Spectres of Decoloniality: Comparing constitutional histories of India and South Africa

By *Anuj Bhuwania*[*]

Constitutionalism has been in crisis in India and in South Africa in recent times. Theunis Roux, a South African comparative constitutional scholar who has also written extensively on the Indian constitutional experience, is particularly well-placed to diagnose and address this crisis.[1] But Roux here primarily chooses to address one aspect of this crisis which has attracted a lot of public attention lately, the decolonial spectre. That is, the challenge to the legitimacy of the constitutions of these two countries on the grounds that these constitutions are insufficiently derived from indigenous traditions. Roux is not unaware of other aspects of the crisis that plague these two constitutions, as becomes apparent at various points in his piece. But his choice here to focus on the decolonial question, which in theory poses an existential challenge to arguably the two most celebrated constitutions of the global south, conceals as much as it reveals about these other equally fundamental challenges.

Roux's treatment of this question is a refreshing one, in particular his enacting of an imaginary Socratic dialogue between two interlocutors representing idealized versions of the two currently most hegemonic narratives on the constitutions of these countries. Roux calls them the Liberal Progressivist Narrative (LPN) and the Culturalist Grand Narrative (CGN). One of Roux's key arguments is that actually both these seemingly antagonistic positions, if taken sincerely, have a lot in common and can be taken to complement each other. While in my view this is correct, my takeaway from this analysis is that this consensus, which he calls 'Southern Democratic Constitutionalism' (SDC), shared between the two positions is part of the problem, and not the solution.

In my response here, I will focus on the discursive boundaries within which both LPN and CGN operate, which I argue repress many of the fundamental problems with these two constitutions. In particular, I argue that both these positions operate within a statist and nationalist frame. Roux's aptly chosen term LPN stands for a whiggish narrative of progress, which views the two constitutional settlements as the crowning achievements of the liberatory anti-colonial struggles in the two countries. While LPN is clearly statist and

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1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), in this special issue.

nationalist in its framework, CGN views LPN as not statist or nationalist enough[2]. Statism is a key aspect of the constitutional imagination of both CGN and LPN, though to differing degrees. Their key difference however lies in that LPN sees anti-colonial nationalism more as a historical impetus which provided the context for the constitution but did not have to significantly define its content. On the other hand, CGN argues that the very design of these constitutions needed to be imagined indigenously. This difference is key because the anti-colonial framing in the nationalist narratives of LPN and CGN is the basis of constitutional legitimacy, not just in the popular imagination but also in academic writing, both within these countries and globally. Though statism is central to the SDC consensus which Roux treats as his point of departure, he does not dwell upon this aspect here because his focus is on the nationalist question of the extent of cultural indigeneity in the two constitutions.

I will proceed with my response here along 4 axes. First, I will argue that the consensus within SDC is not innocuous, but its statism poses a challenge to constitutionalism per se. Second, the challenge of comparing Indian and South African debates on this issue, though robustly handled by Roux here, is afflicted by many unavoidable difficulties arising out of their historically divergent experiences of colonialism, some of which I will flag here. Comparative constitutional scholars are used to comparing constitutional texts and legal materials like statutes and judgements, but questions of comparison become much more complex when dealing with historical conjunctures. Third, I argue that the extent to which nationalism and its civilizational narrative infected the constitutional discourse in LPN is often underestimated and the CGN narrative needs to be located in connection with it. Finally, the question of decolonizing the legal system has actually been grappled with for a long time, at least in India after independence. While recent Indian decolonialists may not be interested in this history, I argue that its worth revisiting it here because the lessons may still be instructive. Since I am much more conversant with the Indian experience around these questions, I will mainly focus on it in my discussion and will draw from the South African story primarily to draw out a comparison.

A. Southern Democratic Constitutionalism?

The key maneuver in Roux's thesis is the supposed consensus around SDC which both LPN and CGN share. But SDC remains a curiously undertheorized term here.[3] While

2 This is evident in their approaches to Federalism. While LPN can at best countenance a weak federal setup, CGN is suspicious even of that.

3 Roux describes this shared ideal of SDC thus: "the role of constitutions in the Global South is different from the classic liberal idea of constitutions as limits on government. Rather, constitutions in the Global South should be designed to empower a democratic state to undo the colonial legacy of social, economic, and cultural inequality. Constitutions, on this view, are not purely procedural frameworks for managing competition between political groups with different – constitutionally compatible but not prescribed – conceptions of the common good. They are instruments for transforming society in line with a clearly articulated vision of post-colonial justice" see *Roux*, note 1, p.50.

Roux's intuition regarding the empirical existence of this consensus may well be valid, the difficulty is that the adjectives of 'southern' and 'democratic' can qualify constitutionalism to such a severe degree, that not much may be left of constitutionalism thereafter. At least, not constitutionalism in the classic *guarantisme* sense, as theorised by Giovanni Sartori.[4] If SDC is the normative ideal that both the Indian and South African instances are the archetypes of, I argue that this ideal itself is part of the problem, at least in the Indian case. The problem is not that it is southern and/or democratic or even that a context shaped by colonialism and mass impoverishment requires a very different kind of constitutional design, but that the design itself departed from certain fundamental ideals of constitutionalism.

If the LPN position is that of SDC being an imaginative extension of liberalism rather than being post-liberal,[5] then the Indian case poses a challenge. Because arguably it departed in key areas from the core liberal meaning of constitutionalism, whose principal telos Sartori articulated thus, "a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a limited government." Or as McIlwain did even earlier: "constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government: the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law."[6] Arguably the celebration of SDC takes a rather sanguine view of its trajectory. Sartori had already envisaged the problems posed by a formulation such as SDC, which he characterized as the challenge of 'contemporary constitutions': "Contemporary constitutions are being said to improve on the former ones in that they are no longer "negative" but "positive." If positive means that they are also an instrument for social and economic policy, then let us be happy with this positive development. Under one condition, however: that the follow-up, i.e., the "economic" tail, should not eat the "political" head." The latter is precisely what has transpired in India since the 1970s, as I have argued elsewhere.[7] The flag of SDC is exactly what Public Interest Litigation flew under since its inception, as an

4 *Giovanni Sartori*, Constitutionalism: A Preliminary Discussion, The American Political Science Review 56 (1962), pp. 853-864.

5 This is a view which Roux himself has long been sympathetic to. See *Theunis Roux*, Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference? Stellenbosch Law Review 20 (2009), pp. 258-285. For a recent reiteration of this broad argument, see *Theunis Roux*, The Global South and liberal constitutionalism: incommensurable opposites?, https://auspublaw.org/blog/2021/08/the-global-south-and-liberal-constitutionalism-incommensurable-opposites/ (last accessed on 1 August 2024).

6 *Charles Howard McIlwain*, Constitutionalism: Ancient and Modern, Indianapolis 2005, p. 21.

7 *Anuj Bhuwania*, Judicial Review and India's Statist Transformative Constitutionalism, in: Aparna Chandra / Gautam Bhatia / Niraja Gopal Jayal (eds.), Cambridge Companion to the Indian Constitution (Forthcoming).

explicitly indigenist innovation approximating to Indian tradition and Indian realities, and it became globally celebrated at least partly for this very reason.[8]

Roux starkly points out the challenge posed by the Modi years to LPN: "its adherents need to confront the fact that India's descent into ethno-nationalist populism is occurring under the existing constitutional dispensation. While the 1950 Constitution cannot be solely responsible for that descent – since constitutionally extraneous forces are undoubtedly also at work – it has at least failed to prevent the emergence of ethno-nationalist politics in India. It therefore cannot simply be business as usual for adherents of the LPN. They need to think about the underlying causes of the rise of ethno-nationalism and whether the Constitution might be contributing to them." Roux's diagnosis here is spot-on but its implications for the crisis of constitutionalism in India are, I would argue, not limited to LPN but apply to SDC per se. While the Indian academic and liberal public sphere is almost entirely defensive about the Indian constitutional project and projects a sense of siege, the fact that the same constitution provides such little protection from authoritarianism should be a wakeup call but it hasn't been so far. I would argue that constitutionalism is in crisis in India not because of the decolonial challenge but because the Indian constitutional regime lacks constitutionalism in many key aspects, and its flaws have been ruthlessly exposed by the Modi regime in the last ten years.

SDC is precisely what has enabled the authoritarian and majoritarian nature of the Modi government in India to not only subsist within the institutional eco-system created by the Indian constitution but actually thrive. The Indian constitutional framework, I would argue, is quite remarkably compatible with his brand of illiberalism. To use a colloquialism, it's a feature, not a bug. It's a matter of design that the Indian constitution-makers chose not to institutionalize distrust of elected governments. This did not merely happen because the constitution was drafted in the midst of a civil war as is commonly assumed,[9] but because a strong state without any significant horizontal or vertical division of powers was deemed necessary to perform its vanguardist role. In fact, I would argue, that the insistence on such a state by the Congress left and big business in a strange coalition that characterized Congress in the late colonial era is what led to the civil war in the first place.

I would argue then that the ease with which state-led socio-economic transformation is sought to be hyphenated with liberal constitutionalism needs to be re-examined and the celebration of SDC maybe misconceived. This omission is actually not just Roux's, but as much that of public discourse in these countries, as well as in academic discourse both locally and abroad. Its arguably even worse abroad because India is after all one of the shining examples of the supposed success of constitutionalism in the global south.

8 *Anuj Bhuwania*, Courting the People, Cambridge 2017.

9 I use the term 'civil war' instead of the euphemistic 'partition violence,' following the argument made in *Shruti Kapila*, Violent Fraternity: Indian Political Thought in the Global Age, Princeton 2021, p. 241.

B. Comparing India and South Africa

My criticism of SDC as a normative ideal outlined above is much more applicable for India than for South Africa. And that leads us to question the comparison itself. To begin with, it is important to note that colonialism took very different forms in these two countries. Simply put, the centrality of settler colonialism gave South Africa a very different colonial experience than India. The umbilical cord to the mother country had been shed as early as 1910 for South Africa. The Anglo-Boer wars prior to that were the equivalent of an American style anti-colonial campaign led by the white settlers. The constitutional transition of 1990-96 was from white minority rule and apartheid, which is the usual corollary of settler colonialism globally. South Africa was already a state, which acquired a new multiracial national foundation with the new constitution. But external political rule had long been defunct.

British India was not a state in any similar terms in 1947-50. It was an empire with extremely heterogenous institutional forms, in particular the existence of 'indirectly ruled' princely states in one-third of its territory and the so-called excluded and partially excluded areas covering massive chunks of territory in the periphery of the empire with concentrations of the so-called 'Scheduled Tribes.' The prior British-era constitution of 1935 never actually applied to the Princely States and carved a blanket exception for the Excluded Areas. The constitutional transition of 1947-50 was thus also a transition from an empire to a state, with reterritorialized and rationalized forms of rule being established in parts that were formally integrated for the first time, while large chunks of British Indian territory were carved into the new state of Pakistan. This is just to say that the 1950 constitution was part of the process of state-formation in India in a way that didn't need to happen in South Africa which had been formally independent for a long time already.

While there is tendency to hyphenate India and South Africa in comparative constitutional studies, it's important to keep in mind that the postcolonial constitutions of these two countries were responding to very different problems. Or to frame it in terms of Kim Lane Scheppele's influential formulation, these constitutions were defined by what they were aversive to.[10] South Africa's constitution of 1996 was of course an anti-apartheid constitution, and the act of undoing white minority rule and legally institutionalized segregation with the enfranchisement of the black majority was central to the transition of 1990-96. The emergence of mass democracy was the key shift in such a context though it's the new constitution which is globally more feted. In the Indian case it is vice versa, the emergence of mass democracy has long been globally celebrated, while its constitution has received such acclaim relatively recently.

This is interesting because the spectre of such a majoritarian democracy was the principal cause of anxiety on the part of major non-Congress political stakeholders in the Indian

10 *Kim Lane Scheppele*, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models**.**, International Journal of Constitutional Law 1 (2003), pp. 296-324.

constitutional deliberations of 1928-1946. Ambedkar as a leader of one such minority had long warned of the threat that such a democracy would pose to India. And had for decades, made the demand for separate electorates for Dalits central to his political agenda right up to early 1947.[11] The Muslim community had of course obtained such separate electorates in 1909. And it's the insistence on the withdrawal of such separate electorates in the Congress led Nehru Report of 1928, the first comprehensive attempt at drafting a post-independence constitution by Indian leaders, that crystallized the process of "parting of ways," as Muslim League leader Muhammad Ali Jinnah later famously called it. Unlike much scholarly writing that dates the process of Indian constitution-making from December 1946 with the formal convening of the Constituent Assembly, I would argue the constitutional transition process was well underway when the Viceroy Lord Irwin formally declared in 1929 that "India's constitutional progress" was contemplated by the British to lead to "the attainment of Dominion Status." From then on, various proposals of power-sharing between the various stakeholders emerged, whether on federal or consociational basis, that would attempt to address the spectre of 'the tyranny of the majority' which non-Congress leaders repeatedly alluded to. With various failed attempts along the way, this long process of constitutional negotiations culminated in the Cabinet Mission Plan of May 1946. I would argue that the Indian Constitution of 1950 is fundamentally aversive to this history of 1928-1946 when repeated attempts to fashion an alternative constitutional paradigm for a post-British India were made, especially the Cabinet Mission Plan. The 1950 Constitution is a rejection of all of these constitutional possibilities of sharing power, whether federal or consociational. The statism that key Congress leaders of this period aspired to required a rejection of such possibilities. It went on to adopt Westminster parliamentary democracy with centralized rule and the first past the post-electoral system which would enable the single party domination and majoritarianism that Jinnah and Ambedkar had repeatedly warned against between 1928-1946.

The primary constitutional question in the last two decades of colonial rule then, the 'Indian problem' to use the language of its time, was to find a constitutional compact

11 "No safeguards are going to be of any value to the Untouchables unless the Untouchables get a separate electorate. Separate electorate is the crux of the matter" (Letter by Ambedkar to A. V. Alexander about the proposals of the Cabinet Mission, 14 May 1946), Babasaheb Ambedkar Works and Speeches (BAWS) 17/2, p. 202. In his famous March 1947 memorandum 'States and Minorities' submitted to the Indian Constituent Assembly, Ambedkar warns against adopting the British system of democracy in India: "As to the consequences that would follow if the British System was applied to India the situation can be summed up in the following proposition: (1) The British System of Government by a Cabinet of the majority party rests on the premise that the majority is a political majority. In India the majority is a communal majority. No matter what social and political programme it may have the majority will retain its character of being a communal majority. Nothing can alter this fact. Given this fact it is clear that if the British System was copied it would result in permanently vesting Executive power in a Communal majority." BAWS 1, p. 413. Ambedkar makes this point several times in his writings between 1945 and 1955.

that could accommodate its social as well as institutional heterogeneity.[12] Any attempt to translate this continental scale heterogeneity at the level of governance was always going to be a challenge and required a great deal of constitutional ingenuity. While various attempts at accommodating this diversity were made between 1928-1946, its most tangible iteration was the Cabinet Mission Plan of May 16, 1946. The Plan arguably was an interim constitution, providing a substantive and procedural framework for the drafting of a new constitution.[13] Interestingly, this makes the Indian constitution-making process rather more similar to the South African one of 1993-96 than is conventionally considered. The Congress, like the ANC, was able to get its way during this transitional process and steamroll its agenda in the constituent assembly, but with decidedly more violent results.

A Constituent Assembly was indirectly elected as per the terms of the Cabinet Mission plan, with almost all its members being part of the Congress or the Muslim League. The substantive constitutional framework envisaged under the plan was almost confederal in nature, with a very weak centre. The question however was whether the terms of the Cabinet Mission Plan bound the assembly. The Congress position was that the Assembly was sovereign and enjoyed constituent power and was not bound by the Plan, a position with which the League fundamentally disagreed. The League boycotted the assembly because of the Congress' refusal to clearly accept the terms of the Plan as binding. When the Congress proceeded nevertheless with the Assembly, the League accused it of acting ultra vires the Plan underlying it and refused to be part of the assembly, leading to the partition of the subcontinent.[14] Thereafter, the princely states were annexed and absorbed into the newly formed Dominion of India. This constitutional denouement is crucial to understand the nature of Indian constituent assembly. Since Austin's influential account suggested that the Assembly was broadly representative in spite of overwhelming Congress domination, this view has been taken to be gospel. More recent accounts of the Indian constituent assembly are even more hagiographic. The key move that has enabled such a heroic portrayal is detaching the Assembly from its pre-1946 history. The Plan under which it was set up is treated purely as background.

12 The classic exposition is by Reginald Coupland: "To understand the nature of a problem is halfway to solving it, and the nature of the Indian problem is now clearer than it was. It is no longer a political problem in the wider sense. The relationship between Britain and India has ceased to be the major question, since it has. been shown that the final transfer of power presents no insuperable difficulties. The major question now is the relationship between Indians, and Indians: and the problem which has always had its constitutional side is now seen to be little else than constitutional. For the issue is simply whether a system or systems of government can be devised under which the different sections and communities of India, Provinces and States, Hindus and Moslems and the rest, can agree to live together." *Reginald Coupland,* The Constitutional Problem in India, Oxford 1944, p. 307.

13 This is contrary to the argument made in *Hanna Lerner*, Making constitutions in deeply divided societies, Cambridge 2011, pp. 125-126.

14 Muslim League Resolution, January 31, 1947, in: *Shiva Rao*, The Framing of India's Constitution, Delhi 2015, pp. 353–59.

What emerged post-partition was a one-party Constituent Assembly, and the complexity involved with a divisible sovereignty shared among states, provinces and communities was undone with a majoritarian state.[15] The Constitution making process was thus a state-making process in the case of India. Remarkably though, the political failure to arrive at a constitutional solution to accommodate the immense heterogeneities of the British empire in South Asia has been hailed retrospectively as a moment of consensual constitution-making in post-facto accounts, especially in recent decades.

C. India as a civilizational state

Roux notes that the CGN narrative about India insists on it being a civilizational state that long predated the Indian Constitution. But this viewpoint has deep roots in the LPN story as well. To begin with, it is inconceivable that the principal successor state to the British Empire in South Asia would be called 'India, that is Bharat,' without the territorial reconstitution of 1947-50. As Pritam Singh has argued, "The naming of India as Bharat reflected the power of the Hindutva-minded sections in the Constituent Assembly who wanted the name to reflect the ancient pre-British and pre-Muslim era of a 'glorious' Hindu past." Nehru himself had referred to 'Bharat' as "the old Sanskrit name derived from the mythical founders of the race" in his well-known book 'The Discovery of India.' From mid-19th century onwards, "the old and native name Bhārata became a workable concept for the national cause," as Catherine Clémentin-Ojha has argued in a detailed history of this term.[16] The insistence on 'Bharat,' evoking a Hindu sacred geography, in the Constituent Assembly was an explicitly anti-Muslim gesture, most clearly articulated by Congress' Kamlapati Tripathi: *"*When a country is in bondage, it loses its soul. During its slavery for one thousand years, our country too lost its everything. We lost our culture, we lost our history, we lost our prestige, we lost our humanity, we lost our self-respect, we lost our soul and indeed we lost our form and name. Today after remaining in bondage for a thousand years, this free country will regain its name…"[17] The evocation of a thousand years of slavery is meant to connote Muslim dynasties in India and not just the British era, a rhetorical move now commonly made by the votaries of CGN in India.

There are other symptoms of this idea of India that was deeply intuitive for many of the founding fathers of the Indian Constitution. The much-celebrated Objectives Resolution proposed by Nehru in December 1946 and passed by the Assembly in January 1947 includes this remarkable clause: "Wherein the territories that now comprise British India, the

15 For a brilliant recent account of this history in the context of princely states, see *Priyasha Saksena*,. Sovereignty, International Law, and the Princely States of Colonial South Asia. Oxford 2023.

16 *Catherine Clémentin-Ojha*, 'India, that is Bharat…': One Country, Two Names, South Asia Multidisciplinary Academic Journal 10 (2014). On the dissemination of the idea of India as *Bharat* in the late 19th century, see *Manu Goswami*, Producing India, Chicago 2004, pp. 165-208.

17 *Clémentin-Ojha*, note 16.

territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all." This envisages a civilizational idea of India as not just a successor state to British India and the Princely States but includes "such other parts of India as are outside" these boundaries. It also includes a fourth category which is of other territories that may willingly want to accede to India, thus seemingly excluding such expression of a will to integrate from the first three categories. But the third category is particularly interesting here because it clearly invokes a transhistorical civilizational idea of India. A policy of revanchism based on a civilizational ideal was thus constitutionally enshrined. This was acknowledged in a Supreme Court judgment of 1960 that explained Art. 1(3)(c) of the Indian Constitution thus: "the territory of India shall comprise such other territories as may be acquired" as, among other things, "providing for the integration and absorption of Indian territories which, at the date of the Constitution, continued to be under the dominion of foreign States."[18] Clearly there is a pan-Indian civilizational imagination at work here. Unlike Africa, which was parcelled among various European powers, the British empire in South Asia encompassed almost all of South Asia except for small pockets under other European powers. These small pockets were sought to be amalgamated through a civilizational meta-narrative, a move which is now seen as historically inevitable, but the strangeness of such a claim can be understood better when it is compared with Africa or the Caribbean.

The characterisation of India as a civilizational state rather than just a nation-state was seen as innocuous, even uncontroversial, in a prior era. Venerable scholars like Ravinder Kumar expressly made this claim: "Beyond the proximate and regional points of reference, lay an affiliation to a pan-Indian civilisation, amorphous in texture, yet tangible in presence, which offered a basis for the nation-state formally defined by the Constitution of 1950."[19] Of course, his civilizational understanding was based on a spirit of tolerance, a far cry from the Hindu right. While the Indian exponents of CGN today have a less accommodative spirit, the idea of a single pan-Indian state as an inheritor of a whole civilization was already discursively available to them in the 1950 Constitution of India itself.

D. The long history of decolonising Indian Law

The kneejerk manner in which the Modi government has gone about changing key British era statutes in the name of decolonising Indian law is only the latest and perhaps the crudest chapter in a very long engagement with this question of the British colonial legacy in the design of the Indian legal system. The CGN narrative about the Constitution needs to be located in the context of this history. The inability to come to terms with the hybridity of

18 In Re, Berubari Union (I), AIR 1960 SC 845.

19 *Ravinder Kumar*, India: A 'nation-state' or 'civilisation-state'?, South Asia: Journal of South Asian Studies 25 (2002),pp. 13-32, seep. 30.

Indian lives and insisting on a purity derived from Hindu civilisational origins characterises the CGN impulse. But there has long been a perceived sense of inauthenticity about Indian identity among its elite. Many millions of words have been written about it in the last many decades. Whether it be sport, music, clothes, language, medicine or law, there has long been an anxiety around Indian cultural/social/political behavioural forms being not Indian enough. An early but enduring rendition of it in popular culture came from the famous words of a Hindi film song in 1955:

> *My shoes are Japanese, these trousers are English;*
> *The red cap on my head is Russian, but still my heart is Indian.*

The strangeness of India's obsession with cricket is well-summarised by the first line of Ashis Nandy's book 'The Tao of Cricket,' "Cricket is an Indian game accidentally discovered by the British." Hindi film music, the most popular from of music in India, was banned from All India Radio for being insufficiently indigenous for several years after independence. The complicated socio-cultural status of English in India is well-known, with more people perhaps speaking English in India than in England, while the manner in which it is spoken continues to be the singularly most conspicuous marker of class position in Indian society. The modernisation and proliferation of 'indigenous' medicine like ayurveda in India has spawned a whole field of study. Unsurprisingly, the question of the obviously colonial origins of Indian law too has attracted attention right since independence, but the lessons that could be drawn from this whole experience have been ignored in the current discourse on decoloniality around the Indian constitution.

This wilful ignorance is another aspect in which the discourse on decoloniality in India is very different from the one in South Africa: While the postcolonial field has been globally dominated by Indian origin academics for decades now, the decolonial critique of the Indian constitution does not yet have any place in the academy, unlike in South Africa, which Roux has ably outlined. It has however been quite successfully disseminated in the massive Hindutva public sphere, particularly on YouTube. But the intellectually ungrounded character of this critique has also meant that it has ignored prior histories of such anti-colonial criticism of Indian law, which may be worth revisiting here. In a remarkable article written more than half a century ago, Marc Galanter had provided a comprehensive account of the institutional attempts to replace aspects of existing Indian law with a revival of indigenous law in the first two decades after independence.[20] Shriman Narayan Agarwal, whose draft constitution is usually discussed as the one instance of a tangible Gandhian alternative, also articulated a critique of the existing Indian legal system in terms that have been repeated since by revivalists. He "accused the British system of working havoc in India by replacing quick, cheap and efficient *panchayat* justice with

20 *Marc Galanter*, The aborted restoration of 'indigenous' law in India. Comparative Studies in Society and History 14 (1972), pp. 53-70. See also *Arudra Burra*, What is" Colonial" About Colonial Laws?, American University International Law Review 31 (2016), p. 137.

expensive and slow courts which promote endless dishonesty and degrade public morality. Existing law, he said, is too foreign and too complex; this complexity promotes 'criminal mentality and crime'. In their place he would have *panchayats* dispense justice at the village level, thereby eliminating the need for lawyers and complex laws."

The focus of such critique in this initial period was largely "adjectival law on court administration (delay, expense, corruption), complexity of procedure, unsuitability of rules of evidence, the adversarial rather than conciliatory character of the proceedings, and (occasionally) the nature of penalties."[21] The 14th Law Commission Report on 'Reform of Judicial Administration' of 1958 discussed this viewpoint in some detail. The report began with a brief description of the so-called 'indigenous [legal] system,' which it then suggests "shows how unsound is the oft-repeated assertion that the present system is alien to our genius. It is true that in a literal sense the present system may be regarded as alien. It is undoubtedly a version of the English System modified in some ways to suit our conditions." This view of the Indian legal system was best expressed by MC Setalvad, the Chairman of this first post-independence law commission and the longest serving attorney general of India, "For over a hundred years distinguished jurists and judges in India have, basing themselves upon the theories of English common law and statutes, evolved doctrines of their own suited to the peculiar need and environment of India. So has been built up on the basis of the principles of English law the fabric of modern Indian law which notwithstanding its foreign roots and origin is unmistakably Indian in its outlook and operation."[22]

But in a token concession to revivalists, the 14th Law Commission Report suggested that Judicial Panchayats can be set up at the village level to settle petty disputes. Accordingly, in 1962, such judicial bodies were set up with the following objective: "by reviving panchayats and moulding them on the right lines we will be taking a much needed step in the direction of making law and administration of justice reflect the spirit of the people and become rooted once again in the people"[23] However these bodies were far from traditional in their selection (by elections), jurisdiction (territorial constituencies), process (majority vote); substantive norms (bound by statutory law) and enforcement (compulsory execution of decrees in courts). While these bodies were soon seen as a failure satisfying none of its stakeholders and were gradually phased out, the symbolic allure of the appeal to the virtues of an indigenous legal system did not entirely fizzle out. It was revived in spectacular fashion at the height of Indira Gandhi's assault on the judiciary in the 1970s. The focus of her attack was on the Supreme Court for undoing her 'socialist' policies of the 1960s and the rhetoric her government deployed was classic anti-elitist class critique. But the expressive markers of this elitism were soon extended to the alien Anglo-Saxon origins of the legal system itself. Thanks to the efforts of two of the judges she appointed

21 *Galanter*, note 20.

22 *MC Setalvad*, The Common Law in India (Hamlyn Lectures No. 12), London 1960.

23 *Galanter*, note 20.

during this phase, Justice PN Bhagwati and Justice VR Krishna Iyer, this critique was carried over to judicial pronouncements as well as a number of governmental reports on access to justice.[24] The culmination of this turn to indigeneity as the solution to the then perceived crisis of the Indian legal system was the discursive emergence of informalism as panacea with an onslaught on the rigours of legal procedure. It led to the establishment of 'Lok Adalats' or People Courts at the lowest level, tribunalisation at the intermediate level and most prominently, Public Interest Litigation at the highest level of the Indian judiciary.[25] While these innovations have all proved disastrous in the long term, they have nevertheless survived. In any case, these were all parallel processes which seemingly left the mainstream legal system untouched, but the ideas unleashed stigmatising proceduralism itself as un-Indian has taken deep roots in the Indian legal system. In particular, the field of criminal law has been significantly hollowed out and an onslaught on civil liberties has been the enduring result, with a public sphere increasingly condoning or celebrating widespread state-sponsored vigilantism.[26]

These trends starting from the mid-1970s and 1980s however played out well after Galanter had written his piece. While the turn to indigeneity has since gradually corroded much of the then extant Indian legal system, there has been very little fundamental change on paper and it's still instructive to return to Galanter's conclusion about the following lessons to be drawn from the survival of the hybridity of the Indian legal system:[27]

"Modern India is measured against societies in which law is supposedly an accurate and coherent expression of social values-Britain for British administrators, traditional India for the Gandhians, the 'West' for comparative scholars. The Indian situation is perceived as deficient or even pathological; prognoses range from stress and demoralization to rigidity and obstruction of development. The Indian experience provides an occasion for questioning the familiar notions that underlie these judgments, notions of what is 'normal' in legal systems; that law is historically rooted in a society, that it is congruent with its social and cultural setting, and that it has an integrated purposive character. These notions express expectations of continuity and correspondence, of present with past, of law with social values,

24 For a brief account of these remarkable reports, see *Marc Galanter*, Indian Law as an Indigenous Conceptual System, in: Marc Galanter (ed.), Law and Society in Modern India, Oxford 1989, pp. 92-100.

25 On lok adalats, see *Marc Galanter* / *Jayanth K. Krishnan*, Debased informalism: Lok Adalats and legal rights in modern India, Beyond common knowledge: Empirical approaches to the rule of law 96 (2003), pp. 96-141. On Tribunals, see *Arun K. Thiruvengadam*, Tribunals, The Oxford Handbook of the Indian Constitution, Oxford 2016, pp. 412-431. On Public Interest Litigation, see *Bhuwania*, note 8.

26 *Anuj Bhuwania*, No country for procedural justice, The Hindu, https://www.thehindu.com/opinion/op-ed/no-country-for-procedural-justice/article30453477.ece (last accessed on 10 September 2024),

27 Galanter deployed the linguistic metaphor to explain this hybridity: "Though spoken in accents grating to some, the present system is India's legal vernacular. Like many Indian languages it is characterized by functional diglossia." *Galanter*, note 20.

of practice with precept; expectations which are in part projections of the working myths of modern legal systems. The Indian experience suggests a set of counterpropositions. It suggests that neither an abrupt historical break nor the lack of historical roots prevents a borrowed system from becoming so securely established that its replacement by a revived indigenous system is very unlikely. It suggests that a legal system of the modern type may be sufficiently independent of other social and cultural systems that it may flourish for long periods while maintaining a high degree of dissonance with central cultural values."

While Galanter's discussion largely pertained to adjectival law, it's not clear why the same conclusions do not apply to the Constitution itself.[28] Perhaps these old counter-intuitive lessons from a different era by a 'law and society' scholar who studied Indian law for decades may still help inform ongoing discussions on Constitutionalism in the Global South.

E. Conclusion

One of the striking aspects of the current decolonial challenge under discussion in this symposium is that while in India this discourse is a singularly culturalist one, the one in South Africa has a strong materialist basis as well. Much of the criticism of the 1950 Constitution in India too initially came from the left. In spite of having birthed the constitution, the Congress Party also from time to time articulated a materialist critique and in the first few decades, its electoral domination meant it could keep amending the constitution whenever the latter seemed like an obstacle to its policy agenda. This tendency culminated in the 1976 amendment which radically overhauled the constitution amending dozens of provisions. While it was authoritarian and centralizing in nature, it came clothed in leftist and progressive rhetoric, most obviously manifested in its insertion of the words 'socialist' and 'secular' in the preamble of the constitution. While some of the worst of these changes were undone later, this history illustrates quite a different experience from Roux's account of South African debates which assumes that ANC as the primary author of the 1996 Constitution would not be interested in its drastic revision.

The domestic political as well as academic discourse around the Indian constitution was often critical or at best pragmatic till the 1980s, but this has changed fundamentally since the 1990s. A hagiographical narrative about the Indian Constitution is now firmly entrenched in public discourse as well as in academia, domestically as well as globally.

28 Even the supposedly indigenous religious personal laws that have applied to Indians in different forms since 1772 are better characterized as 'Anglo-Hindu law' and 'Anglo-Mohammedan law,' i.e., hybrid systems with tenuous claims to religious purity, as scholars have long argued. See J. *Duncan M. Derrett*, The administration of Hindu law by the British. Comparative Studies in Society and History 4 (1961), pp. 10-52, *Michael R. Anderson*, Islamic law and the colonial encounter in British India, in: David Arnold / Peter Robb (eds.), Institutions and Ideologies, Richmond 1993, pp. 165-185 and *Bernard S. Cohn*, Law and the colonial State in India, in: June Starr / Jane Collier (eds.), History and Power in the Study of Law: New Directions in Legal Anthropology, Ithaca 2018, pp. 131-152.

This consensus around the greatness of India's 1950 constitution was ironically absent when Congress itself enjoyed complete hegemony in Indian politics. Four principal reasons come to mind to explain this change. The most significant reason has been the sense of siege that the BJP's rise has led to among the Indian intelligentsia over the last three decades.[29] This is well illustrated by the publication of a pamphlet by scholars associated with the largest Communist Party of India in 2000 which almost completely eschewed its old critical approach towards the 1950 Constitution and viewed it in purely celebratory terms.[30] Second, the global narrative of the success of Indian democracy especially once it completed fifty years of independence in 1997 made the relative longevity of the constitution its principal virtue, notably in the fields of comparative law and politics.[31] In the field of comparative constitutional law, the Indian judicial innovations of basic structure doctrine and public interest litigation were two areas that particularly excited scholars globally. Third, the disastrous experience of the emergency of 1975-77 and the experience of undoing the worst of its excesses including its assault on the constitution itself, made it seem like a particularly precious political resource. Finally, the status of Ambedkar radically changed in Indian politics since 1990 and his public identification as the author of the constitution gave it an affective charge especially among the Dalit community, which has made it politically unhelpful to openly criticize it. The iconography of the preamble of the constitution is everywhere in India now, especially after the widespread protests against the Citizenship Amendment Act spectacularly foregrounded it.[32] The general elections of 2024 took constitutional iconography to a whole different level, with opposition politicians making the threat perception of a victorious BJP fundamentally changing Ambedkar's constitution the very centerpiece of their electoral campaign. In his first major public appearance after his coalition's narrow victory, Modi made a show of ceremonially bowing to the constitutional text prior to his victory speech. In India today, the expressive function of the 1950 constitution far outweighs its actual legal content.

29 In a recent survey of Indian constitutional scholarship published in one of India's leading politics journals, this trend is noted: "In the mid-1990s, there is a steady output emphasizing the normative content in the Indian constitution…This was also the period in which conservative and majoritarian positions began to express more loudly a critique of the constitution and its values. This naturally led to a 'closing of left-democratic ranks and a reassertion of faith in the values under attack' *Anupama S. Krishnan, K. K. Kailash*, Generations of Constitutional Studies, Studies in Indian Politics 9 (2021), pp. 124-131.

30 See Communist Party of India (Marxist), Subverting the Constitution: The RSS-BJP Gameplan, Delhi, 2000. The context for this pamphlet was the then BJP led government's appointment of a committee to review the constitution, a prospect that has now acquired a more conspicuously decolonial disguise.

31 This is as a result of the same post-cold war 'international political culture' that privileged constitutionalism globally which Heinz Klug persuasively invoked in the context of South Africa. *Heinz Klug*, Constituting democracy: Law, globalism, and South Africa's political reconstruction. Cambridge 2000.

32 *Arvind Elangovan*, A political turn? New developments in Indian constitutional histories, History Compass 20 (2022), pp. 1-12.

To conclude, it may be worth reminding ourselves once again that autochthony need not necessarily mean indigeneity. The discourse of constitutional autochthony in the field of comparative constitutional law derives significantly from KC Wheare's classic work published in the same year as British Prime Minister Harold MacMillan's famous "winds of change" speech at the highpoint of decolonisation globally. While Wheare's subject was the constitutions of commonwealth countries, his discussion of constitutional autochthony was with particular reference to Ireland and India/Pakistan. Interestingly, he interpreted the literal Greek meaning of autochthony ('sprung from the land itself') as 'home-gown' but in the limited sense of an assertion of popular sovereignty and indicating a break from the past.[33] This was not a culturalist understanding, but a political one. There is no gainsaying though that the culturalist understanding of constitution-making has since acquired a deep intuitive appeal even as the circulation of constitutional ideas are as intensely global today as they were then. But the fact of this intuitive appeal itself raises an interesting question about the changing cultural understanding of constitution itself.

In an influential formulation that has fundamentally shaped postcolonial studies, Partha Chatterjee had theorised the nature of anti-colonial nationalism with a "framework for analyzing the contradictory pulls on nationalist ideology in its struggle against the dominance of colonialism and the resolution it offered to those contradictions. Briefly, this resolution was built around a separation of the domain of culture into two spheres— the material and the spiritual. It was in the material sphere that the claims of Western civilization were the most powerful. Science, technology, rational forms of economic organization, modern methods of statecraft – these had given the European countries the strength to subjugate the non-European people and to impose their dominance over the whole world. To overcome this domination, the colonized people had to learn those superior techniques of organizing material life and incorporate them within their own cultures. This was one aspect of the nationalist project of rationalizing and reforming the traditional culture of their people. But this could not mean the imitation of the West in every aspect of life, for then the very distinction between the West and the East would vanish – the self-identity of national culture would itself be threatened. In fact, as Indian nationalists in the late 19th century argued, not only was it undesirable to imitate the West in anything other than the material aspects of life, it was even unnecessary to do so, because in the spiritual domain the East was superior to the West. What was necessary was to cultivate the material techniques of modern Western civilization while retaining and strengthening the distinctive spiritual essence of the national culture."[34] Constitutionalism of course fundamentally connotes "modern methods of statecraft" and would paradigmatically belong to the outer material realm. And that is where LPN largely retained it. But with CGN, we see an argument for moving the constitution to the inner spiritual realm. This implies a huge cultural shift

33 *Kenneth Wheare*, The Constitutional Structure of the Commonwealth, Oxford 1960.

34 *Partha Chatterjee*, Colonialism, nationalism, and colonialized women: The contest in India. American ethnologist 16 (1989), pp. 622-633.

in understanding the nature of a constitution itself. I would argue that this cultural shift is precisely because of the centrality of the constitution in the political life of these two countries since the 1990s. The cultural weight that the constitution increasingly carries in these two countries is why we see a decolonial challenge to it now like never before.