's inquiry is confined to the founding of the Indian Constitution. On his account, the framers anticipated the challenge of implementing a new, democratic constitution by providing a constitutional setting to support the emergence and development of a democratic people. One of the key messages of the book is the need for this to be a focus of attention in other constitution-making contexts, where the people on whom the effective operation of a democratic constitution depends have no previous democratic experience on which to draw.

By definition, the book does not continue the story, to explore how these measures worked out. It is almost impossible not to think about this, however, as the story unfolds and to wonder how Khosla would evaluate the performance of the constitution, in the light of his conclusions about what the framers sought to do. On the one hand, the outcome confirms the achievement of the framers, in the sense that India, famously, is the largest democracy in the world, which has functioned continuously, under the same constitution, for more than 70 years. Even the emergency from 1975–1977 does not necessarily detract from the achievement; democratic government was restored, following an election, in 1977 and the commitment to constitutional democracy arguably was strengthened.⁷ On the other hand, there are features of Indian constitutional government that prompt more specific questions about the effectiveness of some of the prescriptions put in place at the founding. These include, for example, the extensive reliance on executive power,⁸ the broad reach of judicial review,⁹ the

7. See Shruti Rajagopalan, *Constitutional Change: A Public Choice Analysis*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 127, 137 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

8. Shubhankar Dam, *Executive*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION*, *supra* note 7, at 307, 307–29.

9. Upendra Baxi, *Law, Politics, and Constitutional Hegemony: The Supreme Court, Jurisprudence, and Demosprudence*, in *THE OXFORD HANDBOOK OF THE INDIAN*

persistence of poverty¹⁰ and the continued influence of sectarian and caste identities.¹¹ Should these be understood as merely less admirable features of a complex constitutional system working itself out in difficult conditions, in a world where every set of constitutional arrangements has problems of its own? Or can they tell us something about the suitability of choices made at the founding or about how they were put into practice?

To note that the book does not deal with these questions is not a criticism. On the contrary; it is to the credit of the persuasiveness of the account Khosla offers that such questions are prompted at all. In the end, however, answers to these questions are necessary to adequately evaluate the strategies of the framers of the Indian Constitution, both for India and for the relevance of their choices elsewhere. The case for a sequel is compelling.

CONSTITUTION, *supra* note 7, at 94, 94–96.

10. The Global Economic Mobility Index 2020 placed India 76th out of 82 countries ranked. WORLD ECON. FORUM, THE GLOBAL SOCIAL MOBILITY REPORT 2020: EQUALITY, OPPORTUNITY AND A NEW ECONOMIC IMPERATIVE 7 (2020), http://www3.weforum.org/docs/Global_Social_Mobility_Report.pdf.

11. SAGARIKA DUTT, INDIA IN A GLOBALIZED WORLD 70–97 (2006).