Detangling Knots in the Narratives: A Response to Theunis Roux

By *Aparna Chandra*[*]

In his insightful paper, Theunis Roux argues that there are two dominant narratives about the constitutional transitions in India and South Africa.[1] The Liberal Progressivist Narrative ("LPN"), understands these constitutions as the application of Western liberal ideas to the context of the global South. The repurposing of universally valid (but of Western origin) liberal constitutionalism to serve the interests of the global south does involve some development and innovation, but these departures represent differences of degree not of kind. Reliance on liberal constitutional ideals and devices in framing post-colonial non-Western constitutions is legitimate because – to borrow from Alexander Hamilton - Indians and South Africans adopted variations of liberal constitutionalism by 'reflection and choice … not accident and force.'[2] They exercised political/intellectual agency and sovereign will in making these ideas, values and institutions work for their circumstances. Thus, these constitutions are legitimate both because of their adherence to 'universal' reason, as well as their authorization by popular will.[3] Where these constitutions do not work as intended, they can be changed through incremental means routed through constitutionally approved institutional channels such as constitutional amendments and judicial (re-) interpretations.

The Culturalist Grand Narrative ("CGN") agrees with LPN that the Indian and South African constitutions are grounded in Western liberal ideology, but disagrees on whether such reliance is legitimate. In this narrative, privileging Western epistemes over indigenous ones amounts to epistemicide. The Western liberal claim to universality is a technique of power for securing hegemony and domination over colonized peoples. By not provincializing liberal constitutionalism in the particularities of the Western liberal tradition and culture, these constitutions continue the colonial practice of devaluing epistemologies of the South as parochial un-reason, as against the universal rationality of the Western episteme.

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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.

2 *Alexander Hamilton*, Federalist No. 1, https://founders.archives.gov/documents/Hamilton/01-04-02-0152 (last accessed on 23 July 2024).

3 *Paul Kahn*, Comparative Constitutionalism in a New Key, Michigan Law Review 101 (2003), p. 2677.

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As such they reinforce the 'colonial matrix of power,'[4] and cannot claim to express the authentic democratic will of the people they seek to govern. To be legitimate, these constitutions should reflect the equally epistemologically valid and more culturally appropriate values, norms and governance structures rooted in the political philosophies and histories of the global south. Hence, these constitutions are illegitimate, and should be overhauled.

Roux argues that despite significant differences, there is much common ground between the two narratives. Both agree that the Indian and South African constitutions are based on Western liberal constitutionalism. Both are committed to the idea of a distinctive 'southern democratic constitutionalism' where constitutions are 'designed to empower a democratic state to undo the colonial legacy of social, economic, and cultural inequality.'[5] Their main ground of disagreement is whether these constitutions meet this ideal sufficiently. For LPN, these constitutions take western liberal constitutionalism as a point of departure and innovate its structures to suit to their own circumstances, making these constitutions at the same time universal *and* indigenous. For CGN, these constitutions subordinate indigenous epistemes to western liberal frameworks, and continue rather than disrupt the colonial matrix of power.

Roux concludes by highlighting the practical strategies that proponents of each narrative need to undertake to realise their shared ideal of a distinctive 'southern democratic constitutionalism.'

Motivated perhaps by the desire to tease out the differences and agreements between the two narratives, Roux conceptualizes each narrative category in a capacious manner. In this process, he clubs within each of these umbrella categories distinct narratives that are better understood as different discursive practices altogether and not variations on a common theme. Roux folds post-liberal narratives into LPN, and de-colonial critiques within CGN. I argue below that detangling these narratives allows us to see what is truly distinctive and what is not about these constitutional transitions – and allows us to more properly evaluate the claims of either narrative.

In what follows, I focus on Indian constitutional praxis. Part A. engages with LPN and demonstrates what post-liberal accounts of the Indian constitutional transition offers that differs from the standard narrative as presented by Roux. Part B. turns to CGN and teases out the differences between (and stakes of) the decolonial and culturalist strands of CGN. Part C. concludes.

A. LPN: Detangling the Liberal and the Postliberal.

In Roux's version of the Liberal Progressive Narrative (LPN), Indian constitutionalism is a variant of Western liberal constitutionalism. While the narrative recognizes that Indian

4 *Anibal Quijano*, Coloniality of Power, Eurocentrism, and Latin America, Nepantla: Views from the South 1 (2000), p. 533.

5 *Roux,* note 1 p. 51.

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constitutional actors have innovated and adapted constitutional design to suit their own circumstances, its adherents claim that Indian constitutionalism does not depart from the liberal constitutional template. Such adaptions and extensions do not amount to a new constitutional*ism*, but are variations on the themes of universally adaptable liberal constitutional paradigms. LPN therefore rejects the body of scholarly opinion that categorises the Indian constitution as inaugurating a post-liberal constitutionalism which is different in kind from liberal constitutionalism.[6]

Roux does not define what he means by liberal constitutionalism. Hence, it is difficult to know why exactly he folds post-liberal accounts of the Indian Constitution into the liberal one. At one place (and in a slightly different context) he refers to the "classic liberal idea of constitutions as limits on government."[7] If this is his definition of liberal constitutionalism, then the departures of the Indian Constitution are significant enough to warrant thinking of it as more than just liberalism-*plus* (or liberalism-*lite,* as the case may be).

The Indian Constitution does not stop at constituting the state and establishing structural and rights limitations on the exercise of state power.[8] It contains a distinctive configuration of the relationship between legitimate political authority, state power, the people, and the constitution, such that for scholars like Upendra Baxi, "the Indian constitution marks a historic break with 'modern' constituitionalism…the normative discontinuities are, indeed, astonishingly inaugural. Whatever be the point of arrival, the point of departure is, indeed, startling."[9]

Take for example, Indian constitutionalism's distinctive 'enchantment' with the state. Uday Singh Mehta has argued that while the Constitution was transformative in that it based its legitimacy on popular sovereignty, it also consolidated state power in service of securing national unity, social upliftment, and international recognition.[10] The new configurations of state power were focused not on freedom from the state as much as ex-

6 Ibid., pp. 13-14.

7 Ibid., p. 51.

8 This is the paradigmatic definition of liberal constitutionalism. See *Michael W. Dowdle* / *Michael A. Wilkinson*, On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity in: Michael W. Dowdle / Michael A. Wilkinson (eds.), Constitutionalism Beyond Liberalism, Cambridge 2016; *Wil Waluchow* / *Dimitrios Kyritsis*, Constitutionalism in: Edward N Zalta and Uri Nodelman (eds.), The Stanford Encyclopedia of Philosophy, Stanford 2023; https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/ (last accessed on 23 July 2024); *Mark Tushnet*, Varieties of Liberal Constitutionalism, in: Xenophon Contiades / Alkmene Fotiadou (eds.), Routledge Handbook of Comparative Constitutional Change, London 2020.

9 *Upendra Baxi*, The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism in: Zoya Hasan, Eswaran Sridharan, and R Sudarshan (eds.), India's Living Constitution: Ideas, Practices, Controversies, Delhi, 2005, p. 55 (footnote 61) (detailing the constitutional features that illustrate this departure).

10 *Uday Singh Mehta*, Constitutionalism in: Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India, Delhi 2010.

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tending the control of the political over all domains of the social, in order to transform the social through state power and law.[11] In seeking to govern relations between individuals, between individuals and communities, and between communities and the state, the Indian Constitution departed significantly from the liberal script of constraining state power to protect individual freedom. It created an all-powerful state, authorized to intervene in all areas of social life through a defined programme of action in service of the teleological vision of recasting society in the image of the Constitution.[12] For Sudipta Kaviraj, such an omnipotent state inaugurated a distinctive governmentality best exemplified in everyday constitutional discourses where state powers are "invoked in every demand for justice, equality, dignity, assistance - because all such demands can made only in its name; and it is the state's responsibility to meet all these expectations."[13]

These constitutional imperatives aimed at creating a good society are not merely incidental add-ons, but are foundational to the imagination and legitimation of the Indian state.[14] For example, constitution framers justified a centralized federal structure as a device for securing economic and social wellbeing;[15] the state's extensive powers of limiting fundamental rights in public interest was necessary for carrying out an extensive programme of reform unhindered by status-quoist judicial ideology;[16] extensive police powers were needed to shore up the state's capacity to carry out its reform agenda in the face of unruly, anti-national elements of society;[17] an innovative design that eschewed state neutrality towards religion and permitted state-led religious reform was essential for securing freedom from oppressive religious structures;[18] directive principles of state policy were required as instructions to future governments on the ends for which political power had to be exercised;[19] and a parliamentary system was adopted over a presidential system in order to empower the executive to carry out the urgent tasks of nation building unhindered by

11 Ibid.

12 See also, *Dieter Grimm*, Types of Constitutions in: Michel Rosenfeld / András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012 ("The impact of the social component would be misunderstood if seen only as an addition of a new content layer to the constitution. It entails a structural change. Social and economic rights are a consequence of waning confidence in the self-regulation capacity of society. Social justice becomes again a concern of the state.").

13 *Sudipta Kaviraj*, On the Enchantment of the State: Indian Thought on the Role of the State in the Narrative of Modernity, European Journal of Sociology 46 (2005), p. 263.

14 *Mehta*, note 10; *Madhav Khosla*, India's Founding Moment: The Constitution of a Most Surprising Democracy, Cambridge MA 2020, p. 620-625.

15 Ibid.

16 *Abhinav Chandrachud*, Due Process in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016.

17 *Samaraditya Pal*, India's Constitution: Origins and Evolution, (LexisNexis 2015), Articles 19 to 28.

18 Ibid., (see debates on Article 25).

19 *Constituent Assembly Debates* vol 7 (19 November 1948) (BR Ambedkar).

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the slow, messy, and fractious business of engaging with a legislature that might be in control of another party.[20] As Granville Austin notes, framers conceived of the Constitution as nothing less than a charter for social revolution, and empowered the state to be at the vanguard of this revolution. The Constitution therefore marks a rupture with colonial and Western liberal legality (understood as legally limited government), despite surface similarities.[21]

Therefore, just because the Indian Constitution borrowed text or ideas from the Government of India Act, 1935 or from Western liberal constitutions, does not mean that these ideas were uncritically transplanted into Indian constitutionalism.[22] Constitutional actors have transformed these ideas in ways that cannot be understood only through the prism of liberal discourses.[23] As Upendra Baxi notes, "[f]ar from being entirely mimetic of the European Enlightenment, the new constitutionalism also articulates differential modernity."[24] To think of it as "as a derivative or a doppelganger, a callow copy or a counterfeit, of the Euro-American "original""[25] is to deny agency to Indian constitutional actors in framing our own constitutional vision.[26]

That apart, if liberalism forms the template against which the constitution and its working is imagined, it will also shape the discursive terrain within which the Indian constitutional experience is evaluated. It is not clear why Indian constitutional praxis must be understood by reference to the conceptual categories, vocabularies, and justifications of

20 See debates on form of government. See generally, *Harshan Kumarasingham*, Eastminster – Decolonisation and State-Building in British Asia in: Harshan Kumarasingham (ed.), Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire, London 2016.

21 *Upendra Baxi*, Postcolonial Legality: A Postscript from India, World Comparative Law 12 (2012), p. 178. As others have pointed out, Western/Global North constitutions sometimes go beyond the classic liberal constitutional script of limited government. See for example, *N. W. Barber*, Principles of Constitutionalism, Oxford 2018, pp. 1-19; *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017), p. 527. My claim is not that the Indian constitution is unique in its design, but that its distinctiveness from the liberal constitutional script should be appreciated on its own terms, and not as refracted through the lens of liberal political theory.

22 Ibid.

23 Sudhir Krishnaswamy insightfully notes that in the Constituent Assembly members never invoked liberalism as the basis for constitutional design. The only mentions of liberalism are in the context of appreciating or deprecating departures from liberal constitutionalism. *Sudhir Krishnaswamy*, Is the Indian Constitution Liberal?, https://clpr.org.in/publications/is-the-indian-constitution-liberal/ (last accessed on 23 July 2024).

24 *Upendra Baxi*, Nihilisms, Contradictions, and Anomie in New Constitutionalisms: A View from India in: Boaventura de Sousa Santos, Sara Araújo, and Orlando Aragón Andrade (eds.), Decolonizing Constitutionalism: Beyond False or Impossible Promises, London 2023, p. 70.

25 *Jean Comaroff* / *John L. Comaroff*, Writing Theory from the South: The Global Order from an African Perspective, https://worldfinancialreview.com/writing-theory-south-global-order-african-perspective (last accessed on 23 July 2024).

26 See also, *Khosla*, note 14, introduction.

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liberal constitutionalism. Such an approach limits our ability to understand and evaluate Indian constitutionalism on its own terms, and might distort our judgment of its working by collapsing distinctions of kind or by viewing differences from the liberal paradigm as deviances.

For example, it might be tempting but mistaken to dismiss the particular instantiations of judicial power in India as perversions of an 'appropriate' judicial role (as benchmarked against liberal constitutional conceptions of judicial power). Such an analysis would fail to account for the specific discourses of constitutional legitimacy through which the judiciary has come to exercise the kinds of powers it has.[27] Similarly, by evaluating the Constitution on its own terms, scholars have understood Indian constitutionalism's approach to creating a common political authority in a multi-national, multi-lingual territory as upending the relationship between states and nations.[28] So also, Rajeev Bhargava has argued that the Constitution's rejection of state neutrality with respect to religion in favour of state intervention grounded in an approach of 'principled distance' leads not to the rejection of secularism, but to the inauguration of distinctive conceptions of that concept.[29] And finally, the programmatic elements of the Constitution aimed at securing socio-economic and political justice provide a specific constitutional vocabulary within which new types of assertions and claims can be made upon the state. Such claim-making has shaped the trajectories of separation of powers including by weakening (dissolving?) the distinction between the domain of the political and the juridical, and transforming the Indian higher judiciary from an adjudicative body to an institution of co-governance.[30] Thus, underlying a liberal constitutional device of separation of powers as a check on state power, is a constitutional practice that sees all organs of the state, including the judiciary, as engaged in a joint enterprise of governance, in order to achieve the constitutional teleology.[31]

The particular idioms and nuances of Indian constitutional discourse which frame how Indian constitutional actors (framers, judges, lawyers, politicians, citizens) conduct constitutional conversations cannot be understood without appreciating this ontology and teleology of Indian constitutionalism on its own terms. For example, without accounting for these distinctive elements of the Indian constitution it is difficult to make sense of the early tensions between the courts and parliament, where even liberals like Nehru decried

27 See *Aparna Chandra*, Book Review: Courting the People: Public Interest Litigation in Post-Emergency India, International Journal of Constitutional Law 16 (2018), p. 710.

28 *Alfred Stepan* /*Juan J. Linz* / *Yogendra Yadav*, The Rise of "State-Nations", Journal of Democracy 21 (2010), p. 50.

29 *Rajeev Bhargava*, India's Secular Constitution in: Zoya Hasan / Eswaran Sridharan /R Sudarshan (eds.), India's Living Constitution: Ideas, Practices, Controversies, London 2002.

30 See *Upendra Baxi*, Preface in: Mayur Suresh and Siddharth Narrain (eds.), The Shifting Scales of Justice: The Supreme Court in Neoliberal India, Hyderabad 2014.

31 See generally *David Landau* / *David Bilchitz*, Introduction in: David Landau and David Bilchitz (eds.), The Evolution of the Separation of Powers, Cheltenham/Northampton 2018.

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the use of liberal legality to defeat the aims of the Constitution.[32] Or, as Anuj Bhuwania has documented, Indian constitutionalism's focus on state led social transformation has resulted in distinctive attitudes of judges towards judicial power and legal constraint, which cannot be understood without recourse to the particular discursive practices of Indian constitutionalism.[33]

None of this is meant to uncritically celebrate the post-liberal constitution either as an authentic, indigenous manifestation of Indian ingenuity and agency, or as a morally superior constitutional formation (and I agree with the brief listing of structural weaknesses of the Indian constitutional order that Roux undertakes).[34] My aim here is to emphasize that narratives about the Indian Constitution should take seriously the claim that there is something distinctive about the Indian constitutional praxis that goes beyond liberal constitutionalism, such that it is a category mistake to see it as "*developments* of that tradition rather than *departures* from it."[35] Roux fails to do so without explaining why (his reading of) LPN rejects such a distinctive post-liberal interpretation of the Indian Constitution. As he himself recognizes, the post-liberal conception of Indian constitutionalism poses a strong challenge to CGN's claim that the Indian constitution is not authentic or autochthonous.[36] By dismissing the post-liberal narrative as a variant of LPN (or at the least not explaining why this is the best reading of LPN), he concedes too much ground to CGN. I turn to this issue below.

B. CGN: Detangling the Culturalist and the Decolonial

In Roux's framing, CGN encompasses a long-held critique of Indian constitutional discourse as a Western cultural import, inflected in recent times with Latin American inspired decolonial theories. The narrative rejects as "fanciful" and "misleading" the LPN claim that liberal constitutional values can be detached from their origins in European Enlightenment and re-purposed for other contexts. Instead, it argues that the adoption of the Western liberal episteme perpetuates (and under the garb of democratic legitimacy, further entrenches) the 'colonial matrix of power' since it continues Western imperialism's epistemic subordination and denigration of the political traditions and cultural values of the South.[37]

32 *Parliamentary Debates*, vol. 12 part 2, 16 May 1951 (Jawaharlal Nehru) ("We had found this magnificent Constitution… which was kidnapped and purloined by lawyers.").

33 *Anuj Bhuwania*, Courting the People: Public Interest Litigation in Post-Emergency India, International Journal of Constitutional Law 16 (2017). See also, *Anuj Bhuwania*, Judicial Review and India's Statist Transformative Constitutionalism in: Aparna Chandra et al (eds.), Cambridge Companion to the Constitution of India, forthcoming.

34 *Roux*, note 1, p. 46.

35 Ibid., p. 46.

36 Ibid.

37 Ibid., pp. 25-26.

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A post-liberal reading of the Indian Constitution which ascribes agency, choice, and reflection to Indian constitutional actors (as opposed to uncritical imitation of the Western episteme) might go some way in answering this charge, but for CGN such a post-liberal constitution would remain illegitimate since it is not rooted in India's indigenous conceptual universe, which is *a priori* superior to the Western liberal tradition. For this reason, CGN's positive claim is that "the anti-colonial struggle is better conceived as the struggle of a culturally homogeneous people to win back the capacity to govern itself according to its own political traditions and cultural values."[38] Thus, legitimate constitutional design should not "prolong the colonial process of 'epistemicide'."[39] Instead, the current Constitution should be replaced by one that is grounded in these authentic and culturally appropriate concepts.

Recognizing that the culturalist critique can be used in support of an exclusionary nativist rhetoric, Roux brings together the decolonial critique and the culturalist critique under CGN in a deliberate attempt to "give the full richness of this narrative its due" and to accord it its "most charitable interpretation."[40] He sees in this narrative the desire for a truly authentic and autochthonous southern democratic constitutionalism. Such a constitutionalism would go beyond procedural framework for managing political competition, and would "empower a democratic state to undo the colonial legacy of social, economic, and cultural inequality," including through "transforming society in line with a clearly articulated vision of post-colonial justice."[41]

Roux is too charitable by half in attempting to rescue the culturalist critique from its worst impulses. He recognizes that the culturalist critique is based on a view that the "the anti-colonial struggle is better conceived as the struggle of a *culturally homogeneous people* to win back the capacity to govern itself according to its own political traditions and cultural values."[42] In the Indian context, Roux recognizes that this strand of CGN does not refer to the rejuvenation of "the diverse values of the many different cultural traditions that could be said to be indigenous to India, but the cultural values of India's Hindu majority."[43] Underlying these assertion is a claim that these culturally homogenous norms are morally, conceptually, and contextually superior to the Western liberal episteme as a resource for global south constitutionalism. Without claiming an *a priori* superiority of "a state governed according to Hindu religious and cultural principles"[44] a major plank of the culturalist strand of CGN falls through – its claim to be more authentic and democratically legitimate than LPN.

38 Ibid., p. 25.
39 Ibid., p. 26.
40 Ibid., p. 26.
41 Ibid., p. 51.
42 Ibid., p. 25.
43 Ibid., p. 27.
44 Ibid., p. 28.

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Decolonial theories on the other hand do not assume the *a priori* superiority of epistemologies of the south. As Boaventura de Sousa Santos and his co-authors explain, a constitutionalism grounded in epistemologies of the south

> *"does not involve romanticizing knowledges on the other side of the [abyssal] line or showing contempt for modern institutions. The objective is to promote debates based on the logic of radical co-presence, that is, dialogue in which the contemporary/primitive dichotomy is replaced by transversal recognition of the incompleteness of knowledges and the provincialization of modern understanding and law."*[45]

Such theories are therefore not so much a critique based in the *source* of Western epistemic ideas, but in the *a priori* privileging of such ideas and the devaluing of epistemologies of the south.[46] If, as the decolonial critique holds, southern epistemes should not be rejected *solely* because they are southern and not compatible with a Western epistemic worldview, then obviously, it leaves open the possibility that on reflection, some or all of southern epistemes may in fact be rejected. This is not the argument that the culturalist strand of CGN makes.

Furthermore, in a culturally diverse geography like India, the idea of a culturally homogenous, pristine and morally superior past, discoverable in the present, cannot but serve the exclusionary ethno-nationalist goals that Roux is seeking to recover it from. The nativist impulses in this strand are not its dark side, but its only face; they are a design feature, not a bug. In a multi-religious, multi-cultural, multi-national and deeply divided polity,[47] why would it be legitimate for Hindu cultural values to form the basis for a constitution, unless it can be claimed that these values are *more* authentic, morally *superior*, or *more* indigenous than other traditions? This is precisely the argument made by Hindutva's advocates.[48] Such a conceptualization of the bases of constitutional legitimacy would condemn India's significant religious minorities to perpetual second-class status since the legitimizing principle for political authority (and therefore possibly the legitimacy of political participation and holding political office) would be adherence to the religious norms of one religious group.

Further, for a critique based on epistemic in/justice, CGN – as narrated by Roux – does not grapple with a range of epistemological questions the invocation of cultural homogeneity presents. For example, in a polytheistic religion like Hinduism, whose version

45 *Boaventura de Sousa Santos* /*Sara Araújo* / *Orlando Aragón Andrade*, Conclusion in: Boaventura de Sousa Santos / Sara Araújo / Orlando Aragón Andrade (eds.), Decolonizing Constitutionalism: Beyond False or Impossible Promises, London 2023, pp. 323-324.

46 See also *Boaventura de Sousa Santos*, The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South, London/Durham 2018.

47 On India as a multinational state, see *Stepan* et al., note 28. On India as a deeply divided society, see *Arend Lijphart*, The Puzzle of Indian Democracy: A Consociational Interpretation, American Political Science Review 90 (1996), p. 258.

48 See *Roux's* own description of this exclusionary discourse see, note 1, p. 28.

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of Hinduism would prevail as the homogenous Hindu view, and why? A focus on Hindu religious scriptures, the study of which was prohibited to the majority of Hindus, would not be in tune with the lived religious traditions of the bulk of Indians. Roux might argue, along with others that he cites, that "there is an inherently pluralist character to Hinduism that has allowed it to coexist with other religions over the years."[49] It is telling that the authors cited for such a claim are all dominant caste, Hindu men. What does Hinduism's claimed pluralism and tolerance look like from the point of view of a Dalit woman who bears the intersectional burden of Brahminical patriarchy?[50] Shashi Tharoor's cited work, *Why I am a Hindu* should be counter-posed against the book it riffs its title from: Kancha Illiah's, *Why I am not a Hindu*.[51] This juxtaposition will help illuminate the everyday ritual humiliation in the name of religion faced by oppressed castes, as well as their own contested relationship with (Brahminical) Hinduism.[52] One may or may not agree with Ambedkar that annihilating caste requires rejecting the religious authority of the Shastras.[53] However, since these Shastras, as commonly understood, authorize a system of graded inequality where hierarchy is based on marking humans as pure or polluted by birth,[54] basing the legitimacy of the *constitution* on its coherence with these texts, their common interpretation, or the everyday religious beliefs and practices they engender, would at the least constitute severe psychological harm to those who are subordinated by such a religion, as well as epistemic injustice to the cultures of resistance to these texts and practices.

The justification for basing the Constitution on the conceptual apparatus of Hindu traditions is that this shift would allow for a more authentic expression of the democratic will of the people. This begs the question: is inclusive democracy even possible in a system that does not recognize fellow citizens as equal, either because they profess a different religion or because they are born into a different caste? Is a foundational commitment to equality necessary for democracy to become the legitimate method for allocating political

49 Ibid., p. 28 (especially footnote 84).

50 On Brahminical patriarchy see *Uma Chakravarti*, Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State, Economic and Political Weekly 2 (1993), pp. 579-585.

51 *Kancha Ilaiah*, Why I Am Not a Hindu: A Sudra Critique of Hindutva Philosophy, Culture and Political Economy, Calcutta 2019.

52 See also, *B. R. Ambedkar*, Annihilation of Caste, 2014 (which concludes with Ambedkar announcing that he is leaving the Hindu fold).

53 Ibid. I personally agree with this argument.

54 *B. R. Ambedkar*, Untouchables of the Children of India's Ghetto, in: Vasant Moon (ed.), Dr. Babasaheb Ambedkar Writings and Speeches, vol. 5, Delhi 2014, pp. 101-102.

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authority?[55] In a constitutional order whose legitimacy depends on its adherence to an exclusionary constitutional vocabulary, why would the order be democratic in the first place?[56]

Even if the centrality of caste to the Hinduism could be annihilated, how might one conceive of an indigenous conceptual apparatus - unmediated by colonialism - for such a heterodox religion that can shape an alternative vision for Indian constitutionalism. As scholars of Anglo-Hindu laws have demonstrated, the idea of a homogenous body of Hindu norms emerged during, and through, the colonial encounter. Under the Hastings Plan of 1772, "the shastras with respect to the Gentoos (Hindus)" would be applied to a range of disputes between them.[57] This privileging of the shastras and their specific interpretations as propounded by court-affiliated Brahmin priests, served the colonial project by bringing diverse religious traditions and practices under conceptual control, thereby making it possible to regulate and administer these populations.[58] As Flavia Agnes has noted, the colonial encounter

> *"created the legal fiction that the laws of Hindus….are rooted in their…scriptures and further that Hindus…are homogenous communities following uniform laws….This legal fiction provided no space for validating the role of customary laws which has no scriptural basis and is evolved at the local level transgressing boundaries of religious identities….[W]hen the [East India] Company officials stepped in to arbitrate in civil and criminal disputes, due to their limited understanding of local traditions and customs, they relied upon Hindu pundits ..to ascertain their respective law. This set in motion the process of Brahminization…of [Hindu] laws."*[59]

The idea of a culturally homogenous (Hindu) community whose conceptual universe can be the source of an authentically indigenous alternative conception of Indian constitutionalism

55 Roux recognizes that political dominant culturalist narratives seek to redefine India as a civilizational state. How does this comport with the idea of the political legitimacy grounded in popular sovereignty? In a civilizational state, it is not "popular will" but adherence to pre-democratic civilizational values that supplies the legitimating principle for political authority. How would one assume that this system will be necessarily democratic? See generally, *Peter Reid* / *Asanga Welikala*, The Constitutional Challenge of the Civilisational State https://thenewdigest.substack.com/p/the-constitutional-challenge-of-the (last accessed on 9 September 2024).

56 Ambedkar, for example believed that India would not be able to sustain its newly enacted political democracy without ensuring social democracy. See Constituent Assembly Debates vol. XI (25 November 1949) (BR Ambedkar). See also, *Ambedkar*, note 52 ("Democracy is not merely a form of government. It is primarily a mode of associated living, of conjoint communicated experience. It is essentially an attitude of respect and reverence towards one's fellow men.").

57 Hastings Plan of 1772.

58 See generally, *Baxi*, note 21.

59 *Flavia Agnes*, Law and Gender Inequality: The Politics of Women's Rights in India, Delhi 1999, pp. 43-44. See generally *J. Duncan M. Derrett*, Essays in Classical and Modern Hindu Law: Anglo-Hindu Legal Problems 3, Leiden 1977, p. 58.

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is therefore itself an invention rooted in epistemicide of the diverse traditions, ethos, and practices that were not legible on the colonial register. This is not to say that there is nothing worth saving or perhaps even celebrating in the Hindu traditions and practices. However, any claim to broad sweep and *a priori* superiority of such norms, without examining their specifics, their imbrication in perpetuating, resisting, or otherwise complicating caste, gender, and religious power and hierarchies, would introduce an irreconcilable tension between the culturalist and the decolonial strands of CGN.[60]

The invention of homogenous Hindu law through the colonial encounter also raises an epistemic question regarding the feasibility of CGN as a vehicle for articulating an authentically Southern democratic constitutionalism. What really would be 'authentically' 'indigenous' and 'southern' about such an experience? As Roux recognizes (but does not explore the implications of), syncretism marks all constitutional developments.[61] Polities are not hermeneutically sealed, and the diffusion of ideas, values and norms, both by force as well as through more benign encounters has shaped Western and southern epistemes.[62] The culturalist strand can either double down on the claim that there is a pristine past that is discoverable in the present – a claim that is epistemologically dubious – or agree that while southern epistemes have been influenced by various traditions, they retain a distinctive character that can form the basis of an alternative constitutional imagination. Proponents of the second claim therefore would not reject the diffusion of Western liberal epistemes into Indian constitutional law, but would challenge the assumption that this episteme is the only, or superior, basis for constitutional formations in the global south. As discussed above, for this argument to work, we would have to agree with LPN that all that the Indian constitutional framers did was uncritically adopt Western liberal constitutionalism (with relatively minor variations), rather than chart a distinctive constitutional path, informed by, but not mimicking, Western liberal constitutionalism. Once we open the space for hybridity and syncretic growth of constitutional conceptions, then both the standard LPN account and the culturalist strand of CGN would have to descend from the lofty heights of grand narratives and grapple with specifics design choices in the Indian Constitution to explain why they are (il)legitimate.

Separating the decolonial and the culturalist strands of CGN allows us to not be misled by the faux progressive deployment of the conceptual vocabulary of decoloniality to estab-

60 *Boaventura de Sousa Santos* / *Sara Araújo* / *Orlando Aragón Andrade*, Introduction: The Constitution, the State, the Law and the Epistemologies of the South in: Boaventura de Sousa Santos / Sara Araújo /Orlando Aragón Andrade (eds.), Decolonizing Constitutionalism, London 2023. See also, *Arun K. Thiruvengadam*, Excavating Constitutional Antecedents in Asia: An Essay on the Potential and Perils, Chicago-Kent Law Review 88 (2012), p. 45 (raising similar concerns about the attempt to connect modern constitutional design and principles to historical political traditions in other Asian jurisdictions).

61 *Roux*, note 1.

62 *William Twining*, Diffusion of Law: A Global Perspective, Journal of Legal Pluralism and Unofficial Law 36 (2004), pp. 1-45.

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lish an exclusionary nativist vision. The decolonial narrative leaves open the possibility of constitutional change by uncovering subordinated constitutional vocabulary, but its relation to power and structure, justice and governance, rule and resistance would have to be persuasively argued rather than *a priori* assumed.[63]

C. Conclusion

I agree with Roux that it is important to pay attention to political narratives about the Constitution. These narratives supply the discursive terrain within which Constitutions are evaluated, justified, and (de-)legitimized. For this reason, I understand the impulse to take a politically salient narrative like CGN seriously, give it its most charitable interpretation and engage with it in good faith. However, as discussed in this paper, this charitable interpretation does not comport with the premises and the political project driving CGN. Conflating the decolonial and the culturalist critiques of the constitution allows the proponents of the culturalist strands to appropriate the emancipatory decolonial discourse for their own exclusionary purposes. On the other hand, the post-liberal account of the Indian constitution could serve as an important foil for CGN, and undercut its claims regarding the absence of an authentic southern democratic constitutionalism in the global south. However, folding the post-liberal narrative into LPN blunts this prospect, and also fails to describe Indian constitutional praxis on its own terms. Detangling these various strands of the narratives allows a more nuanced and clear-eyed view of the politics of the various narratives about constitutionalism in the global south. If nothing else, it allows us to meet the challenges posed by these narratives heads on, without getting distracted by their conceptual sophistry.

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63 See generally, *Baxi*, supra note 21.

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