

## The Roux Balm

By Arghya Sengupta\*

### A. Introduction

If Lindiwe Sisulu, Transport Minister of South Africa, thought that the Constitution of South Africa was like a “Panadol” providing momentary relief, Theunis Roux’s article bringing that Constitution into conversation with the much older Indian Constitution is like a balm.<sup>1</sup> It burns at first blush, but when it settles, has a soothing feel.

In India, debates about the nature of the Constitution, and its ability to truly serve “we the people” in whose name it is written, are unusually fractious. In this context Roux’s intervention that brings two seemingly opposing viewpoints into conversation with each other prods each of us who are participants in this debate to be the best versions of ourselves.

Roux argues that the liberal-progressivist narrative (‘LPN’) of the Constitution—which argues that both the Indian and South African Constitutions are essentially masterful adaptations of a liberal Constitution to a Global South setting—and the culturalist grand narrative (‘CGN’)—that argues that the Constitution is largely a perpetuation of the colonial matrix of power and ignores indigenous constitutional ideals—are both united in a common goal of what he calls *Southern Democratic Constitutionalism*, a new kind of post-colonial state that can transform society and materially improve the lives of people.

As a caveat, it is worth examining whether the unifying rationale that Roux has identified for the two projects does much normative work. In this context, there is a distinction that needs to be drawn between means and ends. The ends sought to be achieved by the proponents of these two viewpoints may well be to articulate a form of constitutionalism that is best suited to their respective countries. At the level of intention, Roux is surely right. However, the key point is this—even if the intention is such, the means adopted are so widely different that the common intended end pales into insignificance. Roger Federer and Rafael Nadal both want to win tennis matches—one does it through silken grace, a single-handed backhand and a serve-and-volley game while the other uses sheer power, heavy top spin and baseline hitting. Merely because they have the same intended end does not whittle down their differences in how to get there. It does, as Roux points out, call for healthy respect and engagement.

To reach his conclusion, Roux adopts the best possible interpretation of each of these two streams of thought and urges them to be better. Since I am much more familiar with the

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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), pp. 5-71.

Indian literature on the subject, I will use examples from the Indian works he has cited to make this point. Take the modern expression of the LPN view found in Madhav Khosla's work. Khosla's main point is that the Constitution was a founding moment for the modern liberal Indian state because of its emphasis on universal suffrage, fundamental rights and codification of law. Roux understands this as taking certain ideas central to constitutionalism in the Western world and adapting it successfully to a non-Western context.

But even though the Constitution of India makes a reference to universal suffrage, the right to vote was not made a fundamental right. The fundamental rights themselves are an incorporation worth celebrating, but came riddled with wide exceptions. Codification itself was a colonial process that began with creating consolidated bodies of Hindu and Islamic law. Besides, Khosla's account does not seriously look at how colonial institutions—the police, the judiciary, the Indian Civil Service (a centralized bureaucracy)—were perpetuated without undergoing any fundamental transformation. Ambedkar admitted as much, when he clarified that “the provisions [in the Indian Constitution] taken from the Government of India Act, 1935, relate mostly to the details of administration.” His implication was clear: merely that the institutions were colonial would not matter; since they would now be run by Indians, they would also be run *for* Indians. Roux is right to point to the fact that if LPN adherents are serious about their goals, they need to be serious about reforming the institutions that will get us there. Maybe the Indian Constitution is simply not as liberal as they would like to believe.

Equally, for the CGN, Roux rightly captures the difficulties of having this conversation at a time when the winds of authoritarianism blow globally. Putting this conversation in a longer historical frame is also apt given the recent tendency to consider any criticism of the Constitution as motivated by support of the Bharatiya Janata Party. Roux perceptively grasps this dilemma that a critic of the Constitution like me faces, when he writes that the nature of the time we live in is a reason why those with critical views of the Constitution pull back from asking for a complete overhaul.

However, upon interrogating this dilemma more deeply, we will find it is not because, as Roux apprehends, that any Constitution that comes out of a time such as this will be authoritarian, but rather that any such constitution, no matter what its contents, will not enjoy the wide, cross-party support that is needed for constitutional ideas to germinate and take root. No Constitution that comes out of this time is likely to be long-lasting and authoritarian. On the contrary, at least in the Indian context, I believe, it would be a waste of time.

In India today, much of this is academic. This is because of the elephant in the room when it comes to discussing the Constitution is BR Ambedkar, widely recognised as its moving force. Roux appreciates this but perhaps does not dwell on it as much. He recognises the paradox that the BJP, whose ideological opposition to all things colonial is well-known, has remained ambivalent on the Constitution.

At the risk of over-simplification, a key reason behind this paradox is that over the decades, Ambedkar has not only been seen as the greatest Dalit leader in India, but also

attained a deity-like status, whose shrine in Chaityabhoomi in Mumbai sees scores of devotees come to pay their respects much like in any other temple. Dalits form 16.6% of the population and are an important voting bloc for any political force that wants to win general elections in India. The BJP has shown its keenness to cast its ideological viewpoint on the colonial nature of the constitution aside and remain pragmatic in this regard.

Sometimes the mask slips, as it did recently in Parliament when Amit Shah, the Home Minister, rather derisively said that if people recited God's name as many times as they did Ambedkar's, they would attain salvation. But he was quick to retract it saying that he wholly respects Babasaheb and can "never insult him". Simply put, had it not been for Ambedkar's position as Chairman of the Drafting Committee of the Constitution (a job that Mahatma Gandhi had put him to), and his role in ensuring widespread consensus regarding its provisions (and, in hindsight, its longevity), the narrative around the Constitution today may have been markedly different. Proponents of the CGN have to recognise this and be careful about what they wish for.

But this fact should not detract all of us, interested in the constitutional futures of South Africa and India, to lay out what the contours of a decolonial Constitution looks like. Many critics of my book *The Colonial Constitution* have claimed that I do not put forward an alternative idea of what the Constitution should contain. This is neither an easy task, nor one that can be done quickly. Yet Roux is right in saying that the important task for interested scholars of constitutional law lies in outlining such a vision. I remain in the hope, as he does, that this will narrow down existing differences between constitutional law scholars further. I am grateful to him for making a start.



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