WORLD VIEW SYMPOSIUM

Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa

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Abstract: There are currently two contrasting ways of narrating the Indian and South African constitutional transitions. The first contends that they were moments when liberal constitutionalism was adapted to the circumstances of the Global South. In contrast to what happened in many other post-colonial countries, this narrative goes, constitution-making in both India and South Africa was driven by a broadly representative liberation movement that had endeavoured to catch the colonial state in the contradiction between its claimed 'civilising mission' and the reality of its oppressive operation. At independence, the Congress party in India and the African National Congress in South Africa expressed this conception of the anti-colonial struggle in constitutions that repurposed liberal constitutionalism to the challenges of post-colonial governance. In so doing, they not only pluralised that approach to governance beyond the West. They developed it in ways that are relevant to the revival of liberal constitutionalism in the Global North. The second narrative, detectable in recent work in decolonial theory, but also in an older tradition of culturalist critique in each country, rejects this account of liberal constitutionalism's already-achieved de-Westernisation. Far from demonstrating the universalisability of liberal constitutionalism's animating principles, adherents of this second narrative maintain, the Indian and South African Constitutions simply reflect the values of the Westernised political elite that adopted them. As such, they prolong the colonial past into the colonial present and perpetuate the suppression of indigenous lifeways that began under colonial rule. After setting out these two narratives as they apply to each country, this paper brings them into dialogue with each other. Rather than offering a purportedly neutral framework by which to assess them, each narrative is treated as the other's most demanding interlocutor, alert to its blind spots and convenient omissions. Proceeding in this way, the paper contends that, notwithstanding their many differences, the two narratives – charitably

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interpreted – are committed to the same ideal: a distinctively Southern conception of constitutionalism that gives the post-colonial state a central role in overcoming past injustices and creating the conditions for active citizenship. The final section of the paper examines the suggestions that adherents of the charitable version of each narrative make about how to realise this ideal in India and South Africa. The problem with the second narrative, the decolonial/culturalist story, is that its adherents' call for fundamental constitutional overhaul tends to be lacking in detail and also in attentiveness to the political context in which such a call would be implemented. One very real challenge for adherents of the charitable version of this narrative is the risk that any new constitution-making process might be dominated by political actors with an exclusionary conception of the relevant national people. The first narrative, the 'liberal constitutionalism already de-Westernised' story, points in the direction of incremental adjustment rather than complete constitutional overhaul. While absolving its adherents of the need to design things afresh, this does not mean they have an easier run of things. Indeed, if anything, the demands on them are higher given the evident failure of the Indian and South African Constitutions thus far to realise their ambitions.

Keywords: Southern Constitutionalism, Constitutional Transitions, Postcolonial Constitutionalism, Liberal Constitutionalism, South Africa, India

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A. Introduction

A postcolonial constitution adopted by a broadly representative constitution-making body may, despite its democratic pedigree, reinforce 'the colonial matrix of power'[1] – the interconnected web of oppressive power relations that prevailed under colonialism. This is the central claim made in the decolonial critique of the Indian and South African Constitutions that is currently gaining traction. In political speeches, scholarly papers and social-media posts, its proponents are calling into question the mainstream view of these constitutions as remarkable achievements – leading examples of the capacity of post-colonial constitution-makers to adapt Western ideas to local needs. The mainstream view is incorrect and self-serving, according to decolonial critics. However innovative the Indian and South African Constitutions may appear to be, their articulation in the conceptual vocabulary of liberal constitutionalism has retarded the reassertion of indigenous ways of being and prioritised the interests of the Westernised political elite that rose to prominence under colonial rule. While the drafters of the two constitutions, drawn as they were from this elite, might have believed that they were specifying the ground rules for a new, transformational state,

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

they were simply engaging in a fresh round of 'epistemicide' – the ongoing destruction of indigenous knowledge systems and cultural practices.[2]

Though informed by a distinctive, post-1980s Latin American literature,[3] the decolonial critique is in many ways but the latest iteration of a well-established culturalist tradition of thinking about the Indian and South African constitutional transitions. Starting during the anti-colonial struggle, a long line of political activists, scholars and public commentators has called into question the mainstream view of the movement for national liberation as a demand for political inclusion in a liberal-democratic state.[4] That way of viewing the struggle, these thinkers argue, concedes too much ground to liberal constitutionalism's claim to universality. Rather than demanding the establishment of a Western-style liberal democracy, the anti-colonial struggle was about asserting the dignity and worth of a denigrated culture, with its own unique approach to governance.

The tenability of the decolonial critique and the culturalist tradition that underpins it has obvious implications for the future of democratic constitutionalism in India and South Africa. If the critics are right, we ought to be putting our energies into overhauling those two countries' constitutions in line with the governance traditions they have been suppressing. Only by doing that, the logic of the critique runs, will the Indian and South African Constitutions give authentic expression to their people's democratic aspirations. If the decolonial critique is misconceived, on the other hand, there is no need to replace these two constitutions. Indeed, doing so might be a dangerous misadventure that opens the way to reconstituting India and South Africa as ethno-nationalist polities, with all that this entails for minority rights at home and peaceful international cooperation abroad. Rather than overhauling the two constitutions, on this view, we ought to be redoubling our efforts to promote the realisation of their goals.

By what criteria should we decide between these two starkly opposed alternatives? The difficulty is that each of them flows from its own grand narrative – a comprehensive account of the Indian and South African constitutional transitions that has deep intellectual roots and fervent supporters in each country. What was described earlier as the 'mainstream view' of these transitions is thus derived from the familiar liberal-progressivist narrative – the idea that human history is marked by steady progress towards an ever more enlightened understanding of the universal preconditions for human flourishing. Against this, the decolonial critique draws on an equally powerful culturalist narrative that sees human history as marked instead by clashes between culturally homogeneous communities, each with its own distinct tradition of governance.[5]

2 *Boaventura de Sousa Santos*, Epistemologies of the South: Justice against Epistemicide, Oxfordshire 2014.

3 See literature cited in Part D. below.

4 See literature cited in Part E. below.

5 I explain my choice of these terms in Part B. below.

Given their adherents' deep investment in these narratives, any purportedly neutral criteria we might devise to assess them would likely be dismissed as weighted in favour of one or the other. But perhaps that is the wrong thing to be attempting in any case. It is not a vindication of 'the truth' of either one of them that we should seek, but rather a productive conversation between them. In a sense, each narrative is already the other's most demanding interlocutor – the bearer of an opposing truth that is capable of exposing its blind spots and convenient omissions. That being so, the best approach might be to set out the two narratives as clearly and as charitably as we can so that they can be brought into conversation with each other. From there, we might try to assess them for what they imply about the practical steps that need to be taken to realise the conception of constitutionalism that could be said to underlie them.

That, in any event, is how I intend to proceed in this article. Part B. starts with a note on 'grand narratives' – how I understand this term and why I have chosen to focus on the liberal-progressivist and culturalist grand narratives in particular. At the same time, I explain my reasons for choosing to compare India and South Africa as prominent sites of contestation between them.

Part C. sets out the hitherto dominant, liberal-progressivist narrative of the Indian and South African constitutional transitions. In both countries, this story goes, a national liberation movement that incorporated perspectives from across the ideological spectrum drove the constitution-making process. In both countries, too, the transition to democracy followed a period of anti-colonial struggle that had pressed down on the contradiction between the colonial state's claimed 'civilising mission' and its de facto racially discriminatory operation. Through this process, a new understanding of the emancipatory potential of liberal constitutionalism developed in each society – one founded on the Western tradition, but which also extended it on the back of local experiences and perspectives. It was this new understanding that informed the two constitutions adopted.

Part D. turns to the culturalist narrative of the Indian and South African constitutional transitions, the decolonial version of which is currently gaining ground. The central thrust of this account is the view that constitutions premised on the Western liberal model necessarily prolong the colonial past into the postcolonial present. While presenting themselves as autochthonous creations, they are in fact steeped in culturally alien European Enlightenment ideas. Their effect is to suppress indigenous constitutional imaginaries and provide legitimating cover for institutional arrangements that perpetuate the unjust power relations that prevailed under colonialism.

With the two narratives in place, Part E. sets up an imaginary dialogue between them under two headings: 'the colonial power matrix of power' and 'liberal constitutionalism and its diversification beyond the West'. The point of this dialogue is not to demonstrate that one or the other narrative has the better of the argument, but to sharpen our understanding of areas of agreement and disagreement, so that it becomes clearer what is at stake.

With each narrative clarified in this way, Part F. turns to spell out their implications for *Southern democratic constitutionalism*, the normative ideal that the dialogue suggests

animates the most charitable interpretation of each of them. Rather than an external, objective standard, in other words, Southern democratic constitutionalism is treated as a shared ideal that can be used to keep the narratives within talking distance of each other. If that is the basis on which the conversation should proceed, Part F. asks, what does each narrative entail for the realisation of Southern democratic constitutionalism and do the differences between them, which appear so stark in the abstract, narrow when it comes to thinking about practical strategies?

To answer this question, Part F. starts with a brief analysis of the political context in which debates over the future of constitutionalism are taking place in India and South Africa. The purpose of this subsection is to ground the discussion of each narrative's prescriptions in a realistic assessment of the context in which Southern democratic constitutionalism is being pursued.

For adherents of the liberal-progressivist narrative, there is nothing in the current political context in India and South Africa to suggest that their constitutions need to be fundamentally overhauled. As genuinely autochthonous attempts to adapt Western ideas to the circumstances of the Global South, they are in theory capable of promoting Southern democratic constitutionalism. The culturalist call for fundamental constitutional change, on this view, is based on a flawed analysis of the indigenous agency on display in the making of the two constitutions and unproven assertions about their ongoing effects. This is not to say, of course, that the two constitutions are without fault. On the liberal-progressivist view, constitutions are adaptable instruments for the pursuit of human flourishing and their performance against this goal must accordingly be continually assessed. In both India and South Africa, persistent economic inequality constitutes an ongoing challenge to the legitimacy of the existing constitution that needs to be resolved, both for intrinsic moral reasons and for the threat it poses to constitutionalist governance. For liberal progressivists, however, they key question is to identify what it is about the design of the two constitutions (as distinct from constitutionally extraneous causes) that might be contributing to this problem. Constitutional overhaul in the absence of an answer to that question would be a dangerous distraction. The same goes for the respects in which the two constitutions might be contributing to the centralisation of political power, say, or the inability of the political system to respond to long-term future threats, such as climate change. In respect of all these issues, liberal progressivists counsel that the path to Southern democratic constitutionalism is one of practical politics and coalition building rather than fundamental constitutional overhaul.

According to the culturalist narrative, on the other hand, both India and South Africa should be thinking about replacing their constitutions. That is because a central part of this narrative is the idea that the constitution – the values it embodies, the institutions it establishes and the symbolic status it enjoys in the collective psychology of the nation – perpetuates colonial social and economic injustices and prevents a properly indigenous tradition of constitutionalism from (re-)emerging. No genuinely democratic form of constitutionalism is possible on this view of things while the constitution remains in place. Before

proceeding to this step, however, democratic constitutionalists who are persuaded by this narrative need to pay attention to the political context in which their project of fundamental constitutional overhaul would be pursued. In both India and South Africa, there are reasons to think that any attempt to implement such a project now would be dominated by political forces with an exclusionary conception of national identity. As pressing as the need for constitutional overhaul may appear to be, the prudent course is to work first to counter-act those forces. In the end, this means that adherents of this narrative need to engage in the practical politics of coalition-building under the existing Constitution in much the same way as adherents of the liberal-progressivist narrative.

B. Why these Grand Narratives and why India and South Africa?

The liberal-progressivist and culturalist grand narratives (hereafter the 'LPN' and 'CGN') are, of course, not the only ways of telling the story of the Indian and South African constitutional transitions. One significant alternative, not given much airtime here, is the materialist/Marxist account, which sees those transitions as being about capital's successful substitution of its political form. That way of narrating the transition is very established in both countries,[6] and some readers might think it odd not to consider it. The reason for leaving it out is that the LPN and the CGN are the two narratives that are currently most often invoked in public debates over the future of constitutionalism in the two countries. They are in that sense the two narratives that are politically in play. On top of that, the LPN and the CGN appear to prescribe diametrically opposed constitutional futures, which makes it both intriguing and productive to put them in dialogue with each other.

By using the term 'grand narrative' I do deliberately mean to invoke Jean-Francois Lyotard's idea of comprehensive explanations of the causal logic behind long-run historical processes.[7] In contrast to Lyotard, however, I do not think that such narratives have lost their legitimating power in the circumstances of post-modernity. On the contrary, the world once again appears to be awash with them, albeit with a greater awareness of the contingency of their truth claims and a certain insouciance about that fact. The defining feature of post-modernity, it turns out, is not so much scepticism about grand narratives, as cynicism. You can have your grand narrative as long as I can have mine.

Subject to that qualification, the premise of this paper is that both the LPN and the CGN are grand narratives in the Lyotardian sense – comprehensive accounts of the Indian and South African constitutional transitions that attempt to make sense of what happened by attributing an underlying causal logic to an otherwise seemingly random series of events. The LPN, for its part, is a specification to the two transitions of what Lyotard refers to as the liberal narrative of 'progress' – the idea that societies evolve towards an ever

6 See, for example, *Patrick Bond*, Elite Transition: From Apartheid to Neoliberalism in South Africa, London 2000; *John S. Saul*, Decolonization and Empire: Contesting the Rhetoric and Practice of Resubordination in Southern Africa and Beyond, Johannesburg 2008.

7 *Jean-Francois Lyotard*, The Postmodern Condition: A Report on Knowledge, Manchester 1984.

more perfect instantiation of human freedom by the democratically mandated application of the latest scientific and technological advances.[8] The CGN has no direct equivalent in Lyotard's work but is a readily recognisable specification to the Indian and South African constitutional transitions of the culturalist view of historical progress that sees culturally homogeneous societies developing on the back of clashes with other culturally homogeneous societies. In the course of these clashes, individuals are motivated, not just by their material interests, but also by the culturally conditioned meaning they attribute to events.[9]

While either India or South Africa might have been considered on its own as a site in which these narratives are currently competing for public support, there is something to be gained by comparing the debates going on in each country with each other. For one, the fact that these narratives are in play in both India and South Africa suggests that there may be some exogenous factors at work. The Indian and South African Constitutions, after all, were adopted some forty-five years apart. If public debates over their legitimacy were driven entirely by endogenous factors, we would expect them to be markedly different. The fact that they are not must have something to do with the context in which these debates are occurring – in particular, the shift to a more multipolar world after the 2008 Global Financial Crisis. Having reached the zenith of its influence in the 1990s, liberal constitutionalism is now being assailed on several fronts, with its presumptive right to dictate the normative standard according to which other civilisational traditions of governance should be assessed increasingly being questioned.[10] In that context, arguments about the culturally alien quality of the Indian and South African Constitutions that have long been made by critics inside each country have gained greater currency. Two constitutions that that were once the prime examples of the supposed pluralisation of liberal constitutionalism beyond the West are now being critiqued as the leading examples of the folly of that notion.

The argumentative moves made in these debates are very similar to moves that have been made in international law for some time. For some, therefore, there might be nothing new to see here. The decolonial critique of the Indian and South African Constitutions is simply the long overdue emergence of something akin to TWAIL (Third World Approaches to International Law).[11] That observation is true up to a point. Many of the claims made

8 Ibid.

9 The best-known (controversial and much-criticised) example of this conception is *Samuel P. Huntingdon*, The Clash of Civilizations and the Remaking of the World Order, New York 1996.

10 For a collection of essays on the crisis of liberal constitutionalism, see *Mark A. Graber / Sanford Levinson / Mark Tushnet* (eds.), Constitutional Democracy in Crisis?, New York 2018. On the crisis of liberalism more generally, see *Francis Fukuyama*, Liberalism and its Discontents, London 2022.

11 See *James Thuo Gathii*, The Agenda of Third World Approaches to International Law (TWAIL) in: Jeffrey L. Dunoff / Mark A. Pollack (eds.), International Legal Theory: Foundations and Frontiers, Cambridge 2022, pp. 153-73. For a recent critical survey of the TWAIL literature, see *Naz K. Modirzadeh*, 'Let Us All Agree to Die a Little': TWAIL's Unfulfilled Promise, Harvard International Law Journal 65 (2024), pp. 79-131.

in the decolonial critique are indeed TWAIL-like arguments. Unlike the rules-based international order, however, defenders of the Indian and South African Constitutions see them as deliberate attempts to adapt liberal constitutionalism to the circumstances of the Global South. That gives the constitutional version of these debates an added dimension. We are not talking about an international rules-based order that arrogantly passed off its culturally parochial origins as universal, but two Constitutions whose drafters deliberately attempted to extend the tradition of liberal constitutionalism beyond the West. If the decolonial critique succeeds in that least propitious of settings, it is likely to succeed everywhere. By the same token, if the critique fails, liberal-progressivists would have established the plausibility of their central claim.

C. The Liberal-Progessivist Narrative

The LPN's core contention is that the Indian and South African Constitutions are the fulfilment of a particular understanding of the nature and purposes of the anti-colonial struggle. While in both instances, the LPN concedes, it is possible to conceive of that struggle as the attempt by a culturally homogeneous people to regain the capacity to govern itself according to its own traditions, this is not the understanding that ultimately triumphed. Rather, the understanding of the anti-colonial struggle that in the end succeeded was the one that depicted it, whether sincerely or instrumentally, as being about the establishment of a liberal-democratic state based on universal values of freedom, equality, and democracy.

In contending thus, the LPN does not dismiss altogether the relevance of the rival, culturalist understanding of the anti-colonial struggle. Rather, it incorporates it within the more universalist story it wants to tell. It does this by presenting liberal constitutionalism as an inherently adaptable tradition whose core commitments are deliberately stated at a high level of generality, making them amenable to culturally sensitive specification in different contexts. For the LPN, this understanding of liberal constitutionalism's adaptability is no less true of India in 1950 and South Africa in 1996 than it was of West Germany in 1949. While lacking the shared politico-cultural history that arguably made liberal constitutionalism's passage from North America to continental Europe more straightforward, neither India nor South Africa, the LPN contends, posed an insurmountable *epistemic* hurdle in the way of liberal constitutionalism's migration to the Global South.

In this way, the LPN is able to acknowledge the dark side of Western imperialism – the violence perpetrated in the name of the so-called 'civilising mission' – while still claiming that freedom, equality, and democracy are universal values essential to human flourishing. Indeed, for the LPN, it was precisely the colonial state's commitment to the universality of these values that allowed a particular kind of liberation strategy to be deployed against it. In both India and South Africa, the winning version of the anti-colonial struggle was the one that caught the colonial state in the contradiction between its core legitimating ideology

– the civilising rationale – and the reality of its oppressive operation.[12] At independence, that gave the two national liberation movements responsible for devising this strategy the democratic right to fashion the post-colonial state in its image. Rather than breaking with liberal constitutionalism, the Congress party in India and the ANC in South Africa both chose to adapt it to local circumstances.

In going down this path, the LPN continues, the Congress and the ANC realised that a tradition that had begun in the West in the eighteenth century needed to be repurposed to address the very different challenges confronting India and South Africa two hundred years later. In the absence of the usual support structures on which liberal constitutionalism depends – a flourishing middle class, competitive political parties, and an efficient state administration – the Indian and South African Constitutions had to themselves foster the conditions for their successful operation. This required an entirely new conception of what a liberal constitution needs to do, including specifying in much greater detail the 'good society' that the constitution aims to produce and designing a range of new institutional support structures.[13]

For some, the changes associated with this new conception of constitutionalism justify classifying the Indian and South African Constitutions as postliberal – as significant departures from the tradition on which they built.[14] For the LPN, however, these two constitutions are better thought of as extensions of the liberal constitutionalist tradition to the Global South. Liberal constitutionalism, it maintains, is a tradition that supplies intellectual and moral resources for constitution-making rather than one-size-fits-all blueprints. The Indian and South African Constitutions therefore do no more than what other constitutions that draw on this tradition have always done. While the conceptual and institutional innovations they introduced may have been relatively significant, this does not warrant calling them postliberal when weighed against the extensive philosophical and institutional debt they owe to the liberal-constitutionalist tradition.

If there *was* something different about the extension of liberal constitutionalism to India and South Africa, the LPN concludes, it was that the two countries' Constitutions were authentic, locally made Global South constitutions. Unlike the constitutions adopted when Britain left Africa in the 1960s, the Indian and South African Constitutions were designed by constituent assemblies with a legitimate democratic mandate to adapt liberal

12 On the difference between the so-called Charterist tradition in South Africa and the African nationalism movement, see *Gail M. Gerhart*, Black Power in South Africa: The Evolution of an Ideology, Berkeley 1978. In relation to India, see *Sarbani Sen*, Popular Sovereignty and Democratic Transformation: The Constitution of India, New Delhi 2007, p. 36.

13 See *Penelope Andrews / Stephen Ellmann* (eds.), The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law, Johannesburg 2001; *Madhav Khosla*, India's Founding Moment: The Constitution of a Most Surprising Democracy, Cambridge MA 2020.

14 See, for example, *Upendra Baxi*, Nihilisms, Contradictions, and Anomie in: New Constitutionalisms: A View from India, in: Boaventura de Sousa Santos / Sara Araújo / Orlando Aragón Andrade (eds.), Decolonizing Constitutionalism: Beyond False or Impossible Promises, New York 2024, pp. 60-79, p. 61.

constitutionalism to local needs. For the LPN, this constitutes proof of the universalizability of this tradition. In the very different circumstances — culturally, socially, politically, and economically — of their creation, the Indian and South African Constitutions demonstrated that liberal constitutionalism provides useful resources for constitution-making beyond the West. In so doing, they not only culturally pluralised this tradition. They also developed it in ways that have significance for its revival in the Global North.

So much for the LPN in broad outline. I turn now to explicate it in more detail as it applies to the Indian and South African constitutional transitions. In so doing, I will reverse the temporal order of the telling because it is easier to begin with the more recent South African version of the narrative before drawing out the way in which the Indian version both resembles and differs from it.

I. The ANC as the Legitimate Democratic Agent of Constitutional Reconstruction in South Africa

The 1996 South African Constitution,[15] with its politically progressive rights provisions and novel institutional-design features, bears numerous traces of the setting in which it was produced – the brief period in the mid-1990s when liberal constitutionalism was ascendant in 'international political culture'.[16] Indeed, in many ways the 1996 Constitution was the *crowning achievement* of that period – the then state-of-the-art in modern constitutional design. It would be easy to conclude from this that the Constitution was an entirely alien creation – the work of international legal advisers rather than the outcome of a local democratic process. According to the LPN, however, such a conclusion would be mistaken. While certainly reflective of the salience of Western constitutionalist ideas at the time it was drafted, much of the substantive content of the South African Constitution – its verbal formulations and institutional-design choices – can be traced back to local sources, and particularly to the distinctive political tradition of the Constitution's chief architect, the African National Congress (ANC).

In support of this contention, the LPN emphasizes the way in which the ANC was able to impart much of its own political vision to the final text. While the 1996 Constitution emerged from a two-stage negotiations process between the ANC and the outgoing white minority government, the ANC was the driving force behind the process and controlled its basic shape and outcomes. The detailed story of how that occurred has been told in several studies.[17] In brief, the ANC used a powerful combination of international political pressure, domestic mass action and shrewd negotiation tactics to outmanoeuvre the white

15 Constitution of the Republic of South Africa, 1996.

16 *Heinz Klug*, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction, Cambridge 2000.

17 In addition to *Klug*, note 16, see *Richard Spitz / Mathew Chaskalson*, The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement, Oxford 2000; *Hassan Ebrahim*, The Soul of the Nation: Constitution-Making in South Africa, Cape Town 1998.

minority government at almost every stage of the constitutional negotiations. Heading into that process confident that it could control it, the incumbent National Party regime ended up conceding all of the ANC's major political demands, including an unqualified franchise, the absence of minority vetoes, and a weak federal system. While the 1996 Constitution was required to conform to the thirty-four Constitutional Principles agreed to at the first, non-democratic stage of the process,[18] those principles only moderately constrained the ANC's ability to dictate the content of the final text.

As the prime example of the way the ANC was able to infuse the 1996 Constitution with its own political vision, the LPN refers to the enshrinement of a series of justiciable social and economic rights.[19] While the cross-references in these provisions to the General Comments issued by the UN Committee on Economic, Social and Cultural Rights might again make it look as though they had been drafted by a committee of experts, the socio-economic rights in the South African Constitution were in fact the product of a long process of conceptual development *internal* to the ANC.

Founded in 1912, two years after the Union of South Africa had been declared, the ANC was, like the Indian National Congress, a broad-based national liberation movement that welcomed members from a diverse range of ideological perspectives – Africanists, Marxists, social democrats, and liberals. Like the Indian National Congress, too, it was established to channel a colonised people's demands for political inclusion in a reformed postcolonial state. Those two features are the parameters within which the ANC's internal rights tradition developed: (1) the need to reconcile its diverse range of ideological perspectives and (2) the use of rights discourse as a vehicle for claiming membership of an already formed polity that had pretensions to being a Western liberal democracy.

Within those parameters, the ANC's rights tradition unfolded through a series of key documents, starting in 1926, when one of its founders, Pixley Ka Isaka Seme, produced the first South African Bill of Rights.[20] This was followed by the 1943 African Claims document, the 1954 Women's Charter, and the 1955 Freedom Charter.[21] The production of all these documents followed closely on developments at the international level as the ANC sought to tie its demand for black majority rule to the stated commitments of the international legal order. Because of its ideologically diverse character, the ANC's take on rights was never itself uniformly liberal.[22] Rather, it sought from the very beginning to bridge the divide between its liberal, socialist and Africanist factions. The Freedom

18 Schedule 4 of the 1993 (interim) Constitution of the Republic of South Africa.

19 Sections 22-29 of the 1996 Constitution.

20 See *Richard Rive / Tim Couzens*, Seme: The Founder of the ANC, Johannesburg 1991.

21 The African Claims document 'reformulated the Atlantic Charter's principles of freedom and democracy from the perspective of Africans in South Africa' (*Klug*, note 16, p. 74). On the ANC's rights tradition, see further *Albie Sachs*, Advancing Human Rights in South Africa, Cape Town 1992; *Kader Asmal / Adrian Hadland / Moira Levy*, Kader Asmal: Politics in my Blood: A Memoir, Johannesburg 2011, p. 106.

22 See *Asmal et al.*, note 21, p. 102.

Charter, for example, is capable of being read both as a demand for political inclusion in a liberal-democratic state and as a demand for radical social transformation at the behest of a majoritarian people's democracy.

In the mid-1980s, when the apartheid state entered its final stage of crisis and it became clear that the white minority government might be prepared to negotiate, the ANC formed a Constitutional Committee with the express purpose of setting the intellectual agenda for the deliberations to follow.[23] The Committee met for the first time in Zambia on 8 January 1986. Its brief was to come up with concrete proposals for the constitutional form of the post-apartheid state. Chaired by a Communist, Jack Simons, its members included Penuell Maduna, Ntonzintle Jobodwana, S.L. Pekane, Zola Sweyiya, Albie Sachs, and Kader Asmal. This Committee's deliberations culminated in the ANC Constitutional Guidelines of March 1988. The Guidelines deliberately did not take the form of a draft Constitution, but it is nevertheless possible to draw a direct line between their substantive content and many of the formulations that eventually made their way into the 1996 Constitution.[24]

This is especially true of the formulation given to social and economic rights, according to the LPN. After initially adopting the Irish and Indian approach of treating these rights as directive principles of state policy, the Committee shifted over time to proposing their inclusion as fully justiciable rights alongside a qualified right to property. Partly this had to do with the recognition that the inclusion of a right to property was a concession that would need to be made during the negotiations process, which would in turn need to be balanced by strong social and economic rights.[25] But partly, too, the inclusion of justiciable social and economic rights reflected the ANC's ideologically diverse character and the need to bridge the divide between its left and right factions.

As it turned out, when the 1996 Constitution came to be drafted, there was no absolute requirement that a right to property should be included. The Constitutional Principles attached to the 1993 'interim' Constitution simply stated that the 'final' Constitution should guarantee 'all universally accepted fundamental rights'.[26] In its *First Certification Judgment*, the Constitutional Court, on the back of references to the 1982 Canadian Charter of Rights and Freedoms and the 1990 New Zealand Bill of Rights Act, held that 'no universally recognised formulation of the right to property exists' and strongly implied that, had the 1996 Constitution not contained a property right at all, this would have been acceptable.[27] To the extent that this reading of the phrase 'universally accepted fundamental

23 The Committee was announced at the Kabwe conference in 1985. See *André Odendaal*, Dear Comrade President: Oliver Tambo and the Foundations of South Africa's Constitution, Cape Town 2022. See also *Asmal et a.l*, note 21, chapter 5.

24 *Odendaal*, note 23.

25 *Rosalind Dixon / Tom Ginsburg*, Constitutions as Political Insurance: Variants and Limits, in: Erin F. Delaney / Rosalind Dixon (eds.), Comparative Judicial Review, Cheltenham 2018, pp. 36-59.

26 Constitution of the Republic of South Africa 1993, Schedule 4, Principle II.

27 *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26 (6 September 1996).

rights' was predictable, the inclusion of a qualified right to property had more to do with the reconciliation of the liberal and socialist strands of the ANC's rights tradition than it did with acceding to white minority demands. In their final formulations, too, both the property clause (section 25) and the socio-economic rights provisions are reflective of the ANC's internal rights tradition.

In addition to that tradition, the second major current flowing into the 1996 Constitution was the lived appreciation of law's role in checking the abuse of political power that had developed within South Africa during the struggle against apartheid. The distinctive nature of that struggle, the LPN contends,[28] was that it was waged largely through the courts. As in India, this style of struggle was made possible by the fact that the apartheid state had pretensions to being a state based on 'civilised' Western values and the rule of law. Indeed, in the absence of an inclusive democratic system, rule-of-law legitimation was a crucial part of its survival strategy.[29] This fact in turn allowed for a particular kind of oppositional politics, with apartheid legislation and arbitrary detentions challenged for contravention of the liberal commitments immanent within English and Roman-Dutch common law.

The history of apartheid lawyering and the role of liberal judges in keeping alive a substantive conception of the rule of law has attracted a large literature.[30] It is not a uniformly noble story, the LPN concedes. The Truth and Reconciliation Commission's hearing on the performance of the legal profession under apartheid, for example, revealed many shortcomings.[31] Nevertheless, the apartheid government's rhetorical commitment to the rule of law did make a difference in the Thompsonian sense that, for that legitimating claim to be effective, it occasionally had to make good on its promises.[32] One famous example of this was the 1986 decision in *S v Govender* in which Justice Richard Goldstone, later a member of the Constitutional Court, held that forced removals under the Group Areas Act could not be carried out unless the state could show that there was 'alterative accommodation' available.[33] That decision contributed to the abandonment of the apartheid government's policy of urban influx control and also in no small measure to the unworkability of the apartheid system in its final stages.

This tradition of anti-apartheid human rights lawyering, the LPN continues, gave rise to an oppositional legal culture. Unlike the ANC's internal rights tradition, it was clearly liber-

28 See *Stephen Ellmann*, In a Time of Trouble: Law and Liberty in South Africa's State of Emergency, Oxford 1992; *John Dugard*, Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine, Johannesburg 2018.

29 *Martin Chanock*, The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice, Cambridge 2001; *Jens Meierhenrich*, The Legacies of Law: Long-Run Consequences of Legal Developments in South Africa, 1652-2000, Cambridge 2008.

30 See, for example, *David Dyzenhaus*, Hard Cases in Wicked Legal Systems, Oxford 1991.

31 A full transcript of the hearings is available at www.justice.gov.za/trc/special/legal/legal.htm (last accessed 18 July 2024).

32 See *Edward P. Thompson*, Whigs and Hunters: The Origin of the Black Act, London 1975, p. 266.

33 *S v Govender* 1986 (3) SA 969 (T).

al in the sense that it conceived of law as a tool that could be used to force the apartheid government to make good on its claim to be upholding 'civilised' Western standards. Although the apartheid state operated as an 'dual state' in which the white minority enjoyed the benefits of the liberal rule of law and the black majority was subjected to a system of rule by law,[34] human rights lawyers under apartheid successfully kept alive the idea that the liberal rule of law would one day be extended to all South Africans irrespective of race.

When the post-apartheid constitutions came to be drafted, the LPN goes, this oppositional legal culture fused with the ANC's more ideologically diverse rights tradition. One particularly important figure in this process was Arthur Chaskalson, a leading anti-apartheid human rights lawyer, founder of the Legal Resources Centre (an important public interest law firm), and later the first President of the Constitutional Court. Chaskalson, together with George Bizos, another prominent anti-apartheid human rights lawyer, joined the ANC's Constitutional Committee for its last external meeting in Lusaka in April 1990.[35] In joining the Committee, Chaskalson became a pivotal figure in the cross-pollination of ideas between the ANC's internal rights tradition and the oppositional legal culture that had developed within the country.

This process of cross-pollination can be seen, the LPN claims, in the formulation of the right to housing in section 26 of the 1996 Constitution. The first two subsections drew on the UNCESCR's General Comments, as adapted to the context of a domestic Bill of Rights. These aspects of the clause are philosophically in keeping with the ANC's internal rights tradition. The thinking behind the third subsection, however, is different, and explicitly draws on *S v Govender* in providing that 'no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances'. Read as a whole, section 23 is reflective of the fusing together of the ANC's internal rights tradition and the oppositional legal culture that developed under apartheid.

For proponents of the LPN, the fusing together of these two traditions in the 1996 Constitution complicates its typification as a liberal constitution. The ANC's rights tradition, with its strong Marxist and socialist influences, was not uniformly liberal.[36] On the other hand, the tradition of oppositional human rights lawyering under apartheid *was*, and it was this tradition that, with the end of apartheid, seemed to have triumphed. It is thus possible to read the 1996 South African Constitution as a vindication of the demand that black South Africans be included in a liberal-democratic state. It is also possible to read it, however, as a complex hybrid of the ANC's rights tradition and the oppositional legal culture that triumphed at the end of apartheid. Certainly, in its concern for the abuse, not just of

34 *Meierhenrich*, note 29.

35 *Odendaal*, note 23, p. 586. Chaskalson had been a junior advocate at the Rivonia trial. On his life and career, see *Stephen Ellmann*, Arthur Chaskalson: A Life Dedicated to Justice for All, Johannesburg 2019.

36 See *Asmal et al.*, note 21, p. 102.

public, but also private power, together with its progressive rights formulations and its clear expectation that the post-apartheid state would play a role in driving social transformation, the 1996 Constitution was not classically liberal. Rather, it was something more akin to the Indian Constitution in extrapolating the implications of liberal constitutionalism for post-colonial governance.

For the LPN, the significance of this is that whichever way you read the 1996 Constitution, it clearly demonstrates that liberal constitutionalism can be used as a resource for constitution-making outside the West, and therefore that it is no longer sensible to speak of that tradition as exclusively Western. Not just that, but the modifications and adaptations made to liberal constitutionalism in South Africa are not necessarily tied to the post-colonial circumstances of its creation. The 1996 Constitution's commitment to socio-economic rights, for example, and also its provision for so-called 'fourth-branch institutions', are innovations that have potential relevance for the revival of liberal constitutionalism in the Global North.

II. The Congress Party as the Authentic Democratic Voice of the Indian Independence Movement

The liberal-progressivist account of the making of the South African Constitution bears a striking resemblance to the orthodox account of the Indian constitution-making process.[37] In India, too, the Constitution was drafted by a broad-based national liberation movement that had engaged the colonial state over decades to hold it to account for its ostensible commitment to liberal values. As with the ANC, the nature of that engagement gave the Congress party a particular character. While in economic terms, it was dominated by socialists, in political terms its conception of Indian nationalism was a liberal and inclusive one, particularly in relation to the accommodation of religious minorities. Like the ANC again, the Congress dominated the 1946-49 constitution-making process, infusing it with its inclusive political vision. The Congress's long engagement with the colonial state meant that its demands were often framed in terms of opening access to colonial political institutions, but this did not mean that its vision of postcolonial India was limited to the de-racialisation of those institutions. Instead, the Congress treated the constitution-making process as an opportunity to construct the postcolonial state from the ground up.[38] With no incumbent settler regime to deal with, the members of the Constituent Assembly were relatively free agents – able to adapt received Western political ideas to the demands of the

37 The classic work is *Granville Austin*, The Indian Constitution: Cornerstone of A Nation, Oxford 1966. More recent accounts include *Madhav Khosla*, The Indian Constitution, Oxford 2012; *Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta* (eds.), The Oxford Handbook of the Indian Constitution, New Delhi 2015; *Arun K Thiruvengadam*, The Constitution of India: A Contextual Analysis, Oxford 2017; *Madhav Khosla*, India's Founding Moment: The Constitution of a Most Surprising Democracy, Cambridge MA 2020.

38 *Khosla*, note 37.

postcolonial moment. The conception of constitutionalism that emerged from this process was, like the South African one, a creative blend of Western political ideas and the local Indian tradition of political struggle against the abuse of power.

As in South Africa, the demand for constitutional government in India grew as a progressively evolving contestation of the oppressive nature of colonial rule.[39] After its foundation as a middle-class organisation in 1885, the Indian National Congress developed into a broad-based political movement that continually interrogated the limits of Britain's preparedness to open colonial political institutions to local participation. In so doing, it did not just oppose British proposals but also developed its own constitutional vision.[40] Temporarily divided at the beginning of the twentieth century into moderate and radical factions, the Congress's approach to the liberation struggle stabilised in the 1920s around the ideas of *satyagraha* and *ahimsa*. The campaigns that were successfully waged at this time 'converted the Indian National Congress from an elite group of middle-class intellectuals to a mass movement with deep roots across the Indian subcontinent.'[41]

When the Congress came to participate in the Constituent Assembly from 1946-1949, then, it could legitimately claim to represent a wide diversity of political viewpoints.[42] The delegates to the Constituent Assembly were not directly elected, but rather nominated by the parties that had received support in the restricted-franchise provincial elections that were held from 1945-1946. Nevertheless, they came from all parts of India and were in that sense representative of its diversity.[43] In numerical terms, the Assembly was dominated by the Congress, especially after 1947, with the departure of the Muslim League. But this did not mean that the Constituent Assembly's debates were not contested. Like the ANC, the Congress was an ideologically diverse organisation and members of the party were free to dispute positions in the Constituent Assembly's debates, which they did.[44]

The main difference between the South African and Indian Constituent Assemblies was the absence in the latter case of a party representing an incumbent colonial-settler regime. The Indian Constituent Assembly also did not have to work against the backdrop of constitutional principles agreed to at an earlier, non-democratic negotiating phase.[45] Instead,

39 *Arun K. Thiruvengadam*, 'India's Constitutional Founding: An Enduring but Mixed legacy' in: Kevin Tan / Ridwanul Hoque (eds.), Constitutional Foundings in South Asia, London 2021, pp. 19-62, p. 25.

40 Ibid., p. 33.

41 Ibid., p. 30.

42 *Austin*, note 37.

43 *Khosla*, The Indian Constitution, note 37, p. xiii.

44 *Upendra Baxi*, "The Little Done, the Vast Undone" – Some Reflections on Reading Granville Austin's The Indian Constitution, Journal of the Indian Law Institute 9 (1967), pp. 323, 327.

45 The Indian Constituent Assembly developed its own principles to guide the process in the early committee meetings, whereas in South Africa, as explained in Part C.I., the thirty-four constitutional principles were formally included in the 1993 interim Constitution and then enforced by the Constitutional Court as a constraint on the 1996 Constitution.

departing in the disorganised and precipitous way that it did, Britain more or less gave Indians carte blanche to draft the Constitution they wanted.[46] This did not mean, of course, that Britain did not indirectly influence the process through the institutions it left behind and the political ideas it had imperfectly applied during the course of colonial rule. Even in the absence of a settler minority in the Constituent Assembly, Britain's influence was still exerted through the hold that its constitutional concepts and paradigms had on the minds of the participants. Exhibit number 1 in this respect is the fact that the 1950 Constitution drew on the 1935 Government of India Act.[47] There is also evidence that some members of the Constituent Assembly consulted Western constitutional models for inspiration.[48] Finally, Western influence was exerted through the geopolitical context in which the Constitution was drafted – the triumph of the Allied powers in the Second World War. None of this means, however, that the Indian Constitution was not a genuinely autochthonous creation – or so the LPN contends. As in the South African case, the Congress was a broad-based national liberation movement, and it enjoyed sufficiently widespread support at the time the Constitution was drafted that its views could be said to represent the wishes of the Indian people as a whole.[49] While it reproduced parts of the 1935 Government of India Act, the 1950 Constitution is completely different in spirit and purport from that document. Its provision for universal franchise and a justiciable Bill of Rights, for example, depart significantly from colonial models and mark it out as a significant departure from the British tradition.

In his early, very influential account of the Indian constitutional transition, Granville Austin argued that the most fundamental choice facing the Constituent Assembly was whether to draft a Constitution in the 'Euro-American constitutional tradition' or to base the document on Mahatma Gandhi's village panchayat model.[50] Gandhi's assassination in January 1948, Austin explained, meant that his ideas had to be carried forward by others, notably Shriman Narayan Agarwal. Before Gandhi's death, Agarwal had drafted a Gandhian Constitution for a Free India, of which Gandhi had spoken approvingly.[51] Agarwal's draft, Austin said, can therefore be 'cautious[ly]' accepted as being 'indicative' of Gandhi's ideas.[52] Its principal suggestion was for a radically decentralised approach to governance

46 *Sandipto Dasgupta,* "A Language Which Is Foreign to Us": Continuities and Anxieties in the Making of the Indian Constitution, Comparative Studies of South Asia, Africa and the Middle East 34 (2014), pp. 228, 229.

47 Less than 30% of the text was copied, mainly dealing with structural provisions. In any case, the 1935 Act was not a purely British creation, but drafted after consultation with the Indian National Congress.

48 *Khosla*, note 37, p. xiv-xv.

49 *Austin*, note 37.

50 Ibid., pp. 27-28.

51 Ibid., p. 30.

52 Ibid., p. 30.

based on village panchayats conceived as 'self-sufficient, self-governing communities.'[53] Had this model been adopted, there would have been no centrally elected Parliament at all. Rather, political power would have been exercised from the ground up, with each panchayat electing district representatives who would have elected other representatives in turn all the way up to an All-India panchayat.[54]

Despite the existence of this fully worked out alternative, Austin argued, the idea that the Indian Constitution would be based on the Western system of parliamentary democracy was never seriously contested. 'Members spoke of democracy, socialism, and the responsibilities of legislatures, but not of the necessity for an "Indian" form of government.'[55] When the Union and Provincial Constitution Committees produced their reports in July 1947, only Ramnarayan Singh remarked on the absence of any mention of the panchayat model.[56] The first full draft, produced by constitutional adviser B.N. Rau, also made no mention of the panchayats, but was instead mainly based on the British and American Constitutions.[57] Submissions made in response to this draft raised the idea of panchayats but only as a form of local government.[58] Panchayats, in other words, were treated as an administrative issue rather than an alternative constitutional model.[59] In its final form, Article 40 of the Constitution, within the chapter on Directive Principles of State Policy, simply provides that '[t]he State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government'. For Austin, this outcome was foreordained by the fact that 'many Indians had become intellectually committed to the liberal democratic tradition through their travels and education'. The Allied Victory in 1945 had also 'raised the stock of representative democracy'.[60] The final reason was the domination of the Constituent Assembly's debates by Nehruvian socialism, which precluded the adoption of a decentralised model of governance.[61]

In his review of Austin's book, Upendra Baxi argues that studies of the Indian constitution-making process and subsequent constitutional politics that see it as a dynamic between 'indigenous' and 'Westernised' or 'modernizing' and 'traditional' elites tend to oversimplify the 'political multilinguism of [Indian] leadership'.[62] Gandhi himself, Baxi speculates, never intended his panchayat model as a viable alternative to parliamentary democracy,

53 Ibid., p. 30.
54 Ibid., p. 30.
55 Ibid., p. 33.
56 Ibid., p. 34.
57 Ibid., p. 34.
58 Ibid., p. 36.
59 Ibid., p. 37.
60 Ibid., p. 41.
61 Ibid., p. 42.
62 *Baxi*, note 44, pp. 323, 331-32.

and thus there never really was a choice between alternatives, as Austin presents things.[63] Rather, Gandhi's motivation in suggesting this model might simply have been to create a platform 'for the traditional elite to assert its values both in the Party and in the Assembly, thus hoping to create an atmosphere in which over-Westernisation of the projected political system can be consciously corrected.'[64] Madhav Khosla, in his more recent treatment of the same issue, likewise argues that '[t]he argument from autochthony presents a false choice between an indigenous and colonial constitution. The Indian Constitution was neither. It rejected the Gandhian vision, along with the designs of Hindu nationalists who desired a constitution that embodied spiritual values. But it also marked a decisive departure from the past.'[65]

Modern renditions of the LPN in this way try to steer clear of seeing the Constituent Assembly as making a simple choice in favour of the Euro-American constitutional tradition over indigenous ideas. The Indian 'constitutional compact,' Arun Thiruvengadam writes, 'has many elements of liberalism, but it is a peculiar combination of liberal and non-liberal ideas and amalgamations.'[66] Partly this had to do with the fact, as Khosla has argued, that the constitution-makers could not assume the existence of a democratic state as the basis for the constitutionalism they were hoping to engender. Instead, that democratic state had to be constructed simultaneously with the fostering of a constitutionalist culture. At the time of independence, India did not have the sizeable middle class that is ordinarily taken to be a precondition for building democracy. What it had, instead, was a historical experience of colonial institutions, nominally founded on British democratic institutions, but applied in India in a racist and exclusionary way to head off and suppress demands for political freedom. The challenge facing constitution-makers was accordingly to open these institutions to the entirety of India's population, while fostering a political culture that would make them work in an inclusive and democratic way.[67]

At the same time, the Indian Constitution needed to accord a much more central role to the state in driving economic development. This was partly a question of social justice, but also partly a question of fulfilling the social and economic preconditions for a well-functioning democratic system. The Congress itself consisted mainly of people who would have regarded themselves as socialists in regular left-right terms.[68] A Constituent Assembly composed of such people was never going to adopt a classic liberal constitution on the American model. Rather, it was always going to adopt a constitution that defined the role of the state in building India's democracy much more closely. The emerging model is thus probably best described as one that was infused with elements of Western liberal

63 Ibid. p. 343.

64 Ibid.

65 *Khosla*, The Indian Constitution, note 37, p. xvi.

66 *Thiruvengadam*, 'India's Constitutional Founding', note 39, p. 22.

67 *Khosla*, India's Founding Moment, note 37.

68 *Austin*, note 37, chapter 1.

democracy, but which adapted these elements to the specific challenges facing the new Indian state.

The Indian Constitution's tendency to adapt and extend liberal ideas rather than simply copy them is particularly apparent in its treatment of religion. While officially described as 'secular',[69] the Indian model of accommodating religious diversity departs from the Western script. Instead of banishing religion from the public sphere, what the Constitution does is to ensure equal state support for all religions. Articles 25-30 thus both protect Indians in the exercise of their religious freedoms but also guarantee to them the capacity to act collectively to observe and maintain their religious traditions.[70] No one religion is singled out as superior to the others, and in that sense, there is a separation of religion and state. But at the same time, the Constitution acknowledges religion as a fundamental aspect of Indian public life. In this way, the framers of the Constitution created a deliberate counterpoint to the theocratic state that was being constructed next door in Pakistan.

While the LPN as it applies to India has been refined in this way, it still fundamentally subscribes to Austin's view that the Constituent Assembly 'provided Indians with an "Indian-made" constitution, and that its indigenous nature has been the major reason for the Constitution's success.'[71] Crucially, the indigeneity in this passage is not the indigeneity of a Hindu nationalist Constitution but the indigeneity of a constitution whose Indian authors creatively adapted Western political ideas to their needs. Understood in that way, the Indian Constitution, like the South African, both drew on and developed the liberal constitutionalist tradition.

D. The Culturalist Grand Narrative

The LPN, the preceding section shows, is premised on two mutually supporting claims: that liberal constitutionalism's principles and institutions are suited to constitution-making in a variety of cultural settings, not limited to the West; and that these principles and institutions did, as a matter of historical fact, inform the highly creative, autochthonous postcolonial constitution-making processes that took place in India from 1946-49 and South Africa from 1993-96.

Appealing as this account is to those who like to see signs of emancipatory progress in the bewildering contingency of human history, not everyone finds it compelling. First, the detachability of liberal constitutionalism from its origins in the European Enlightenment has been questioned in both India and South Africa. The adoption of a liberal constitution, these critics say, means importing a series of political values that are undeniably Western in origin. The suggestion that these values can somehow float free of their cultural origins

69 A 1976 amendment to the Constitution explicitly used this term.

70 For a recent study of these provisions, see *Mathew John*, India's Communal Constitution: Law, Religion and the Making of a People, Cambridge 2023.

71 *Austin*, note 37, p. 2.

when expressed at a high enough level of generality, so that constitutional drafters can then re-infuse them with local, culturally sensitive content, is fanciful, misleading, and ultimately destructive of non-Western traditions of governance. Second, as a strategic matter, framing the anti-colonial struggle in the would-be-universalist language of liberal constitutionalism comes at a significant cost to a colonised people. While this framing might help in the short term to drive a more rapid transition to nominal independence, the price to be paid is the perpetuation of the coloniser's conceptual constructs. Socially, culturally, and economically, what occurs is an incomplete constitutional transition – a transition that not only fails to defeat Western imperialism but perversely enables it to continue in a more sustainable way, legitimated as it now is by a democratically adopted, but, in reality, faux autochthonous constitution. In light of these considerable costs, 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.

Throughout the history of the anti-colonial struggle in both India and South Africa proponents of this alternative, culturalist framing repeatedly clashed with the dominant assimilationist faction within the liberation movement. For various reasons, however, culturalists never gained the ascendancy. They consequently failed to exert any meaningful influence over the two postcolonial constitutions that eventually came to be drafted. This does not mean, however, that their rival understanding of the nature and purposes of the anti-colonial struggle is now irrelevant. On the contrary, in recent years it has re-entered public discourse in the form of the contemporary decolonial critique of the social and economic effects of the two constitutions, with decolonial critics now able to point to all the respects in which, as they see it, their colonial-era predecessors' predictions have been realised.

In this latest iteration of the CGN, critics of the Indian and South African constitutional transitions have turned to Latin American decolonial theory as a particularly rich source of thinking about the perils of using liberal constitutionalism as a basis for postcolonial constitution-making. The key move made in this literature is the argument that the formal end of colonialism did not automatically dismantle the 'colonial matrix of power'[72] – the complex, overlapping racial, cultural, economic, and sexual hierarchies characteristic of colonial power relations. Breaking both with classical Marxist approaches and Wallersteinian world-systems theory,[73] Aníbal Quijano,[74] Boaventura de Sousa Santos[75] Walter

72 *Quijano*, note 1.

73 *Immanuel Wallerstein*, The Modern World-System, New York 1974.

74 *Quijano*, note 1; See also *Ramón Grosfoguel*, The Epistemic Decolonial Turn: Beyond Political-Economy Paradigms, 21 Cultural Studies 21 (2007), pp. 211, 217.

75 *Boaventura de Sousa Santos*, Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges, Review 30 (2007), p. 45; *de Sousa Santos*, note 1; See also *Nelson Maldonado-Torres*, Against War, Durham 2006.

Mignolo, Catherine E. Walsh[76] and others emphasise instead the enduring effects of 'coloniality' in delegitimating indigenous forms of knowledge and ways of being. Rather than reconstructing the postcolonial state on indigenous lines, this perspective maintains, postcolonial constitutions on the liberal-democratic model simply prolong the colonial process of 'epistemicide' – the destruction of indigenous knowledge systems and their denigration in favour of Western forms of rationality.[77]

When applied to the Indian and South African constitutional transitions, decolonial theory calls into question almost all of the assumptions on which the LPN is based. Far from being authentic expressions of their respective people's democratic will, the Indian and South African Constitutions reflect the hegemonic hold of Western conceptions of governance at the time they were adopted. In India's case, that was the end of the Second World War, when the victory of the Allied forces had seemingly vindicated the superiority of liberal democracy over its fascist rivals. In South Africa, the 1996 Constitution was drafted at the zenith of Western geopolitical power following the collapse of the Soviet Union. In both instances, Western-oriented political and economic elites seized on the opportunity presented by the geopolitical context to press for the adoption of what were in effect liberal constitutions. In so doing, they pulled off a confidence trick for the ages – successfully giving off the appearance of transitioning to democracy while in fact entrenching the social and economic power relations, and more importantly, the mental and conceptual landscape, of colonialism.

The rest of this section proceeds to elaborate the CGN as it applies to the Indian and South African constitutional transitions. While acknowledging the currency of the latest decolonial version of this narrative, I attempt throughout to give a sense of the longer tradition of thinking that lies behind it. In addition to being a more accurate portrayal of the development of the CGN, the reason for folding the decolonial critique into the longer culturalist tradition is to give the full richness of this narrative its due. In India, in particular, decolonial theory is being deployed in support of nativist arguments. It would be easy to dismiss the CGN on this basis, but that would be to judge it according to its susceptibility to abuse rather than on the basis of its most charitable interpretation.

I. The Suppression of Cultural Values in India

Kengal Hanumanthaiya's wry observation that, instead of 'the music of a Veena or Sitar', 'we have the music of an English band' is probably the best-known, and certainly the most metaphorically powerful, attempt to capture the 1950 Indian Constitution's cultural character. Explaining his remark, Hanumanthaiya continued: 'That was because our constitution makers were educated that way. I do not blame them, rather I would blame those people, or

76 *Walter D Mignolo / Catherine E Walsh*, On Decoloniality: Concepts, Analytics, Praxis, Durham 2018.

77 See *de Sousa Santos*, note 2.

those of us, who entrusted them with this kind of work.'[78] Read together, the quoted words pithily convey the CGN's three main claims in relation to India's constitutional transition: first, that the 1950 Constitution failed to give due recognition to Indian cultural values; second, that this was not because Britain imposed the Constitution on Indians but because those who drafted it were mentally straightjacketed by their Western education; and, third, that the blame for this outcome lies with the Congress party leadership.[79]

These claims have been articulated by a wide variety of political actors, public intellectuals and scholars over the course of the last century, both before the Indian Constitution was adopted (in critical commentary on the Congress's approach to the anti-colonial struggle) and afterwards.[80] For analytic purposes, it is helpful in the Indian case to distinguish two broad variants of the CGN: what we might call the charitable version, whose complaint is not about the secular character of the 1950 Constitution per se but the fact that it failed to draw sufficiently on Hinduism's own tradition of religious inclusion as opposed to the Western liberal tradition; and the 'dark side' of the CGN, which deploys the culturalist critique in support of an exclusionary, ethno-nationalist conception of Indian national identity. In discussing these two versions together, I do not mean to elide this important distinction. My intention is simply to consider in one place a set of perspectives that share certain common characteristics. What unites them, over and above their differences, is that they both treat the Indian Constitution as a culturally alien document. They deny, in other words, the LPN's central claim that the Constitution was a specification to Indian circumstances of the liberal-constitutionalist tradition, in the course of which that tradition was pluralised beyond the West. In addition, they also claim that the alien cultural character of the Indian Constitution entailed the suppression of indigenous values, by which is meant not 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.

Understood in this way, the beginnings of the CGN in India go all the way back to foundation of the Congress party in 1885 and the criticisms that were made even at that early stage of its Westernised, middle-class identity. When Gandhi returned from South Africa in 1914, the Congress party was split between moderate and radical factions, with the latter faction under Bal Gangadhar Tilak arguing that the movement should adopt a less assimilationist, more Hindu-centric approach to the struggle. Following Tilak's premature

78 *Kengal Hanumanthaiya*, Constituent Assembly Debates, 17 November 1949.

79 As Sandipto Dasgupta has even more concisely put the point, 'autonomy is not the same as indigeneity', *Sandipto Dasgupta*, Legalizing the Revolution, University of Columbia PhD 2014, p. 113.

80 The culturalist tradition also has antecedents in imperial British political thought. Most famously, Edmund Burke's commitment to the impeachment of Governor General Warren Hastings (1788-1795) was based on an appreciation of India's civilisational distinctiveness and a critique of its misrecognition in universalising liberal-imperial discourse. See *Uday Singh Mehta*, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought, Chicago 1999, pp. 153-189; *Jennifer Pitts*, A Turn to Empire: The Rise of Imperial Liberalism in Britain and France, Princeton 2005, pp. 59-100.

death in 1920, Gandhi assumed control of the Congress and began the process of transforming it into a mass-based, non-violent party. While that approach was very successful on many levels, it alienated the Hindu nationalists in the organisation, who took exception to the alliances Gandhi forged with members of India's Muslim community and particularly his support for the restoration of the Islamic caliphate following the break-up of the Ottoman empire.

In the 1920s, two significant events occurred: first, the Hindu Mahasabha, which had previously been a Hindu nationalist grouping within the Congress, began to develop its own separate political identity, and, second, in 1925, Hindu nationalists, inspired by Italian fascism, established the Rashtriya Swayamsevak Sangh (RSS), an organisation aimed at restoring Hindu cultural pride.[81] Institutionally and politically, those two events mark the beginnings of an exclusionary, ethno-nationalist take on the Indian struggle for political freedom. Rather than the creation of a secular state, this variant of the CGN maintains, the purpose of the Indian national struggle was the establishment of a state governed according to Hindu religious and cultural principles, as laid down in religious texts like the Manusmriti.

This variant of the CGN has had several well-known exponents over the years, including most notably Vinoyak Damodar Savarkar, the coiner of the term Hindutva that has since come to serve as a shorthand for the exclusionary, Hindu-centric conception of Indianness. In his foundational work, Savarkar argued that the Indian nation consisted of all those groups who owed their primary allegiance to the Hindu holy land 'from the Indus to the Seas'.[82] This vision of India included within its ambit Hindus, Sikhs, Buddhists and Jains, but excluded Muslims and Christians, whose primary allegiance Savarkar argued lay elsewhere.[83] In 1939, M.S. Gowalkar added to this exclusionary conception of Indianness by invoking the idea of 'Hindusthan', a pristine Hindu land that predated the time of both the Mughal and the British conquests of India.[84] In Gowalkar's vision for India, adherents of other religions either had to 'lose their separate existence to merge in the Hindu race' or

81 The RSS acts in concert with various affiliated organisations, collectively known as the Sangh Parivar. See *Manjari Katju*, Hinduising Democracy: The Vishva Hindu Parishad in Contemporary India, New Delhi 2017.

82 *Vinayak Damodar Savarkar*, Essentials of Hindutva,Bombay 1923 (as quoted in *Sashi Tharoor*, The Battle of Belonging: On Nationalism, Patriotism, and What it Means to be Indian, New Delhi 2002, p. 167). For a study of the 'place of history' in Savarkar's political thought, see *Vinayak Chaturvedi*, Hindutva and Violence: V.D. Savarkar and the Politics of History, Ranikhet 2022.

83 Ibid.

84 *MS Golwalkar*, We or our Nation Defined, Nagpur1939 (as quoted in *Tharoor*, note 82, p. 169). The RSS's exclusionary conception of Indianness is deeply controversial. For more inclusive interpretationssee *K.M. Sen*, Hinduism, London 1991; *Amartya Sen*, The Argumentative Indian: Writings on Indian Culture, History and Identity, London 2005*; Sashi Tharoor*, Why I am a Hindu, New Delhi 2018. For all these writers, there is an inherently pluralist character to Hinduism that has allowed it to coexist with other religions over the years. India, in turn, is historically a place where multiple religious traditions have found a home.

'stay in the country, wholly subordinated to the Hindu Nation, claiming nothing, deserving no privileges, far less any preferential treatment – not even citizen's rights'.[85]

While current in public discourse, these ideas exerted little influence on the 1946-49 constitution-making process, for a variety of reasons. First, and most obviously, the Constituent Assembly was dominated by Congress with its very different conception of the form that the postcolonial Indian state should take. The Congress's dominance was in turn a function of the much more prominent role it had played in the anti-colonial struggle, including in the crucial 1942 Quit India Movement, which the Hindu Mahasabha, led by Savarkar, had boycotted.[86] Following Gandhi's assassination by a member of the RSS in 1948,[87] Hindu nationalist ideas were further sidelined at just the time that the Constitution came to be drafted. Although the Indian Constitution's great biographer, Austin, argues that this made no practical difference since the Hindu Mahasabha's views on 'institutional aspects of the Constitution differed little from Congress',[88] this is debatable. A well-known editorial published in the RSS's official publication at the time the Constitution was passed criticised it for containing 'no mention of the unique constitutional development in ancient Bharat'. 'To this day,' the editorial went on, '[Manu's] laws … excite the admiration of the world and elicit spontaneous obedience and conformity.'[89] It is clear from statements like this that India would have had a very different Constitution had political parties loyal to the RSS exerted a greater influence on it.

In the two decades after 1950, Nehru's secular-socialist vision of India went virtually unchallenged as the country focused on consolidating its constitutional transition. It was only after the horrors of the 1975-77 Emergency that space once again opened up for criticism of the Congress party and its claim to represent the Indian masses. Two new lines of culturalist critique began to emerge at this time, both of them less easily dismissed as nativist ideology. The first began to question whether the Congress ever really bridged the divide between its elite origins and the Indian masses. The second maintained that, even if the Congress could be said to have bridged this divide, it successfully resisted all attempts to infuse the Constitution with the cultural values of its majority Hindu population.

A representative version of the first line of argument can be found in the work of the Subaltern Studies school, the renowned group of revisionist Marxist historians who came to prominence in the wake of the Emergency. Writing during that era of profound disillusionment with the Congress's role in post-colonial India, Ranajit Guha and others challenged the orthodox Marxist account of the transition. While it was true, Guha contend-

85 *Gowalkar*, Bunch of Thoughts as quoted in *Tharoor*, note 82, p. 173.

86 *Tharoor*, note 82, p. 225.

87 *Dhirendra K. Jha*, Gandhi's Assassin: The Making of Nathuram Godse and his Idea of India, London 2023.

88 *Austin*, note 37, p. 15.

89 Editorial of 30 November 1949 as quoted in Does BJP Intend to Change Indian Constitution? National Herald, https://www.nationalheraldindia.com/opinion/does-bjp-intend-to-change-indian-constitution (last accessed on 18 July 2024).

ed, that Gandhi had successfully reached out to the Indian peasantry after he took over leadership of the Congress in the 1920s, Indian politics throughout the transition period was characterised by a profound disjuncture between the educated elite and the Indian masses – the 'subaltern' class in Antonio Gramsci's terminology.[90] In stark contrast to the revolutions in England in 1648 and France in 1789, the Indian bourgeoisie had never spoken 'for the nation.' Rather, they 'lived in a happy state of accommodation with imperialism for the greater part of their career as a constituted political force between 1885 and 1947.'[91]

What this meant, Guha argued, was that, when the transition came, there were two Indias: the world of elite politics, in which the transfer of power between the departing colonial authorities and the Congress leadership took place, and the world of subaltern politics, which was interconnected with, but also distinct from, that world. Divided as the country was into these two worlds, there was no such thing as a national political culture founded on bourgeois values – no fusing together of the Western tradition of liberal constitutionalism and the anti-colonial tradition of struggle against the abuse of political power. There were instead two separate political cultures: one Westernised and founded on the Congress's demand for political inclusion in a liberal-democratic state, and the other indigenous, and founded on the Indian peasantry's ongoing fight against imperialism.

For Guha and the Subaltern Studies school, then, the idea that India's constitution-makers adapted liberal constitutionalism to Indian needs misses the most crucial thing about the transition – that it was a failed bourgeois revolution. While the Constitution as text might be read as a liberal document, there was no concomitant transformation of Indian political culture akin to what had happened in England and France. There, the emergent bourgeoisie of agrarian landlords had succeeded in persuading workers and peasants that their interests were bound up with the success of the anti-feudalist revolution. Nothing like that occurred in India, however – no process through which the subaltern class came to think of its future as tied to the success of the Congress's struggle against colonialism. In the absence of that, the constitutional transition was an elitist exercise. It served the Congress's needs but failed in any meaningful sense to articulate the emancipatory wishes of the Indian people.

While framed as a correction on the orthodox Marxist account, Guha's argument applies equally to the LPN. If the Congress never genuinely spoke for the Indian masses, and never successfully created a single national political culture, the LPN's contention that the Indian Constituent Assembly adapted liberal constitutionalism to the circumstances of the Global South falls flat. At most, the Congress party used the constitution-making process to articulate its own elitist vision of the nature and purposes of the anti-colonial struggle. But the Indian Constitution was not autochthonous in the deeper sense of expressing a syncretic

90 *Ranajit Guha*, Dominance without Hegemony: History and Power in Colonial India, Cambridge MA 1997.

91 *Ranajit Guha*, On Some Aspects of the Historiography of Colonial India' Subaltern Studies I, Delhi 1982, pp. 1, 5.

tradition of political struggle based on a creative amalgam of Western constitutionalist ideas and majoritarian Hindu cultural values.

So much for the first line of argument in response to the LPN's contention that the Congress Party, notwithstanding its elitist origins, eventually came to speak for the Indian people as a whole. The second focuses on the Congress Party's role during the constitution-making process itself, and particularly the way in which it successfully suppressed calls for that document to be based on majoritarian Hindu values. Here the charitable version of the CGN highlights what it sees as a kind of epistemicide 2.0 – a renewed round of cultural silencing, only this time at the behest of Westernised elites within the Congress. Whether for the instrumental reasons that drove B.R. Ambedkar, or the sincere belief in the superiority of Western political institutions that drove others, the Congress leadership never seriously entertained the notion that the Indian Constitution should express the cultural values and political traditions of its majority Hindu population. In failing to give expression to those values and traditions, the charitable version of the CGN claims, the Congress perpetuated a process of cultural silencing that had begun as far back as the Moghul empire.

This second line of argument is more controversial than the first since it touches on questions of national identity that are currently the subject of intense political debate in India.[92] As explained in Part F.I.1. below, the contemporary decolonial version of the CGN is today being deployed in support of an ethno-nationalist conception of India that would exclude non-Hindu communities, particularly Muslims, from full citizenship. In sketching this aspect of the CGN, I run the risk of giving these nativist arguments credence. But my purpose in this section, to repeat, is not to lend support to one or other side of this debate but to draw attention to a more charitable version of the CGN so that it can put it into dialogue with the LPN, its main interlocutor. The benefit of doing that, in turn, is that it will make it possible in later sections to see more clearly the extent to which this charitable version is being distorted in service of ethno-nationalist ends.

Proceeding, then, to put the CGN in its best light, adherents of this narrative could be said to make two plausible, non-nativist claims in relation to the Congress Party's alleged suppression of Hindu cultural values. First, we might understand them as arguing that, if the reason for preferring liberal constitutionalism was its supposedly superior capacity to accommodate religious diversity, this was a mistake based on a gross underestimation of Hinduism's own, inherently tolerant and pluralist character. Second, that, if the reason for suppressing Hindu cultural values was instead Hinduism's caste inequality problem, more careful thought should have been given to the cultural-autonomy costs of denying Hinduism the capacity to address this problem itself.

In support of the first contention, the charitable interpretation of the CGN stresses Hinduism's long tradition, not just of religious tolerance, but also of religious acceptance.[93] In contrast to liberal constitutionalism's commitment merely not to discriminate on the

92 See Part F.I.1. below.

93 See the literature cited in note 84 above.

basis of religion, the CGN reminds us, Hinduism positively celebrates and embraces religious diversity.[94] Throughout its history, indeed, Hinduism has expanded and diversified by incorporating many of the religious practices it has come into contact with.[95] This is true even of Hinduism's response to the various traditions that have broken away from it, such as Buddhism and Jainism. Rather than rejecting the adherents of those traditions as apostates, Hinduism has welcomed their pursuit of alternative paths to enlightenment.[96] The same was true of Hinduism's response to Christianity when it arrived (for the second time) with the East India Company.[97] To the confusion of the early British missionaries, Hindus treated their stories of Christ as engaging accounts of just one of many possible avatars of the supreme being.[98] The problem was not Hinduism, but rather Christianity's monotheism and intolerance of difference.

The notion, then, that India needed to adopt liberal constitutionalism as a device to accommodate the wide array of religions on the subcontinent was not just culturally insulting. It also deprived India of the richness of its mainstream tradition of religious accommodation. To be sure, it was this tradition that Gandhi invoked, and which is reflected in the Indian Constitution's commitment to giving equal public recognition to all religions. It is not entirely true, therefore, to say that Hindu cultural values exerted no influence. But Gandhi's take on religious acceptance, the charitable interpretation of the CGN maintains, was bound up with his woolly romanticism on issues of state-building more generally. This led him to advocate a scrupulously even-handed approach to all religions in India that downgraded its majoritarian tradition to the status of just one among many. The better approach, in relation to religious accommodation but also other important constitutional questions, would have been to draw on the rich resources of India's majoritarian Hindu tradition – rather than an adapted and distorted liberal constitutionalism – to design the required institutions.

Second, on the question of caste inequality, the charitable version of the CGN argues that the Constitution, by including caste as a ground of discrimination in article 15, deprived Hinduism of the capacity to address this problem itself. The costs of this approach included not just the direct cultural-autonomy costs of subordinating Hindu religious practices to an alien, Western conception of equality, but also the indirect costs of retarding the organic process of Hinduism's progress towards greater social equality. Ironically, by subjecting Hinduism to Western standards of morality, the Constitution gave supporters of the caste system an anti-Western rationale for maintaining it.

At this point, the CGN departs from Hanumanthaiya's depiction of mentally colonised drafters unconsciously channelling Western values. On one version of the CGN, at least, the

94 The account of Hinduism offered here is based on *K.M. Sen*, note 84.

95 Ibid.

96 Ibid.

97 The first Christians came to India in 52AD.

98 *Tharoor*, note 84, p. 62.

Constitution's subjection of caste to the right to non-discrimination was a deliberate device to end what was seen as Hinduism's unforgivable blind spot. The central character in this part of the story is B.R. Ambedkar, the Dalit lawyer-activist who had a very personal reason for wanting to 'annihilate caste'.[99] For adherents of the LPN, Ambedkar gave authentic expression to the Deweyan pragmatism of his English and American education, striving to find the optimal institutional solution to the challenge of recognising caste inequality without entrenching it.[100] For adherents of the CGN, by contrast, liberal constitutionalism was the convenient vehicle that Ambedkar seized on to drive his anti-caste project forward. Towards the end of his life, Ambedkar and his followers turned to Buddhism, thereby rejecting, on one arguable reading, liberalism's 'materialistic vision of a society based on "rights'.[101]

Whatever the historically accurate account of the drafters' motivation, the charitable interpretation of the CGN maintains, the Constitution's solution of combining a right to non-discrimination on the ground of caste with public sector job reservations has failed. Caste consciousness remains an everyday facet of Indian life, including not just in its most egregious form of so-called 'caste atrocities' but also in other facets of everyday social and political life.[102] While Dalits and 'Other Backward Classes' have been able to organise themselves to become an important force in electoral politics,[103] this has had the effect of locking the caste system into India's constitutional democracy – thereby prolonging and deepening it. The reservation of jobs meanwhile has bred inter-caste resentment, recently expressed in the form of a controversial constitutional amendment that gives intermediate castes access to the job reservation system.[104] In all these ways, the CGN concludes, the forced imposition of a Western conception of equality has disrupted what might otherwise have been an organic process of development within Hinduism itself towards the reform of the caste system.

99 *B. R. Ambedkar*, Annihilation of Caste, speech prepared for (but never delivered to) the Annual Conference of the Jat-Pat-Todak Mandal of Lahore, 1936 (published by UWA Publishing with an introduction by Arundhati Roy in 2015).

100 Ambedkar had trained with John Dewey in London and was one of the central figures, with Nehru, in giving the Constitution a secular rationalist cast. For Ambedkar, this was the only way in which the Constitution could address the pernicious problem of caste.

101 *Roy*, note 99, p. 140.

102 *Ritu Kochar*, From Traditional to Modern Atrocities: Has Caste Changed in Independent India? Contemporary Voice of Dalit (2022), pp. 1-22.

103 See *Christophe Jaffrelot*, Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy, Princeton 2021.

104 The 103rd Amendment (Constitution Act, 2019) (amending Articles 15 and 16 to allow the state to make provision for the advancement of 'economically weaker sections' of citizens belonging to classes, castes and tribes not previously listed).

II. The ANC and Neo-apartheid Constitutionalism

Despite its name, the ANC has for most of its history resisted defining its political programme in exclusively African nationalist terms.[105] The South African political party most closely associated with that framing of the anti-colonial struggle is the Pan-Africanist Congress (PAC). Formed as a breakaway party from the ANC in 1959, the PAC's origins lie in contrasting views about the role of non-Africans in the liberation movement that started to emerge in the 1940s. Around that time, Africanists in the ANC began to question the materialist analysis propounded by the movement's communist members, many of whom were from minority racial groups. Rather than a class war, Anton Lembede and others argued,[106] the anti-colonial struggle was a struggle by Africans – culturally united across differences of ethnicity – to regain the ability to govern themselves. As a practical matter, this meant that membership of the ANC should be restricted to this group. Failure to do that would mean diluting the struggle with the well-meaning, but distracting, agendas of outsiders – and not just any outsiders but people who, for all their sympathetic concern, were representative of the colonising power.

This historical split within the liberation movement continues to inform the debate over the most appropriate governance model for South Africa. Liberal constitutionalists, as we have seen, draw on the Charterist tradition of calling for a multiracial democracy to depict the 1996 Constitution as the realisation of that goal. Against this, decolonial critics focus on the link between what they see as the crisis of post-apartheid constitutionalism and the warning that Africanists issued in the 1940s and 1950s about the risks of conceiving of the struggle as a demand for inclusion in a Western-style liberal democracy. The decolonial critique of the South African transition in this way has deeper intellectual roots than its current framing in the language of Latin American decolonial theory might suggest. To properly understand it, it is necessary to go back to the mid-twentieth century, the point at which the anti-colonial struggle, on the culturalist understanding of things, took a wrong turning.

The key thinker to emerge during this time was Lembede. In addition to being a leading Africanist, he was the first president of the ANC Youth League. In that capacity, Lembede – along with Peter Mda, Walter Sisulu, Oliver Tambo, Nelson Mandela and others – initiated a radical shake-up of the Youth League's parent organisation.[107] Like the Indian National Congress before Gandhi, the ANC had by the 1940s become stuck in a fruitless quest for concessions from the white political establishment. Against this, the Youth Leaguers argued that greater African unity and self-reliance were important

105 See *Gail M. Gerhart*, Black Power in South Africa: The Evolution of an Ideology, Berkeley 1978, pp. 12-13 (explaining how the ANC has been 'less an African nationalist movement … than a movement to win democratic rights for Africans').

106 Ibid., p. 55.

107 *Benjamin Pogrund*, Robert Sobukwe: How Can Man Die Better, Johannesburg / Cape Town 2006, p. 35.

preconditions for national liberation, and that the ANC should focus on achieving these goals first. Of the initial Youth League leadership group, Lembede, together with Mda, was the most stridently Africanist,[108] warning of the dangers of co-operation with political activists from other race groups and stressing instead 'the need for black … racial pride'.[109] Though bordering at times on 'cultural and racial essentialism',[110] Lembede's views on the prerequisites for African emancipation are generally regarded as the most important early contribution to the Africanist tradition in South Africa.

Lembede died prematurely in 1947.[111] Not long afterwards, the ANC issued its first major public statement to give a recognisably Africanist slant to the anti-colonial struggle – its 1949 Programme of Action. The enduring influence of Lembede's ideas is detectable in the Programme's language. 'By national freedom', it declared, 'we mean freedom from White domination and the attainment of political independence.'[112] The Programme then went on to map out a series of actions for attaining this goal, including Gandhian methods of civil disobedience and non-cooperation.[113] While these methods were later deployed in the 1952 Defiance Campaign,[114] the ANC continued to co-operate with other political organisations in the Congress Alliance. In 1955, the Freedom Charter proclaimed that 'South Africa belong[ed] to all who live in it, both black and white'.[115] Drafted in the main by a white communist,[116] the Charter was read by Africanists as an unwelcome confirmation of the ANC's commitment to multiracialism. Led by the new rising star of the movement, Robert Sobukwe, they broke away to form the PAC.[117]

Sobukwe's conception of the anti-colonial struggle was based on several key principles. First, he stressed the idea of Pan-Africanism – the notion that there was a common cultural ethos connecting all Africans on the continent that was existentially threatened by European colonialism.[118] A second key principle was that of non-racialism, which Sobukwe and other Africanists contrasted with the ANC's multi-racialism. For Sobukwe, the ANC's approach to the struggle, based as it was on forging ties with other organisations in the

108 Ibid., p. 44.

109 *Saul Dubow*, The African National Congress, Stroud 2000, p. 29; *Gerhart*, note 105, p. 61.

110 *Dubow*, note 109, p. 29; See also *Tom Lodge*, Sharpeville: An Apartheid Massacre and its Consequences, Oxford 2011, p. 28, noting that Lembede believed 'no foreigner … could every truly interpret the African spirit'.

111 *Dubow*, note 109, p. 30.

112 African National Congress, Programme of Action, 1949.

113 Ibid.

114 *Dubow*, note 109, p. 34.

115 Congress of the People, Freedom Charter, 1955.

116 Lionel 'Rusty' Bernstein. See *Lodge*, note 110, pp. 41-42.

117 *Pogrund*, note 107, pp. 112, 117.

118 Ibid., p. 122 ff.

Congress Alliance,[119] was destined to perpetuate apartheid thinking. Only a scrupulously race-blind approach, he argued, would address the consequences of the National Party's invidious classifications.[120] At the same time, however, Sobukwe stressed the need for minority groups to embrace African cultural values as the majoritarian tradition in South Africa. His non-racial society was thus very much still an African society into which Coloureds, whites and Indians would have to immerse themselves if they were ever to feel a sense of belonging in South Africa.[121] In a neat inversion of the ANC's approach, this led Sobukwe to call for a kind of assimilationism in reverse. For him, and the PAC more generally, the anti-colonial struggle was an existential fight for survival between two culturally incompatible peoples in which there could be only one winner and in which questions of cultural identity superseded those of class.

While the PAC's anti-communism was theoretically attractive to the apartheid regime, its emphasis on mass defiance of the pass laws soon led to confrontation.[122] On 21 March 1960, less than a year after its formation, the PAC organised a series of peaceful protests across the country. At one of these, in Sharpeville, a group of white policemen opened fire on unarmed and fleeing demonstrators. 69 people were killed, and many others seriously wounded.[123] What might in other circumstances have been a turning point towards Africanism turned out instead to be the high watermark of the PAC's influence. Fearing a backlash against the Sharpeville massacre, the apartheid regime moved quickly to ban the PAC and arrest Sobukwe and other leaders.[124] When the PAC responded by forming an armed wing, Poqo, it was infiltrated and its members taken into custody.[125] In combination, these measures severely reduced the PAC's capacity to organise. Sobukwe, the feared intellectual leader of the movement, was transferred to Robben Island and kept in *de facto* solitary confinement, his sentence repeatedly extended by parliamentary decree.[126]

For the CGN, the apartheid regime's crushing of the PAC is illustrative of several similar incidents that saw the ANC take on the mantle of the main liberation movement in South Africa, not because its conception of the anti-colonial struggle was superior to the Africanist view, but because it made better use of available opportunities. After Sharpeville, the ANC thus managed to send several key leaders into exile to begin its ultimately successful strategy of winning international support for the anti-apartheid cause. What for the LPN amounts to a shrewd decision to engage and shape the evolving international

119 The Congress of Democrats, The South African Indian Congress, and the Coloured People's Party.

120 *Pogrund*, note 107, pp. 123, 161.

121 Ibid., p. 124.

122 Ibid., p. 145.

123 For a comprehensive analysis, see *Lodge*, note 110.

124 See *Pogrund*, note 107, p. 178.

125 In 1963, 3 246 Poqo members were arrested and detained. See *Lodge*, note 110, pp. 202-203.

126 See *Pogrund*, note 107, p. 3.

legal order,[127] is for the CGN just another instance of the ANC's expedient use of Western institutions.

With Sobukwe imprisoned on Robben Island and then, from 1969, silenced by house arrest,[128] the Africanist strain in South African liberation thought disappeared from public view. From 1960-1970, South Africa experienced a period of sustained economic growth during which the National Party government used its control of the state apparatus to promote the interests of its mainly Afrikaner constituency.[129] Pursuing its own racist version of cultural nationalism, the apartheid regime after 1960 successfully silenced the two main liberation movements, clamping down on all opposition and for the better part of the 1960s managing to sustain the illusion of stability.

Towards the end of that decade, however, the very success of the National Party's divide-and-rule strategy created the conditions for the revival of black liberation thought.[130] One goal of so-called 'grand apartheid' had thus been the creation of 'University Colleges' for each of South Africa's ethnic and racial groups, four of which were founded in 1960.[131] While students at the new University Colleges were not permitted to join the white-led National Union of South African Students (NUSAS), a University Christian Movement was established in 1967 that attracted a large black membership.[132] This created the space for 'dialogue' between African, Indian and Coloured students that promoted the emergence of a new sense of black solidarity.[133] This in turn emboldened the few African students who *were* able to join NUSAS to challenge the way it was being run.[134] In a replay of the debates over the role of communists in the ANC in the 1950s, but this time directed at liberals, they questioned the white student leadership's true commitment to non-racism.

Steve Biko, the intellectual inspiration behind the Black Consciousness Movement (BCM), grew to prominence as a student leader during this time. Initially working within NUSAS,[135] his experience of liberal white students' hypocrisy at the organisation's 1967 annual congress caused him to change his mind.[136] For Biko, the NUSAS leadership's preparedness to use their universities' racial segregation policies as an excuse for accepting superior accommodation showed that they could not be trusted to promote black interests.

127 See, for example, *Klug*, note 16.

128 See *Pogrund*, note 107, p. 394.

129 *Dubow*, note 109, 71.

130 *Gerhart*, note 105, pp. 257-299; *Dubow*, note 109, pp. 79-83.

131 The University Colleges of the Western Cape, Zululand, of the North and Durban (Biko 9).

132 *Steve Biko*, I Write What I Like, Portsmouth 1978, p. 10.

133 Ibid.

134 African students enrolled in the traditionally white universities or on their black campuses, were able to join NUSAS.

135 Biko was a medical student at the black campus of the University of Natal, and thus able to join NUSAS.

136 *Xolela Mangcu,* Biko: A Biography, 2017, p. 123.

In 1969, with the blessing of the new, more radical NUSAS leadership, he established the South African Students' Organisation (SASO) as a blacks-only organisation.[137]

With the ANC and the PAC both still banned, the BCM did not attach itself to either organisation but rather worked through SASO and the Black Community Programmes.[138] The goal of the new movement was to inculcate in black South Africans the psychological self-confidence to play a leading role in national politics. Biko's thinking in this respect was indebted to Lembede and Sobukwe, but also drew on the American Black Power movement and postcolonial thinkers like Aimé Césaire and Frantz Fanon.[139] Following them, Biko emphasised the need for black South Africans – which for him meant not just African, but also Indian and Coloured South Africans – to embrace their racial identity without falling into European-style cultural chauvinism.[140] In an essay on white South African liberals, Biko vented his frustration 'against the fact that a settler minority should impose an entire system of values on an indigenous people…. For one cannot escape the fact that the culture shared by the majority group in any given society must ultimately determine the broad direction taken by the joint culture of that society'.[141] In other essays, Biko struck a more conciliatory note, calling for 'a viable synthesis of ideas and a *modus vivendi*' between the black and white sections of society.[142] Like Sobukwe, Biko also warned that, if the anti-colonial struggle continued to be conceived as a demand by black South Africans for assimilation into white society, victory would be hollow – the creation of a neo-apartheid state in which an elite class of black South Africans would displace their colonial masters, but with the deep structures of colonialism left intact.[143]

The repression that followed the Soweto student uprisings in 1976 drove many of the new BCM leaders into exile.[144] Biko himself, however, bravely remained in the country, subject to constant police harassment, banning orders and a string of unsuccessful prosecutions.[145] In 1977, he was murdered in custody by the South African police.[146] While Black Consciousness has survived as an important strain in black liberation thought, South Africa

137 SASO's first representative conference was held in 1968, but its inaugural conference was held in July 1969.

138 A Black People's Convention was eventually formed.

139 *William Beinart*, Twentieth-Century South Africa, Oxford, 2001, p. 233; *Gerhart*, note 105, p. 274-75.

140 *Mangcu*, note 136; *Beinart*, Twentieth-Century South Africa, Oxford 2001, pp. 232-33.

141 *Biko*, note 132, p. 24.

142 Ibid., p. 51.

143 Ibid., p. 149. See also Gail Gerhart's interview with Biko in *Andile Mngxitama*, Amanda Alexander / Nigel C. Gibson (eds.), Biko Lives! Contesting the Legacies of Steve Biko, London 2008, pp. 41-42.

144 *Dubow*, note 109, pp. 82-83.

145 *Mangcu*, note 140.

146 Ibid., pp. 243-266

was deprived by this violent act of the contribution that Biko would otherwise have made to post-colonial governance.

The last major anti-apartheid movement to be formed inside the country, the United Democratic Front (UDF), was organised along multiracial rather than Black Consciousness lines.[147] Its members were absorbed into the ANC after the latter's unbanning and the return of its exiled leadership in 1990.[148] In the result, when the 1993 and 1996 South African Constitutions came to be drafted, the ANC's Charterist tradition was hegemonic. The PAC, while also unbanned, received very little support at the first democratic elections in 1994 and never became a major force in post-apartheid politics.[149] The same is true of the BCM-aligned Azanian People's Organisation (AZAPO).[150] For the first fifteen years of democracy, at least, political parties espousing a culturalist conception of the anti-colonial struggle were unable to counter the ANC's monopolisation of the transition narrative.

From about 2010 or so, however, things started to change. Under Jacob Zuma's presidency, the ANC revealed itself to be a corrupt and nepotistic party that was no longer unambiguously committed to the values of the 1996 Constitution.[151] This development, together with the gradual shift to a less Western-dominated, more multipolar world, has exposed the 1993-1996 constitutional settlement to renewed culturalist critique. As further explained in Part F.II. below, the critique has partly been opportunistic, with deeply compromised politicians, both inside and outside the ANC, abusing Sobukwe's and Biko's legacy for personal gain. But there is also today a serious scholarly literature that is arguing, in essence, that what these thinkers predicted would happen has indeed come to pass. In a series of law-journal articles published over the last decade, Tshepo Madlingozi,[152] Joel Modiri,[153] Sanele Sibanda,[154] and Emile Zitzke[155] have claimed that the 1996 Constitution, in focusing on reversing South Africa's more recent history of apartheid racial discrimina-

147 *Beinart*, note 139, p. 251.

148 Ibid., p. 273.

149 The PAC received only 1.25% of the national votes and won 5 seats.

150 AZAPO boycotted the 1994 election and has since never won more than a single seat in the National Assembly.

151 There are numerous accounts of the ANC's descent into corruption. See for example, *Andrew Feinstein*, After the Party: A Personal and Political Journey Inside the ANC, Johannesburg / Cape Town 2007; *Jacques Pauw*, The President's Keepers: Those Keeping Zuma in Power and Out of Prison, Cape Town 2017.

152 *Tshepo Madlingozi*, Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' Stellenbosch Law Review 28 (2017), p. 123.

153 *Joel M. Modiri*, Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence, South African Journal on Human Rights, p. 300.

154 *Sanele Sibanda,* Not Purpose-made! Post-independence Constitutionalism and the Fight Against Poverty, Stellenbosch Law Review 22 (2011), p. 482.

155 *Emile Zitzke*, A Decolonial Critique of Private Law and Human Rights, South African Journal on Human Rights 34 (2018), p. 492.

tion, has failed to address the deep-seated social, economic and cultural consequences of colonialism.

In his first contribution to this literature, Madlingozi drew on decolonial theorist Boaventura de Sousa Santos's notion of the 'abyssal line'[156] to argue that South Africa is a country that condemns a large proportion of its black population to live in 'a zone of non-beings', effectively prevented from meaningful participation in society.[157] Using Abahlali base Mjondolo, a shackdwellers' association in KwaZulu-Natal, as his main case study, Madlingozi described this system as one of 'neo-apartheid constitutionalism' no different from the apartheid dual state except for the fact that a small black middle class has crossed over the abyssal line to reinforce a system of systemic racism from the other side. He dismissed social justice talk and transformative constitutionalism as the 'master frame' within which 'an assimilationist logic … perpetuates an anti-black bifurcated society'.[158]

In a subsequent article, Madlingozi discussed the then proposed amendment of the South African constitutional property clause to explicitly provide for no compensation to be paid in certain instances. In response to liberal white academics, who had claimed that the amendment was unnecessary as the clause already provided for this possibility, Madlingozi argued that it would in fact not go far enough to decolonise the Constitution. In his view, 'a thoroughgoing and holistic project of decolonisation cannot be achieved within the framework of the current constitution.'[159] In particular, Madlingozi saw the 1990-1996 constitutional settlement as the triumph of 'evolutionary constitutionalism' – a form of constitutionalism that preserves settler colonialism and the 'defeat of revolutionary constitution-making paradigms'.[160] He made three other main claims: first, that the 1996 Constitution did not undo the colonial state ('a] constitution is only decolonising', Madlingozi said, 'to the extent that it undoes the colonial state form and reinstate[s] the sovereignties of subjugated indigenous kingdoms'); second, it 'marginalise[d] African lifeways, their epistemologies and systems of social ordering'; and third, it did not address historical injustice.[161]

Joel Modiri's critique, for its part, is focused on the adequacy of the constitution-making process. While accepting that some of South Africa's current travails are attributable to 'chronic levels of corruption and maladministration by the ruling ANC government',[162] he argues that a large part of the problem, too, is that the 1996 Constitution did not go far enough in rooting out the deep structures of colonialism. Instead, it addressed itself to

156 *de Sousa Santos*, note 75, p.45.

157 *Madlingozi*, note 152, p. 123.

158 Ibid., p. 129.

159 The Proposed Amendment to the Constitution: Finishing the Unfinished Business of Decolonisation? Critical Legal Thinking, http://criticiallegalthinking.com (last accessed 18 July 2024).

160 *Madlingozi*, note 152, p. 6.

161 Ibid., p. 8.

162 *Modiri*, note 153, p. 303.

the problem of apartheid. As such, it was a Constitution made in the mould of the ANC's assimilationist political tradition rather than the Africanist tradition of the Pan-Africanist Congress or the Black Consciousness tradition of AZAPO.

Modiri writes broadly from the latter perspective – citing particularly Steve Biko as an intellectual inspiration. His work also connects indigenous Africanist jurisprudence with decolonial theory, critical race theory, and the work of Wendy Brown.[163] The thrust of his argument is that more than three centuries of settler-colonialism in South Africa have influenced social structures and mentalities. Colonialism's effects and legacies are 'socio-economic, cultural, spatial, epistemic/cognitive, psychic and ontological'.[164] Rather than addressing these deep structures, the 1996 Constitution simply sought to provide a basis for black South Africans to be included on equal terms in white society.[165] Under the ANC's influence, the 1996 Constitution was 'made in the image of Western liberal democracy':

> *[T]he constitution is figured not only as a supreme law but also a supreme rationality. Not only is it a formal law-text but it is also a particularly hegemonic public grammar, political imaginary and a form of historical and social consciousness. It embeds particular cultural and ideological values into its fold and as such works to consolidate and preserve particular arrangements and relations of power and knowledge. Understood in this way, the constitution must be implicated in the continuation of colonial-apartheid power relations, value systems and subjectivities.*[166]

For Modiri, then, the 1996 Constitution is indisputably liberal in character and bound up with Eurocentric understandings of political modernity. Drawing on Jean and John Comaroff's work, he describes the Constitution as function of 'ANC's aspiration towards a "Eurocentric ideal of the nation-state".'[167] In this discourse, the Constitution is fetishized as the vehicle through which South Africa will be miraculously transported into modernity. The problem with this is not just that this is an illusory and impossible-to-fulfill promise. It also invests too much trust in the Constitution as a vehicle for social transformation at the expense of democratic politics. This is a problem for two reasons: the Constitution closes off other imaginaries – other ways of thinking about South Africa's political future. It also detracts from democratic politics and hands over too much control to lawyers – and not just any lawyers, but white liberal lawyers who have been the main beneficiaries of the transition and enjoy a privileged position as interpreters of the Constitution. 'The centring of the constitution in South Africa's political and legal culture and social discourse', Modiri claims, has … had the effect of narrowing the space for political contestation and removing

163 Ibid., p. 303.
164 Ibid., p. 304.
165 Ibid., p. 304.
166 Ibid., p. 305.
167 Ibid., p. 306.

from serious analytic view the living memory of South Africa and South African law as artefacts of colonial conquest.'[168]

Madlingozi's and Modiri's work in this way continues the culturalist tradition of thinking about the anti-colonial struggle in South Africa and the conditions for genuine African emancipation. For both of them, the 1996 Constitution and the ideology of transformative constitutionalism that has grown up around it are a distraction from the urgent task of addressing the legacy of centuries of European colonialism and the destruction of indigenous life worlds and governance traditions.

E. Bringing the Narratives Into Dialogue With Each Other

Sections C and D of this paper have sketched what I hope are recognisable versions of the two main ways of narrating the Indian and South African constitutional transitions. This section presents an imagined dialogue between these narratives organised under two sub-headings: (1) the colonial power matrix and judicial review, and (2) liberal constitutionalism and its diversification beyond the West. In each case, the liberal-progressivist narrative (LPN) opens the conversation.

I. Dismantling the Colonial Power Matrix

LPN: Hi. I hope this opening salvo in our dialogue finds you well. I want to start by discussing this idea of the 'colonial power matrix' (CPM). I think I get what you mean by this – a complex web of economic, cultural, and sexual hierarchies that enables certain groups in society to dominate others. Though I might describe it somewhat differently, I don't dispute that Western imperialism produced something like this effect. I also agree that the mere adoption of the Indian and South African Constitutions was unlikely to change things. In fact, these Constitutions themselves recognise this by authorising – and, in some cases, obliging – the state to adopt measures to address entrenched patterns of social and economic disadvantage. That's why the Indian and South African Constitutions are typically seen as departing from the classic liberal-constitutionalist model. Neither of them assumes that reducing social and economic inequalities can be left to the market or to the ordinary democratic process. Rather, the Constitution in each case comes down decisively in favour of pro-active, state-led measures. Whether this means that the Indian and South African Constitutions are best described as 'post-liberal' is a separate question that we can discuss later. For the moment, the point is that they are not blind to what you

168 Ibid., p. 308. For existing responses to these criticisms in the literature, see *Firoz Cachalia*, Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal, South African Journal on Human Rights 34 (2018), pp. 375–394; *Catherine Albertyn*, (In)equality and the South African Constitution, Development Southern Africa 36 (2019), pp. 751–766; *Heinz Klug*, Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa, South African Journal on Human Rights 34 (2018), pp. 469–491.

call the CPM. The disagreement between us seems rather to relate to their alleged role in *sustaining and legitimating* that state of affairs. That's a proposition that I find much harder to accept. To be sure, the CPM hasn't yet been dismantled in every respect. But that doesn't mean that the Indian and South African Constitutions have perpetuated it. There may be all sorts of reasons why the social and economic transformation process envisaged by those two documents has not occurred as quickly or effectively as was hoped. The wrong policies might have been adopted or the right policies adopted but frustrated by poor implementation. Perhaps, too, dismantling the CPM is beyond the ability of any one country to achieve on its own. Until we have a clearer sense of the factors responsible for the Indian and South African Constitutions' failure to fully realise their goals, it is wrong to conclude that they are sustaining and legitimating the CPM. At most, we might charge their designers with setting overly ambitious targets whose non-fulfilment has engendered cynicism about the value of constitutionalism and the rule of law. But that is a very different thing.

CGN: Thanks for raising this issue. I am happy to concede that the Indian and South African Constitutions recognise something like the CPM and commit themselves to addressing it. The problem is that they go about it in completely the wrong way. Instead of tackling the CPM head on, they propose a range of court-centric measures to address its symptoms. But no amount of constitutional litigation is going to undo the structural legacies of Western imperialism including the racially skewed ownership of capital (especially land), gross income equality, education systems that favour Westernised elites, cultural biases in hiring, and so on. Not just that but, in holding out the false hope that these issues can be addressed through litigation, these Constitutions divert attention away from the kinds of political mobilisation that are actually required to dismantle the CPM. It is in that sense that they sustain and legitimate it: they channel democratic politics into a system that is ostensibly committed to social justice but, in reality, frustrates meaningful social and economic transformation. Only a thoroughly decolonised Constitution that recognises the violence done by Western imperialism to indigenous ways of life and commits itself to fundamental structural reforms can hope to address the CPM.

LPN: I think you still have a way to go in showing that the Indian and South African Constitutions sustain and legitimate the CPM as opposed to being relatively ineffective to date in doing anything about it. But let's leave that question aside for the moment. I am interested rather in finding out how you yourself propose to address the CPM. Assume you get your way, and India and South Africa each adopt a 'thoroughly decolonised constitution'. Such a constitution, too, would be confronted by 'the structural legacies of colonialism'. You say you would design it in a way that facilitates and centralises the role of democratic politics. Fine. But democratic majorities, in order to drive social change, need to be able to express their policy preferences in legislation (unless you are proposing Zimbabwe-style land invasions or citizens' assemblies running the country through ad hoc decision-making). If that is right, the question of judicial review comes back into the

picture. Is your Constitution going to give the courts the power to monitor the impact of social transformation legislation on individual rights or not?

CGN: Well, here we clearly disagree. My view is that judicial review, at least in so far as it is directed at supervising the impact of legislation on individual rights, is an alien Western institution. It was not known in either India or South Africa before colonisation and it is clearly at odds with the more communitarian, consensus-seeking approach that characterises indigenous traditions of governance in those two countries.

LPN: So, you would reject judicial review on purely culturalist grounds, irrespective of whether it promotes good governance or not?

CGN: 'Good governance' is itself a Western notion that has very dubious, universalist undertones. But let me not try to win the argument with a low blow like that. I will simply answer directly. Yes, judicial review does fall to be rejected because it is a culturally alien institution. Lest you think that this view stems from some kind of one-eyed, anti-Westernism, let me put the point in the social scientific, evidence-based terms you prefer. Institutions that don't have a solid foundation in the political norms and values of the country in which they are introduced will never promote 'good governance'. In fact, they are generally pretty disastrous for the countries concerned.

LPN: But what about judicial review in places like South Korea and Taiwan? Hasn't it worked there? Those two countries have become flourishing constitutional democracies, in part through their adoption of judicial review, an institution that neither of them had any experience of before it was introduced. And why, in any case, are we treating the West as a monolithic entity when it comes to cultural appropriateness? Judicial review was also a relatively foreign concept in West Germany when it was introduced there in 1949, and yet it has worked spectacularly well in stabilising constitutional democracy and promoting economic growth. Isn't judicial review better seen as a constitutional-design option that originated in a particular political and cultural setting – the United States after 1789 – but which has since shown itself to be adaptable to a range of different contexts in ways that serve local needs?

CGN: I don't know how you can say that judicial review is 'a constitutional-design option', as though choosing whether or not to institutionalise it is a purely technocratic, value-free matter. Judicial review's provenance in a specifically Western tradition of thinking about how best to protect citizens from the abuse of public power is beyond dispute. It is inextricably bound up with European Enlightenment notions of the inherent dignity and worth of the individual.

LPN: But ideas and institutions travel, don't they, and escape their cultural and political origins? Sure, we can trace judicial review back to ideas that were first articulated during the European Enlightenment, but that begs the question of whether India created its own tradition of judicial review after 1950 and South Africa after 1994. If you look at the decisions of the Indian and Supreme Court and the South African Constitutional Court, you will see a rich tradition that is completely different from the American, the Canadian, the German or whichever other country you choose to name. Judicial review is highly expres-

sive, in fact, of a country's constitutional culture. The fact that it has been successfully institutionalised in India and South Africa shows that it is capable of travelling beyond the West. Your approach, by contrast would prevent this kind of cross-country borrowing and experimentation, so that every country would be locked into using its indigenous institutions for ever more. That's silly. For one, it is in the nature of constitutional traditions to intermingle and borrow from each other. For another, any constitutional tradition that adopted such a dogmatically rejectionist attitude to foreign influence would ossify and die.

CGN: But you are forgetting that this is not just any foreign influence we are talking about. Judicial review is a product of the same hyper-individualistic Western episteme that was so destructive of indigenous ways of being under colonialism. The reason why it was adopted in India and South Africa is that the values and assumptions that underpin it had already entered those countries' colonial legal cultures. Judicial review appeared to be suited to them at independence only to the extent that their indigenous legal cultures had already been tainted by Western influence. The tradition of judicial review that subsequently emerged in each case is unique to those countries, I grant you that. But that doesn't mean that it is appropriate or that it serves everyone's interests. It mainly serves the interests of the Westernised legal profession that is able to take advantage of it. Judicial review is elitist, in that sense. Under the guise of circumscribing power, it just gives Westernised elites privileged access to the policy process to frustrate the democratic will of the people. India's and South Africa's decision to adopt this institution at independence was akin to expelling a murderer from your house and then inviting them back to tell you how to run things.

LPN: That's a bit melodramatic, isn't it? I thought you were keen to stress the value of indigenous agency. Isn't adapting a foreign institution to serve local needs a prime example of that? Sure, Western legal-cultural values had taken root in both India and South Africa under colonial rule. The Congress Parties in both countries were established precisely to exploit this fact – to press down on the contradiction between the rule of law's promise and the colonial state's exclusionary operation. Out of that was born a new, post-colonial legal culture in each country. That legal culture bore numerous signs of Western influence, but it also went beyond the Western tradition in rethinking how public power can be directed to transformational ends while at the same time curtailing its abuse. Indians and South Africans should be proud of that achievement – not rejecting it as some kind of colonial hangover. Even though constitutional democracy is currently under threat in both countries, each of them still has something to teach the West. In India, that includes, for example, how the basic structure doctrine can be used to shore up democratic fundamentals, and in South Africa, how socio-economic rights can function to focus democratic attention on social and economic marginalisation.

CGN: It's wonderful that the Indian and South African Constitutions are celebrated in Western academic circles as taking liberal constitutionalism to a new level of sophistication, Bravo! It's just a pity, as you seem to agree, that none of this has made much difference to people on the ground. You react with horror at the new populist movements in India

and South Africa – Narendra Modi's BJP and Julius Malema's EFF in South Africa. But the fact of the matter is that these populist parties are being driven by voter dissatisfaction with liberal constitutionalism. People feel angry about being held to standards of governance that can't be attained and by being judged according to cultural norms that aren't theirs.

II. Liberal Constitutionalism and Its (Alleged) Diversification Beyond the West

LPN: It is interesting that you are so confident that the Indian and South African Constitutions are liberal constitutions. In the literature I read, there is quite a fierce debate about this. Many people think that these two constitutions should rather be classified as 'post-liberal' – as documents that transcend the limits of liberalism. They think this because the Indian and South African Constitutions give a much more proactive role to the state in driving social transformation than, say, the US Constitution.[169] My own view is different. I think that the Indian and South African Constitutions should rather be understood as constitutions that adapted liberal constitutionalism to local conditions. They are developments of the tradition, in that sense, rather than fundamental departures from it. You and I thus end up on the same side of the classificatory debate, but for different reasons. You classify the Indian and South African Constitutions as liberal because it suits your argument to depict them as continuations of what you regard to be an exclusively Western tradition. On your view, liberal constitutionalism and the Western tradition of constitutionalism are one and the same thing, so that classifying the Indian and South African Constitutions as liberal necessarily means that they are premised on alien cultural values. I suppose it would be easier for me to counter this argument by switching to the view that these constitutions should be classified as post-liberal – as fundamental departures from liberal constitutionalism and therefore also from the Western tradition of constitutionalism. But I don't want to do that because I prefer to see them as *developments* of that tradition rather than *departures* from it. So, instead, what I would argue is that your approach begs the question of what actually happened in India from 1946-49 and South Africa from 1991-1996. You simply assume that because the Indian and South African Constitutions drew on liberal constitutionalist ideas and institutions, they must necessarily be Western in their cultural orientation. But what if, in the process of drawing on those ideas and institutions, constitution-makers also had regard to indigenous values and local traditions of struggle against the abuse of power? Wouldn't a constitution that emerged from such a process be better described as syncretic – as based on an amalgam of Western and indigenous ideas? And wouldn't it then also make more sense to think of liberal constitutionalism as having been culturally pluralised through this process, so that it is no longer apt to think of it as an exclusively Western tradition? That's the nub of our disagreement, is it not? You think liberal constitutionalism is incapable of diversification beyond the West and I think that this has already happened.

169 See *Timothy Fish Hodgson*, The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution, South African Journal on Human Rights 34 (2018), pp. 57-90.

CGN: That's right. That is where we differ. I agree with you that the Indian and South African Constitutions are developments of liberal constitutionalism and that the hope was that this would address the challenges facing these countries. I just don't think that anything approaching diversification beyond the West happened. Both the Indian and the South African Constitutions are still predominantly Western in the way they prioritise individual freedom from state control. In fact, they take that quintessentially Western value and push it to extremes. The 1996 South African Constitution, for example, reads like the constitution that the most progressive, prematurely woke Canadian would have wanted to have adopted in 1982 if only they had had enough political support. It's full of exquisite attention to the rights of every conceivable identity-based group you could think of – women, children, LGBTQI+, linguistic minorities and so on – but almost completely lacking in anything you would say stems from an Africanist world view. The word 'ubuntu', for example, which was used in the 1993 Constitution, dropped out of the 1996 Constitution. Subsequent references to that term in the Constitutional Court's jurisprudence are just sops to the need to make the 1996 Constitution appear more homegrown. Likewise, you would have to look long and hard in the Indian Constitution for any sign of Hindu values and traditions. It is a deliberately secular constitution that reflects the views of the Westernised elites who controlled the Congress at the time of its adoption. Of course, people like Jawaharlal Nehru and B.R. Ambedkar tried to adapt liberal constitutionalism to meet the challenges they saw India as facing, but that doesn't mean they de-Westernised it. They simply gave liberal ideas and institutions a local inflection.

LPN: Really? You set the bar on cultural diversification very high. On your approach, what happened in West Germany in 1949, when the Basic Law was adopted, wouldn't qualify. And yet, if you consider the role played by the *Sozialstaatsprinzip*, for example, it is clear that the Basic Law took liberal constitutionalism off in a new, more statist direction. Of course, you could say that the Basic Law isn't an example of diversification but of wholesale departure from the tradition of liberal constitutionalism, towards something more like social-democratic constitutionalism, or whatever you want to call it. But that would fail to acknowledge the continuities, among the differences, between the Basic Law and the classic liberal-constitutionalist model. It would also contradict your classification of the Indian and South African Constitutions as liberal, since their departures from the classical liberal-constitutionalist model are no more marked than the German. So, instead you need to argue that any diversification that happened in West Germany in 1949 occurred within a broadly Western 'episteme', and that there is a qualitative difference between that process and cultural diversification beyond the West. There is something in that argument, I grant you. The idea of the *Rechtsstaat*, for example, arguably has more in common with the Anglo-American concept of the rule of law than anything you would find in indigenous Indian or South African traditions. But the process through which liberal-constitutionalist ideas were drawn on and adapted to local needs in Germany, India and South Africa was roughly the same. In all three instances, a tradition of thinking about the preconditions for human flourishing supplied the intellectual and moral resources for constitution-making in a novel

cultural setting. To sustain the argument that this was not diversification in the case of India and South Africa, you need to show that liberal constitutionalism is inherently incapable of being extended to non-Western settings without obliterating indigenous traditions, such that what occurred in those two countries was the complete subsumption of those traditions under a Western episteme.

CGN: But that is exactly what I do think. You put it very nicely, in fact. Liberal constitutionalism presents itself as this culturally neutral tradition that provides universal solutions for universal problems, but it is in fact shot through with values and assumptions that are uniquely Western. You have mentioned the rule-of-law ideal already, which has distinct and identifiable origins in Western political thought. But there are many more: the way the relationship between individuals and society is conceived, the most desirable forms of conflict management, the conditions for collective decision-making, and so on. Liberal constitutionalism's conception of all these things is clearly traceable back to ideas that were first articulated during the European Enlightenment. Any suggestion that a powerful tradition like that, in the circumstances of post-colonial constitution-making, is not going to swallow up and subsume indigenous traditions is fanciful. Maybe those traditions gave the Western concepts a slight local inflection, but cultural diversification it was not.

LPN: I am not denying that liberal constitutionalism has clearly identifiable origins in the European Enlightenment. I am just saying that it doesn't necessarily follow from this that, when the Indian and South African Constitutions were adopted, Western conceptions of constitutionalism and all the cultural baggage that goes with them supplanted indigenous traditions in a kind of epistemicide 2.0. For one thing, that seems to make no distinction between the circumstances of constitution-making in Malawi in 1964, say, and in India from 1946-49 and South Africa from 1991-1996. In the former instance, the departing colonial power, Britain, *did* just impose its traditions and cultural values on the indigenous population. That is evident from the fact that all of the Constitutions Britain created for its former Africa colonies in the 1960s were virtually identical. Clearly, that process was antithetical to the spirit of liberal constitutionalism. An authentic constitution-making process on the liberal conception requires a representative democratic assembly that is capable of exercising an autonomous choice about what parts of the tradition to adapt to local conditions and how. The constitution-making process functions in that way as a kind of practical exercise in comparative constitutional law, through which all existing examples of liberal constitutionalism serve as moral guides and empirical data points for the constitution-making body to draw on. That happened in both India and South Africa, and that is why it is plausible to think of them as developments of the liberal-constitutionalist tradition.

CGN: That's a fabulous, idealistic story. It must be wonderful to be as ignorant about the way the world actually works as you. Your account downplays the real circumstances of constitution-making in India and South Africa and the power dynamics operating at the time. South Africa's transition was a negotiated one, never forget, in which concessions had to be made to secure the transfer of power. To think of that as some kind of rarefied laboratory in which comparative-law technocrats calculated how liberal-constitutionalist

ideas and institutions could best be adapted to local conditions is completely fanciful. In India, too, though Britain effectively vacated the field, the leading members of the Congress were all culturally assimilated Western lawyers. I say again: they might have thought they were being innovative, but their constitutional imaginations were limited by what was familiar to them, and that was the Western paradigm.

LPN: We are all limited by our situated perspective and life experiences, I am happy to concede that. I am happy to concede, too, that the leaders of the Congress parties in both India and South Africa understood constitutionalism through the prism of the anti-colonial struggle they had been waging. But you can't deny the authenticity of that experience or the fact that indigenous conceptions of constitutionalism were shaped and transformed by it. It is wrong, in other words, to reserve the term 'indigenous' just for those values and traditions that predated colonisation. If you do that, you are in effect saying that, unlike every other governance tradition, the Indian and South African governance traditions didn't grow and develop in response to their environment. Instead, they were frozen in time by colonialism, and are now miraculously available to be revived as though the last 300 years never happened.

CGN: I am not saying that. I am just saying that, now that the West's power is declining in a more multipolar world, we have greater scope and opportunity to revisit the indigenous traditions that were suppressed during the time of constitution-making and draw on them as more culturally appropriate resources for constitution-making. Why should we always continue to draw on Western ideas as though they were inherently superior? To do that amounts to cultural surrender and perpetuates the damage done under colonialism to indigenous people's sense of self-worth. There is nothing inherently superior or universal about the Western constitutionalist tradition. It is just a formerly hegemonic tradition that we no longer need to pay as much attention to as we did in the past.

LPN: But do you deny that it is a rich tradition and one that is not entirely culturally alien given the influence it exerted during the colonial era? Perhaps we must both give a little ground here. I must concede your point about the power dynamics that prevailed during the constitution-making moment, and you need to acknowledge that just because an indigenous tradition of constitutionalism develops in response to colonial oppression does not mean it is any less indigenous. If we do that then I think the position we come to is that both the Indian and South African Constitutions were drafted in a context in which liberal-constitutionalist ideas were hegemonic, but that there was nevertheless considerable scope for democratic choice about how to refashion those ideas to suit the challenges facing those two countries. The two constitutions that emerged were in that sense genuinely autochthonous creations. That doesn't mean they should last forever and can't be criticised. But it does mean that shouldn't be dismissed as culturally alien impositions.

CGN: I can live with this preliminary conclusion, but I suspect that your concession about the power dynamics that prevailed at the time of constitution-making goes further than you want it to. Those dynamics favoured a particular kind of political movement – one that had come to prominence during the colonial era because it was prepared to engage

the colonial state on its own terms, in the language of liberal constitutionalism and the rule of law. The popularity of the Congress in India and the ANC in South Africa at the time of independence flowed from the success of that strategy. Their democratic mandate was genuine, and the constitutions they drafted enjoyed overwhelming support at the time, associated as they were with the transition to democracy. But this does not mean that those constitutions must endure forever. Once it is conceded that they were the product of a particular political moment, rather than some or other context-independent, valid-for-all-time meditation on the preconditions for human flourishing, they lose their aura of immutability. Constitutions can and must be changed when the political circumstances that produced them change. And that has clearly happened in both India and South Africa. Decades after independence, in a more multipolar world, neither of these constitutions needs to pay homage to Western values and conceptions of constitutionalism anymore. They ought to be fundamentally overhauled so as to reflect the values of the majority of the population. That doesn't just make democratic sense, it also makes practical sense in so far as a constitution that is based on widely shared social values is more likely to be complied with. Such a change would be the logical second stage of the constitutional transition process, signalling as it would a final and comprehensive break with the colonial era. If they do that, India and South Africa will finally emerge from under the yoke of colonialism to unleash the full human potential of their respective peoples.

F. The Quest for Southern Democratic Constitutionalism

The sometimes quite robust exchanges in the preceding part have brought the two main narratives of the Indian and South African constitutional transitions into sharper relief by revealing, not just the respects in which they differ, but also surprising areas of agreement.

Neither narrative thus denies the harsh legacy of colonialism or the need for a constitution that assigns the primary role in redressing this legacy to the democratic branches of government. The LPN, for its part, contends that constitutions with this character have already been adopted in India and South Africa, and that the allegation that they assign too great a role to the courts is mistaken. While the courts in India have tended to displace dysfunctional democratic institutions rather than attempt to make them function better (the South African approach), neither constitution as a matter of design elevates the role of the courts above that of the other branches. The CGN places greater emphasis on a post-colonial people's right to be governed according to its own political traditions, but it is still committed to constitutionalism as the principal vehicle through which this right can be realised. Its central claim, after all, is that the Indian and South African Constitutions ought to be replaced with constitutions that better reflect indigenous cultural values. That claim assumes the need for a supreme law to provide the moral and institutional framework for democratic government. What the CGN rejects is not the idea of democratic constitutionalism per se, but the idea that Western standards of good governance may serve as a universal guide to what this form of constitutionalism should look like.

Given these points of agreement, it is fair to say that the LPN and the CGN, despite their many differences, are animated by the same ideal – call it *Southern democratic constitutionalism*.[170] According to this shared ideal, 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 groups with different conceptions of the common good. They are instruments for transforming society in line with a clearly articulated vision of post-colonial justice. While the detailed content of this vision will differ from country to country, constitutions aspiring to instantiate this ideal do not assume that either the state or its citizens will have the capacity to play their appointed roles in the system. In addition to the pursuit of the post-colonial justice, therefore, these constitutions contain a range of measures directed at ensuring (a) that democratic institutions are supported to perform their constitutional functions; and (b) that every member of society has both the material, and the non-material (cultural and psychological), means to participate in the making of political decisions that affect them.

For the LPN, this conception of constitutionalism is the amended understanding of the classic liberal tradition that it claims has already been instantiated in India and South Africa. For the CGN, Southern democratic constitutionalism represents a clean break from the liberal tradition, which it sees as ineluctably bound up with European Enlightenment thought. But this does not mean that this conception of constitutionalism is not a shared ideal to which both narratives are committed.

The purpose of this section, against this background, is to consider the practical steps that the LPN and CGN entail for the realisation of the ideal to which they are both committed. Is it the case, as might at first appear, that their contrasting accounts of the Indian and South African constitutional transitions lead to very different prescriptions for promoting Southern democratic constitutionalism? Or might the two grand narratives, when forced to come down from the heights of their sweeping historical claims, settle on surprisingly similar strategies? To answer this question, we will first need to deepen our

170 For a more phenomenological definition of 'Southern constitutionalism', see *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, in Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), Comparative Constitutional Law and the Global South, Oxford (describing three shared experiences that define a distinct Southern perspective on constitutionalism). The conception of Southern democratic constitutionalism set out bears some similarity to both 'transformative constitutionalism' (see *Karl Klare,* Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 [1998], pp. 146-188) and 'aspirational constitutionalism' (see *Martin Loughlin*, Against Constitutionalism, Oxford 2022). I have avoided both these terms, however, because each is somewhat controversial. 'Transformative constitutionalism', as we have seen (Part D.II.), is rejected by decolonial critics in South Africa as being too bound-up with the liberal constitutionalist ideal. 'Aspirational constitutionalism', while capturing many aspects of the ideal set out here, is used pejoratively by Loughlin to dismiss the distinctive brand of constitutionalism that has developed in India and South Africa, inter alia as being too court-centric.

understanding of the political context in which the LPN and CGN are vying for ascendancy in India and South Africa. It is only by taking account of the constraints under which each narrative's strategies would be implemented, after all, that the practicality of the steps they recommend can be assessed. Having done that, we will be in a position to compare the steps suggested, and from there to discern whether the narratives, so antagonistic to each other in the abstract, in fact converge on similar paths to their shared ideal.

I. Southern democratic constitutionalism in India

1. The political context in which the narratives are competing in India

In India, the current debate over the future of constitutionalism is taking place in a context in which a single political party, the Bharatiya Janata Party (BJP), has entrenched itself in government at the Union level. After winning the 2014 general election with a majority of the seats in the Lok Sabha (the first time this had happened since 1984) the BJP increased its majority in 2019 to 303 of the 543 available seats, before falling back in the 2024 elections to 204 seats. The significance of these victories is not just that one-party dominance is inherently threatening to democracy. It is also that the BJP's political programme is hostile to the inclusive spirit of the 1946-49 constitutional settlement. Established in 1980 after the breakup of the Janata Party, the BJP is the latest iteration of a series of parties (including its immediate forebear, the Bharatiya Jana Sangh) that have espoused the cause of Hindu nationalism. The political mobilisation of ethno-cultural identity is by itself worrying in a country that was founded on a vision of religious pluralism and respect for minority rights. But the BJP is also the political arm of the RSS, the cultural organisation whose origins and character were explained in Part D.I. In many ways, then, the BJP is the political embodiment of what was described there as the 'dark side' of the CGN – the morally questionable version of this narrative that not only disputes the legitimacy of India's constitutional transition but does so in a way that excludes minority groups from full political participation.

At its foundation, the BJP showed few signs of being the dominant political force it has become. After first winning power at the national level in 1996, it was in government for six years from 1998-2004 before being ousted by the Congress party. Its resurgence since then is attributable to several factors, but particularly to the political rise of Narendra Modi, the BJP's national leader and India's current Prime Minister. In 2004, at the time of the swing against the BJP at the national level, Modi was serving as Chief Minister of Gujarat.[171] The BJP performed much better in state elections in that state than it did elsewhere, largely because of Modi's personal popularity. This was somewhat ironic given that the swing against the BJP at the national level followed criticism of the party's handling of the 2002 Gujarat riots, for which Modi was accused of being responsible as

171 Gujarat is a state that has long been at the centre of Hindu-Muslim tensions. See *Jaffrelot*, note 103, p. 34.

Chief Minister.[172] It is a measure of Modi's political acumen that he was not only able to survive the fallout from this incident but use his track record in Gujarat to gain control of the BJP at the national level.

Modi's success is generally attributed to a combination of his personal background and shrewd understanding of electoral politics. After serving as an RSS *pracharak* (apostle) from 1972, Modi was redeployed to the BJP in 1987, where he rose to become general secretary and then Chief Minister of Gujarat.[173] His winning political formula at state level was based on a reputation for business-friendly policies and an initially soft and palatable version of Hindu nationalism.[174] Coming as he does from the fourth, Sudra caste, Modi was able to present the BJP as an agent of caste inclusivity and a bulwark against the alleged threat of Muslim extremism. While his handling of the Gujarat riots temporarily dented his reputation at the international level,[175] the same conduct solidified his reputation in India as a defender of Hindu interests.

In addition to Modi's personal popularity, the other factor driving the BJP's dominance has been the post-1990 implementation of the Mandal Commission's report on preferential treatment for Other Backward Classes (OBCs).[176] Several commentators identify this as an inflection point that, on the one hand, required the BJP to reposition itself as a broad-based Hindu nationalist party and, on the other, allowed it to paint the Congress into a corner, not just as the party of religious minorities, but also as a party that had abandoned its formerly principled commitment to the rights of religious minorities to pursue the religious minority vote for purely instrumental reasons.[177] This strategy has allowed the BJP in turn to depict the liberal inclusiveness of the 1947-49 constitutional settlement as being about the Congress party's alleged policy of Muslim appeasement. The rise of Islamic terrorism from the 2000s, including several prominent attacks in Indian cities,[178] has added further impetus to this strategy, providing as it has a rationale, however spurious, for the BJP's mobilisation of Hindu-nationalist sentiment.

While the political context in South Africa is also marked by one-party dominance, the difference in India is that the dominant political party is not associated with the constitutional settlement. Rather, it is the BJP's main political rival, the Congress, which wears that

172 The violence followed an alleged attack on a train of Hindu worshippers returning from Ayodhya. Modi was accused of not doing enough to contain the communal violence. He was cleared of complicity in the violence in 2012 by a Special Investigation Team appointed by the Supreme Court of India. See *Martha Nussbaum,* The Clash Within: Democracy, Religious Violence and India's Future, Cambridge MA 2008, pp. 17-51.

173 *Jaffrelot*, note 103, pp. 34-38.

174 Ibid., pp. 51-58

175 *Nussbaum*, note 172, pp. 50-51 (recounting the circumstances in which Modi was denied a visa to visit the United States in 2005).

176 In accordance with Article 15(4) of the Constitution.

177 See *Jaffrelot*, note 103, pp. 4-5; *Nussbaum*, note 172, pp. 137-141.

178 In 2006, for example, a terrorist attack on a train in Mumbai killed over 200 people.

mantle. In theory, this should enable the BJP to launch a full-scale assault on the legitimacy of the 1950 Constitution. Freed of any direct association with that document, the BJP, one might think, is in a position to attack any perceived problems with the Constitution as the legacy of the Congress's alleged suppression of Hindu cultural values when it was drafted.

In practice, this is not quite what has happened. To be sure, the BJP *does* derive significant political capital from the Congress party's association with the constitutional settlement. On any particular day in India, some BJP politician somewhere can be found mocking its main political rival's commitment to 'sickularism' – the derogatory term used to capture the Congress's allegedly pro-Muslim policies.[179] Hindutva ideologues and populist politicians associated with the BJP have also on occasion expressly called for the de-secularising/Hinduising of the Constitution.[180] The BJP, as a whole, however, has not moved to that position. While it has used the language of decoloniality to justify a recent bill aimed at amending India's three main criminal law statutes,[181] it has not itself called for a comprehensive change to India's Constitution. Instead, the BJP's strategy has been to combine an overt public posture of respect for the Constitution with incremental constitutional and legislative changes to India's constitutional order.[182]

The BJP's own constitution commits it to the 'secular' and 'socialist' principles that were added to the 1950 Constitution during Indira Gandhi's prime ministership.[183] At the same time, Prime Minister Modi enthusiastically celebrates official constitutional occasions and publicly recognises national constitutional heroes.[184] This public posture of support,

179 *Jaffrelot*, note 103, p. 165.

180 In 2000, for example, the Vishva Hindu Parishad, part of the Sangh Parivar, pressured the BJP into appointing a National Commission to Review the Working of the Constitution. The Commission had a limited brief, and its report did not in the end lead anywhere. Nevertheless, according to *Katju*, note 81, pp. 31-32, the incident was indicative of the BJP's preparedness at that time to allow affiliated organisations to make more radical demands than it was itself (then) politically capable of. In another incident in 2017, a former RSS *pracharak* and general secretary of the BJP (before he broke with the party in 2000), KN Govindacharya, called for the 'rewriting' of Constitution (*Tharoor*, note 84, p. 189). This, too, is suggestive of an underlying potential for the alleged anti-Hindu character of the constitutional settlement to be politically mobilised should conditions for that become propitious.

181 The Indian Penal Code of 1860, the Indian Evidence Act of 1872, and the Criminal Procedure Code of 1973. See Decolonising Criminal Law? On India's New Draft Criminal Codes, Verfassungsblog, https://verfassungsblog.de/decolonising-criminal-law/ (last accessed on 18 July 2024).

182 See *Tarunabh Khaitan*, Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India, Law & Ethics of Human Rights 14 (2020), pp. 49–95.

183 Constitution of the Bharatiya Janata Party, Article 2, pledging the party to 'bear true faith and allegiance to the Constitution of India as by law established and to the principles of socialism, secularism and democracy'. The principles of socialism and secularism were recognised in the Constitution (Forty-Second Amendment) Act, 1976, s. 2.

184 The prime example of this is the statue that the BJP government erected in Gujarat in honour of Vallabhbhai Patel, India's first Deputy Prime Minister and someone recognised for his role in bringing the princely states into the Union of India in particular. Work on the statue began in 2013, when Modi was still Chief Minister of Gujarat.

however, has been combined with legislative and constitutional changes that have slowly chipped away at the foundations of India's constitutional democracy.[185] The list of changes includes the attempted amendment of the Constitution to provide for a National Judicial Appointments Commission,[186] and the abrogation of Article 370, which had given a special constitutional status to the state of Jammu and Kashmir.[187] On the legislative front, the major quasi-constitutional change has been the controversial Citizenship (Amendment) Act of 2019, which provides a mechanism whereby religiously persecuted refugees, with the exception of Muslims, can gain naturalised Indian citizenship.[188]

What might at first appear to be an oddly incremental strategy for a party whose political roots lie in a cultural organisation that has long been critical of India's secular constitutional order makes more sense when one considers the strong popular attachment that there still is in India to the Constitution. Even as social attitudes towards foundational principles like secularism have been shifting, the majority of Indians still regard the Constitution as a symbol of their nation's independence from colonial rule. In a context like that, it serves the BJP's interests to embrace the mythical aspects of the founding moment while working progressively to shift the overall trajectory of Indian constitutionalism in a more ethno-nationalist direction. The BJP can, for example, seek to revise the importance given to certain historical figures in the making of the Indian Constitution but not entirely airbrush out others, like Mahatma Gandhi and B.R. Ambedkar.[189]

Another reason why the BJP has not launched a full-scale assault on the Constitution is that it does not really need to in order to achieve its political objectives. As the political front for the RSS, the BJP can work around the Constitution to drive the broader socio-cultural changes that have long been the objective of that organisation. The BJP has thus been able to use the RSS's extensive network of loyal members to place its personnel in

185 *Khaitan*, note 182.

186 See the Constitution (Ninety-Ninth Amendment) Act, 2014, which was struck down by the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India* (2016) 5 SCC 1.

187 See *Sumit Dutt Majumder*, Article 379 Explained for the Common Man, New Delhi2020; *Gautam Bhatia*, Unsealed Covers: A Decade of the Constitution, the Courts and the State, New York 2023, pp. 231-243.

188 Critics have seen this amendment as the first major move in the remaking of India as a Hindu *rashtra*.

189 As noted earlier, in 2018, Modi inaugurated a statute of Vallabbhai Patel, who for various reasons is a less controversial symbol of Indian national unity than Nehru or Gandhi. The latter, whose views on the accommodation of religious minorities have long been the subject of Hindutva resentment, is too revered a figure for the BJP to attack directly. But 'Gandhi-mocking' is a feature of Hindutva-sympathetic social media. B.R. Ambedkar, the chair of the constitutional drafting committee, is crucial to the BJP's capacity to secure Dalit political support and consequently stands as a significant barrier in the way of its ability to call for the Constitution's complete overhaul. For an analysis of the complex politics of constitutional symbolism in India, see *Arvind Elangovan*, A Political Turn? New Developments in Indian Constitutional Histories, History Compass 20 (2022), p. 1.

government departments at both the Union and the state level. This has allowed it to bend government institutions to its will without the need for formal constitutional changes.[190] The BJP's political programme is in any case based on the idea of a greater India – a civilisational state that long predated the national Constitution and defies accommodation within India's boundaries.[191] This, too, has meant that the wholesale replacement of the Constitution has not been its primary focus.[192]

In this context, public discourse around the need to decolonise the Indian Constitution is primarily being driven, not by the BJP, but by private individuals with deliberately ambiguous (and thus plausibly deniable) relationships to India's dominant political party. The most prominent of these is J. Sai Deepak, a barrister who has traded up his peripheral involvement in the *Sabarimala Temple Case*[193] to become a hugely popular critic of the Constitution's allegedly anti-Hindu bias. In addition to regular social-media posts, Deepak has published two volumes of a planned trilogy of books on the Indian Constitution. The first volume gives an ideologically-driven account of the history of the national liberation struggle focused on depicting the Congress as an elite organisation out of step with India's Hindu majority.[194] The second switches attention to India's deeper colonial past, by which Deepak means not just the history of the British Raj, but also of the Moghul empire that preceded it.[195] The third, still unpublished volume, is expected to return to the making of the Constitution itself and the way in which the Congress allegedly imposed its secular ideals on India.

While Deepak's tendentious reading of India's constitutional history has rightly failed to find a receptive scholarly audience,[196] his intervention is sociologically significant for what it reveals about the context in which debates over the future of constitutionalism are happening. Two features, in particular, stand out. First, in its indebtedness to contemporary Latin American decolonial theory,[197] Deepak's trilogy illustrates the ease with which, in India's current political context, a well-intentioned body of pro-indigenous scholarship can be flipped to serve authoritarian political ends. Second, in using decolonial theory to

190 As in some other authoritarian populist settings, this has precluded the need for formal constitutional amendment. See *Wojciech Sadurski*, Poland's Constitutional Breakdown, Oxford 2019.

191 See *Jaffrelot*, note 103, p. 234.

192 Even it had been, the BJP is not currently certain of securing the two thirds majority it requires in the Rajya Sabha (upper house) for a major overhaul of the Constitution in line with its political vision. Constitutional amendments in India require a 50% majority vote overall but a 2/3 majority of those attending the vote in both houses.

193 *Indian Young Lawyers' Association v State of Kerala* (2018).

194 *J Sai Deepak*, India That is Bharat: Coloniality, Civilisation, Constitution, London 2021.

195 *J Sai Deepak*, India, Bharat and Pakistan: The Constitutional Journey of a Sandwiched Civilisation, London 2022.

196 See, for example, *Anandaroop Sen*, J Sai Deepak's India that is Bharat: Coloniality, Civilisation, Constitution, Social Dynamics 49 (2023), 376-385.

197 *Deepak*, note 194, pp. 47-179.

critique not just the legacy of the British Raj, but also the allegedly oppressive legacy of the Moghul empire that preceded it,[198] Deepak's books show how the ostensibly critical idea of a 'colonial power matrix' can be used in India to conflate and politicise a long and complex history of British and Muslim cultural influence.[199] Deployed in this distorted way, decolonial theory plays directly into the hands of the BJP's ethno-nationalist agenda.[200]

2. Practical steps towards realising Southern Democratic Constitutionalism in India

So much for the political context in which the debate over the future of constitutionalism in India is taking place. What does this mean for the practical steps that need to be taken to promote Southern democratic constitutionalism, the ideal informing both the CGN's and the LPN?

It is important to remember, first, that what we are talking about here is not the distorted version of the CGN that social-media commentators like Deepak are propounding, but the more charitable version that Part D.I. tried to articulate. That is because it is only adherents of the latter version of the CGN that could conceivably be said to share the ideal of Southern democratic constitutionalism. Unlike 'the dark side' of the CGN, the charitable version is committed to constitutionalism in some shape or form (provided it is genuinely autochthonous) and to building an inclusive democracy in which everyone has the right to participate on equal terms, whatever their religion or culture.

But for the political context just sketched, the charitable version of the CGN would seem to require the complete replacement of the Indian Constitution. A core part of this narrative, as noted at the outset, is that the Constitution perpetuates colonial social and economic structures and prevents a properly democratic constitutionalist tradition from emerging. As soon as we consider the political context in which the move towards a new constitution would occur, however, things look different. At least, any sincere adherent of the charitable version of the CGN would need to concede that the political context in India for complete constitutional overhaul is extremely unpropitious.

As we have just seen in relation to Deepak's intervention, the CGN in its contemporary, decolonial form is susceptible to ideological repurposing in service of ethno-nationalist ends. An appreciation of this risk is possibly the reason why Arghya Sengupta – another critic of the Indian Constitution's supposed indebtedness to colonial antecedents – pulled back from suggesting complete constitutional overhaul in the epilogue of his recent

198 *Deepak*, note 195.

199 As Deepak sees things, India – understood in ethno-nationalist terms as a Hindu majority country – has experienced two great moments of epistemicide, first under the Moghul empire form the sixteenth century and then under the British raj. Far from signalling a break with these culturally destructive events, the 1950 Constitution entrenches them in its commitment to secularism and the equality of all religions. See *Deepak*, note 195.

200 After initially praising Deepak's first book, Walter Mignolo was for this reason forced to retract his endorsement.

book.[201] After devoting the bulk of the text to characterising the Indian Constitution as a 'colonial document', Sengupta ends his account by declaring that '[t]his is not a call to draft a new constitution today. We live in polarized times and any constitution that emerges out of such a time is unlikely to be long-lasting.'[202] While Sengupta might have put the point somewhat differently – the risk is rather that any constitution that emerges today could be both long-lasting and authoritarian – the fact that he resists calling for the Constitution's replacement is illustrative of the difficulties facing democratic constitutionalists critical of the Indian Constitution's alleged coloniality. However compelling that typification may be in the abstract, in the current political climate in India, complete constitutional overhaul is unlikely to result in an inclusive constitutional democracy.

If that is right, what should adherents of the charitable version of the CGN be doing to promote Southern democratic constitutionalism? Since constitutional replacement is their ultimate goal, they should presumably be working to foster the conditions for an inclusive democratic discussion of the rationale for that. In the current political context, that means speaking out against (or at least, not voting for) any political actors who propound an exclusionary conception of Indian national identity. Such conceptions, by denying a priori the right of part of the political community to participate in democratic discussion, cannot conceivably promote Southern democratic constitutionalism. Indeed, it is adherents of the charitable version of the CGN who should be particularly concerned about such political actors. They, more than anyone else, should be anxious to correct the abuse of their preferred narrative in this way.

In practical terms, what this means is that adherents of the CGN who are committed to democratic constitutionalism should be working hard to stress both Hinduism's history (contrary to its depiction in Hindutva-friendly accounts) of celebrating religious diversity and also India's history more generally of political toleration. As argued in Part D.II., the CGN is at its most compelling when it contends that the problem with the 1946-49 constitutional settlement was not so much that it was secular, but that it did not draw enough on local Indian approaches to accommodating religious diversity.[203] It is only by redirecting the national conversation towards this version of the decolonial critique, and the inclusionary understanding of Hinduism that underpins it, that democratic constitutionalists can hope to contain those who would deploy the CGN for ethno-nationalist ends.[204]

201 *Arghya Sengupta*, The Colonial Constitution, New Delhi 2023.

202 Ibid., p. 172.

203 This should not be taken as an endorsement of this view, but rather as a statement of what the best interpretation of the CGN is. On another view, the Indian Constitution, drawing on Gandhi's inspirational example, did indeed draw on this tradition in developing a uniquely India model of religious accommodation, one in which the solution was not to drive religion altogether from the public sphere, but rather to give equal public recognition to all religions.

204 Sashi Tharoor, who unsuccessfully ran for leader of the Congress party in 2022, is arguably the person who has come closest to articulating this approach to thinking about India's constitutional future. See *Tharoor*, note 82 and *Tharoor*, note 84.

For adherents of the LPN, the current political context in India poses slightly different challenges to the steps morally and conceptually entailed by their preferred narrative. Recall that the LPN sees liberal constitutions in general, and the 1950 Indian Constitution in particular, as an experiment in constitutional governance: constitutions are revisable conjectures about the institutional preconditions for human flourishing in a defined context. On that approach, liberal constitutions ought seldom to be comprehensively overhauled. Rather, they need to be constantly adjusted in response to feedback about their impact in the world, either through formal constitutional amendment, judicial adaptation, or constitutional endorsement of major legislative changes. On that approach, the practical steps the LPN entails – invariably entails – are steps to support the constitutional institutions through which these adaptations occur: an open and democratic public sphere in which considered debates about proposed constitutional amendments can occur, an independent judiciary with the capacity to develop its doctrines in ways that serve the goal of human flourishing, and a democratically elected legislature responsive to constitutionally-compliant citizen demands. The difficulty facing adherents of the LPN in the current Indian political context, however, is that the adaptive constitutional institutions on which their vision of constitutionalism rests have all been deeply compromised: the public sphere is not currently open and democratic;[205] judicial independence has been undermined by political influence over the appointments process and by executive-mindedness on the part of some judges;[206] and the legislature, while democratically elected, appears to be responsive to (indeed itself fomenting) populist pressure to redefine India's constitutional identity in ways that exclude parts of the political community from full participation.[207]

In those circumstances, what adherents of the LPN need to be doing is working to restore adaptive constitutional institutions so that they can perform their appointed functions. Given that a large part of the problem emanates from the BJP's electoral dominance, this means in the first instance building a political coalition that might eventually win back control of the Lok Sabha and the state legislatures in which the BJP holds a majority. After the 2024 elections, the BJP commands 36.5% of the national vote and 240 seats in the Lok Sabha, rising to a majority of 293 seats when the support of the other parties in the National Democratic Alliance (NDA) is added.[208] The NDA does not yet command a majority in the Rajya Sabha, however, and it lacks the two thirds majority of participating members that would be required to fundamentally overhaul the Constitution. This means that there is still space in India for coalition-building aimed at restoring the founding idea of the country as a religiously and ethnically inclusive constitutional democracy.

205 See *Arvind Narrain*, India's Undeclared Emergency: Constitutionalism and the Politics of Resistance, Leicestershire 2021.

206 See *Bhatia*, note 187.

207 See the discussion above of the Citizenship Amendment Act.

208 There are currently 543 seats in the Lok Sabha.

The fact that the BJP's support is concentrated in the Hindi-speaking north, west and centre of the country makes regional alliances and state initiatives particularly crucial to this endeavour. One route towards countering ethno-nationalist populism in India is thus for the states to demonstrate that there are non-populist alternatives to addressing the problems that populism feeds on. In India, that means that the struggle for Southern democratic constitutionalism needs to be waged especially from the south, where the BJP's support has traditionally been weakest. These are the states that in any case are already performing better economically and in terms of health and educational outcomes (through a combination of more effective governance and reduced population growth).

The three key policy areas that will determine whether southern states are able to prove the superior effectiveness of an inclusive, democratic-constitutionalist governance model are: (1) fiscal federalism, and particularly whether the current arrangement that prevents southern states from being fiscally punished for successfully slowing population growth (by using outdated census figures) is allowed to continue; (2) the impending decision about whether to extend the distribution of seats in the Lok Sabha when the Ninety-First Constitutional Amendment expires in 2026 or whether to reflect the higher population growth in the north of the country in the form of a greater proportion of seats; and (3) the call for states to be given greater autonomy over economic policy, and to be treated for purposes of investment ratings as autonomous economic units, thus giving them the ability to attract foreign investment and improve their economic performance. If the southern Indian states can achieve favourable outcomes in these three areas, there is a chance that they might be able to stem the populist tide and win back some of the ground that inclusive democratic constitutionalism has lost in India.

In the meantime, without control of the constitutional levers of power, adherents of the LPN need to do what they can to bolster the proper functioning of constitutional institutions, from contesting restrictions on freedom of speech, to calling out executive-mindedness on the part of judges and demonstrating against major legislative changes that seek to exclude parts of the political community from participation. Much of this is of course already happening in India. The protests against the CAA are the most obvious example, but there are also numerous other examples of brave individuals challenging the direction the country is taking.[209]

Beyond this, adherents of the LPN ought to be asking themselves searching questions about the kinds of constitutional reform that might be required if and when the public sphere once again becomes amenable to inclusive democratic discussion. The LPN, after all, regards India's current Constitution as a fair attempt at embodying the ideal of Southern democratic constitutionalism. That being so, 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 is not solely responsible for that descent – since

209 Without naming them individually, many of them are authors whose work is cited in the footnotes to this piece.

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.

There is insufficient space here to conduct an in-depth analysis of this issue. But a quick review of the literature reveals structural faults in the Indian Constitution that were either there to begin with or have become apparent over time. For example, the Constitution, despite its progressive reputation, was never actually very strong on civil rights, providing as it did for preventive detention and other security-related restrictions on liberty.[210] The Constitution's failure explicitly to provide for justiciable socio-economic rights also arguably required the Supreme Court to guarantee the material basis for citizenship through speculative doctrinal work that has weakened its authority in certain respects.[211] While containing a right to equality, the Constitution arguably does not contain sufficient mechanisms to combat persistent economic inequality.[212] A further weakness, revealed by more recent Global South constitutions that have dealt with this issue better, is a relative dearth of institutions supporting constitutional democracy – the so-called fourth branch.[213] That absence has forced the Supreme Court to introduce ultimately unhelpful doctrinal innovations, which have seen it taking over the work of democratic institutions rather than supporting their proper functioning.[214] Finally, there are the various well-known problems relating to the Supreme Court itself,including its polyvocal judgments and the absence of mechanisms to ensure judicial accountability.[215] The Supreme Court's robust defence of its independence in the *National Judicial Appointments Commission (NJAC) Case*,[216] while understandable in the context in which it was decided, may need to be revisited in less trying political times. At present, the process for appointments to the Court allows too little public discussion of the candidates and their fitness for office.

Further research is required on the extent to which any of these structural weaknesses could be said to have contributed to the rise of ethno-nationalist populism in India. On

210 See *Anuj Bhuwania*, Constitutional Roots of Judicial Populism in India (as yet unpublished paper on file with author).

211 See *Anuj Bhuwania*, Courting the People: Public Interest Litigation in Post-Emergency India, Cambridge 2017.

212 See *Aakar Patel*, Price of the Modi Years, New Delhi 2021, pp. 11-48 (documenting India's decline under Modi's prime ministership against various measures of social well-being).

213 While providing for an Election Commission, an Auditor General and a Central Information Commission, the Indian Constitution does not contain the full panoply of modern fourth-branch institutions. There are also concerns over the protection the Constitution affords to these institutions' independence and impartiality.

214 See *Pratap Bhanu Mehta*, The Rise of Judicial Sovereignty, Journal of Democracy 18 (2007), pp. 70-83.

215 See *Aparna Chandra / Sital Kalantry / William HJ Hubbard*, Court on Trial: A Data-Driven Account of the Supreme Court of India, London / New Delhi 2023.

216 *Supreme Court Advocates-on-Record Association v. Union of India* (2016) 5 SCC 1.

the back of that work, adherents of the LPN need to begin thinking about the respects in which the Constitution might be amended to promote their ideals. While the extent of the changes would inevitably be less than those advocated by adherents of the CGN, they, too, need to be working to restore the conditions in which an inclusive democratic discussion of constitutional change could be held.

II. Southern Democratic Constitutionalism in South Africa

1. The political context in which the narratives are competing in South Africa

As the principal author of the 1996 Constitution, the ANC is not in any position, one might think, to launch a full-scale assault on the coloniality of that document. But that is not entirely true. Unlike India's transition to democracy, South Africa's transition was negotiated between the movement of national liberation and the outgoing colonial-settler government. This difference provides scope for the ANC, or at least certain factions within it, to depict the 1996 Constitution as a political compromise that would not have taken the form that it did if the ANC had had a free hand in drafting it.

In January 2022, for example, the then Minister of Transport, Lindiwe Sisulu, published an op-ed likening the 1996 Constitution to a 'Panadol' – something that had provided momentary relief from the pain of settler colonialism, but which had not addressed its profound social and economic legacies. Drawing on a mix of decolonial theory and black consciousness thought, Minister Sisulu criticised 'mentally colonised Africans … in the high echelons of our judicial system … who have settled with the worldview and mindset of those who have dispossessed their ancestors.'[217] 'We have a neo-liberal constitution with foreign inspiration', she continued, 'but who are the interpreters? And where is the African value system of this constitution and the rule of law? If the law does not work for Africans in Africa, then what is the use of the rule of law?'

Sisulu was at the time a member of the Radical Economic Transformation (RET) faction of the ANC, a political grouping allied to former President Jacob Zuma. While its policies commitments were never stated independently of the organisation, the RET faction pushed a radical left-populist agenda within the ruling party, either out of a genuine ideological commitment to that view of politics or as a smokescreen to camouflage its members' various misdemeanours.[218]

Sisulu's op-ed was seen at the time as testing the waters for a run for the party presidency. In the lead-up to the ANC's national elective conference in December 2022,

217 Hi Mzansi, Have we seen justice?, IOL; https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-CNccd52a36d3 (last accessed on 18 July 2024).

218 For more in-depth analysis of these dynamics, see *Theunis Roux*, Constitutional Populism in South Africa, in: Martin Krygier / Adam Czarnota / Wojciech Sadurski (eds.), Anti-Constitutional Populism, Cambridge 2022, pp. 99-137.

South Africa's incumbent President, Cyril Ramaphosa, had appeared to be vulnerable on several fronts, including his alleged involvement in the hoarding of undeclared foreign currency.[219] While Sisulu's presidential bid in the end fizzled out, her intervention is noteworthy for its explicit use of decolonial language (e.g., 'mentally colonised') and the way that she was able to connect that language to the long-running culturalist strand in black liberation thought. The incident is in this sense illustrative of the way in which the CGN is re-emerging in South African public discourse, not yet as part of the ANC's formal political programme, but in statements made in the context of the internal battle for control of the party.

The RET faction's decoloniality-inspired opposition to South Africa's negotiated constitutional transition was also behind its ultimately unsuccessful attempt to amend South Africa's property clause, section 25 of the 1996 Constitution. That clause is emblematic of the way in which the framers, on the LPN's version of things at least, adapted liberal constitutionalism to the needs of post-colonial governance. While the clause provides for the payment of 'just and equitable' compensation in the event of the expropriation of property,[220] it makes it clear that this need not amount to market value compensation in circumstances where the 'history of the acquisition and use of the property' or the 'the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property' would suggest otherwise.[221] The clause also provides for the restitution of land taken under apartheid, for the establishment of a land redistribution programme, and for the state to take progressive measures to extend tenure security to all.[222] In all these ways, the clause seeks to strike a careful balance between the need to redress the legacy of racially based land dispossession and the need to respect existing and future property rights. More than any other clause in the Constitution, section 25 illustrates the way in which the framers sought to move beyond the classic liberal model to empower the state to pursue post-colonial justice. Precisely for this reason, the clause functions as a kind of linchpin for the decolonial argument in South Africa. If its critics can succeed in showing that, far from facilitating social transformation, the clause in fact hampers that process, they would be able to expose the 1996 Constitution as the status-quo-preserving sham they consider it to be.

After months of campaigning against section 25, the RET faction finally succeeded in winning party support for its amendment in December 2017 (in the final throes of

219 What is South Africa's Phala Phala farm robbery scandal about?, Aljazeera, https://www.aljazeera.com/features/2022/6/9/what-is-south-africas-phala-phala-scandal-all-about (last accessed on 18 July 2024).

220 Constitution of the Republic of South Africa, 1996, s. 25(1)-(3).

221 Constitution of the Republic of South Africa, 1996, s 25(3).

222 Constitution of the Republic of South Africa, 1996, s. 25(5)-(7)

Zuma's presidency).[223] As eventually gazetted for public comment two years later (after Zuma had been ousted but with his followers still in senior leadership positions in the party), the amendment provided for the payment of 'nil' compensation 'where land and any improvements thereon are expropriated for the purposes of land reform'. In addition, it was proposed that Parliament, rather than the judiciary, should be given the authority to specify the circumstances in which this kind of determination could be made.[224]

The gazetting of the amendment came at a time of public frustration at the slow pace of land reform. It was not as though there was no public support it, therefore. In purely legal terms, however, the amendment was unnecessary. On any reasonable interpretation of the property clause, it already provides for the payment of 'nil' compensation in cases where this would be 'just and equitable'.[225] The RET faction's campaign against the property clause, it is accordingly fair to say, had more to do with its jockeying for position within the ANC than a desire actually to solve the problems with South Africa's land reform programme.

In one final twist to this story, the amendment was never tabled. The main reason for this was that the Economic Freedom Fighters (EFF), a populist political party nominally to the left of the ANC, had withdrawn its support, which was required for the constitutionally stipulated two-thirds majority.[226] The EFF's decision to withdraw its support was initially quite perplexing since the call to amend the property clause had long been a part of its policy platform.[227] If there was ever a time for a minority political party to support a constitutional amendment, this would have appeared to have been it. When the moment came to table the amendment, however, the EFF conditioned its support on the ANC's agreeing to various concessions. When these were not forthcoming, the initiative collapsed. A full understanding of the political context for constitutional reform in South Africa, this chapter in the saga suggests, requires not just an appreciation of the internal dynamics within the ANC but also the way those dynamics are interacting with the EFF's political agenda.

Founded in 2013 after its charismatic leader, Julius Malema, had been expelled from the ANC, the EFF presents itself as a left-wing, populist party.[228] Its constitution is for example based on a Fanonian reading of the psychological effects of colonialism and the alleged incompleteness of South Africa's constitutional transition.[229] At the same time, the

223 See *Jackie Dugard*, Unpacking Section 25: Is South Africa's Property Clause an Obstacle or Engine for Socio-Economic Transformation?, Constitutional Court Review 9 (2019), pp. 135-160, p. 136.

224 Notice 652 in GG No. 42902.

225 *Dugard*, note 223.

226 Constitution of the Republic of South Africa, 1996, s. 74(2).

227 See *Roux*, note 218, p. 113.

228 Ibid., pp. 112-118.

229 Ibid., pp. 114-115

EFF claims to be (somewhat implausibly) the true heir to both the ANC's Charterist tradition *and* the Africanist strand within the national liberation movement.[230] While currently enjoying only 9-10% of the vote, the EFF's ability to dominate the news headlines has seen it punching above its weight in terms of its ability to influence the national policy agenda.

The RET faction's appropriation of the EFF's proposal to amend the property clause is a good illustration of this. With the ANC's support nationally on the decline,[231] the RET faction has been able to use the threat posed by the EFF to wedge the ANC's more moderate faction into adopting populist policies.[232] In addition to the failed amendment to the constitutional property clause, the ANC thus also introduced a National Health Bill just before the 2024 general elections and has mooted the nationalisation of the Reserve Bank. While neither of those policies is all that radical in the abstract, in the context of South Africa's endemic corruption problem and the ongoing mismanagement of public resources, many commentators are concerned that they will create (and are indeed *intended to create*) further opportunities for corrupt enrichment.[233]

This, then, is the volatile political context in which the debate over the future of constitutionalism in South Africa is occurring. Despite being the principal author of the Constitution, the ANC's support for the constitutional settlement is ambiguous, given both the internal divisions within the party and the number of high-ranking party members who are either facing charges of corruption or who have been named as wrongdoers in the Zondo Commission of inquiry into state capture.[234] Of the three major opposition parties, the EFF is critical of aspects of the constitutional settlement, the uMkhonto we Sizwe (MK) Party completely opposed to it, and the Democratic Alliance, the 1996 Constitution's only natural supporter, fatally compromised by its reputation as a white-minority party.[235] What remains of the liberal establishment in the media, business and tertiary education sector vociferously opposes every perceived threat to the Constitution. But it is unclear how widespread this sentiment is.

In the 2024 general elections, the EFF and the MK party received a combined total of 25% of the vote, with perhaps another 5-7% of ANC voters sympathetic to their views. The ANC and the DA, on the other hand, won a combined total of 62% of the vote, with another

230 Ibid., pp. 114-115.

231 At the time of writing, the ANC was widely expected to dip below 50% of the national vote for the first time in the 2024 South African elections.

232 *Roux*, note 218. The true extent of democratic support for economic populism South Africa is currently hidden by the fact that a vote for the ANC is ambiguous as between its moderate and radical factions. While the EFF on its own only enjoys 10-12% of the vote, its support may well be higher than that. See *Roux*, note 218, p. 128.

233 Ibid., p. 113.

234 Judicial Commission of Inquiry into Allegations of States Capture, Corruption and Fraud in the Public Sector, Including Organs of State. Reports presented in 2022, State Capture, https://www.statecapture.org.za/ (last accessed on 18 July 2024).

235 The Democratic Alliance is the successor party to the Democratic Party, which absorbed the New National Party in 2000.

6% of voters represented in the new Government of National Unity (GNU) through smaller parties. If the GNU holds and can deliver meaningful improvements in service delivery in the three years before the ANC's next elective conference in 2027, the prospects for renewal of democratic constitutionalism under the banner of the 1996 Constitution look good. If, on the other hand, the GNU falters, the EFF and MK Party would be able to exploit this opportunity to press for fundamental constitutional change.

Outside of party politics, the scholarly debate over the future of democratic constitutionalism in South Africa has been intensifying. In contrast to India, where the Subaltern Studies school has remained the dominant strand of postcolonial thought, social science and humanities research in South Africa has seen a sharp decolonial turn, particularly in the wake of the #FeesMustFall campaign.[236] In keeping with this turn, as we saw in Part D.II., the depiction of the 1996 Constitution as a colonial document has been gaining ground in South Africa's law faculties. The decolonial critique of liberal constitutionalism has a greater scholarly presence in South Africa in that sense, in contrast to the largely social-media-driven discourse in India.

2. Practical steps towards promoting Southern Democratic Constitutionalism in South Africa

In the abstract, the CGN and the LPN could not be further apart in their practical prescriptions for promoting Southern democratic constitutionalism in South Africa. For adherents of the CGN, the 1996 Constitution is the main barrier in the way of the achievement of that ideal, and therefore nothing short of its complete overhaul is required. Against this, adherents of the LPN counsel caution. While South Africa's constitutional democracy is currently in trouble, there is no clear evidence they would say that the 1996 Constitution is the source of these problems. Without such evidence, we should be cautious about abandoning a legal instrument that on paper, at least, seems to be the very model of a Southern democratic constitution. Does this intractable disagreement change, this section asks, when the adherents of each narrative are asked to consider the political context in which their prescriptions would be implemented?

Thus far, the CGN's contemporary decolonial exponents in legal academia have made only very general statements about the implications of their critique for reform of the 1996 Constitution. Of the authors discussed in Part D.II., Madlingozi has gone the furthest, arguing in an article on the proposed amendment to the constitutional property clause that it did not go far enough, and that 'what is needed is an all-inclusive process of constitution-making aimed at replacing the current Constitution with a "postconquest constitution"'.[237]

236 A critical account of this process in one university is told in *David Benatar*, The Fall of the University of Cape Town: Africa's Leading University in Decline, Cape Town 2021. For a more positive account, see *Max Price*, Statues and Storms: Leading through Change, Johannesburg /Cape Town 2023.

237 *Madlingozi*, note 159, p. 2.

Such a constitution, Madlingozi contended, would need to address the 'three main legacies of settler colonialism', viz. (i) the colonial state form, and conversely the eternal subjugation of indigenous sovereignties; (ii) the entrenchment of a world of apartness…; and (iii) the continuing subordination of African life-worlds and their epistemologies and jurisprudences.' In his most recent article, Madlingozi has followed African philosopher Mogobe Ramose in arguing that the problem with the 1996 Constitution is that it does not recognise the sovereignty of South Africa's 'historical political authorities'.[238] A fully decolonised constitution, he proposes, would require the complete dismantling of the state and its replacement by a 'state composed of independent and equal autochthonous sovereignties under a system of federalism, confederalism or consociationalism'.[239]

Pitched at a high level of generality as they are, it is hard to know what to make of these proposals. The most striking thing is the way they combine at turns both utopian and deeply conservative ideas. The former aspect is Madlingozi's seeming assumption that any constitution, even a postconquest one, could address 'the subordination of African life-worlds' when that problem is the product of a complex macro-social process that, on his own view of things, has been going on for centuries. In this respect, Madlingozi's proposals suffer from the very same problem of 'constitutional fetishism' that decolonial critics are fond of attributing to the adherents of transformative constitutionalism.[240] On the other hand, the suggestion that the colonial state should be reshaped as a system of 'autochthonous sovereignties' sounds like a plan to re-balkanise South Africa into a federation of Bantustans.[241] What would be the basis for distinguishing these new political units from each other? Their dominant ethno-cultural identity?

Modiri, the other scholar whose work was discussed in Part D.II., has been less forthcoming about what a decolonized South African Constitution should look like. When pressed to say what he would change in an online interview by Indian constitutional scholar, Gautam Bhatia, Modiri replied that his main target would be the judicial supremacy

238 *Tshepo Madlingozi*, On Settler Colonialism and Post-Conquest Constitutionness: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa, in: Boaventura de Sousa Santos / Sara Araújo / Orlando Aragón Andrade (eds.), Decolonizing Constitutionalism: Beyond False or Impossible Promises, New York 2024, pp. 168-191, p. 179 citing *Mogobe Ramose*, The King as Memory and Symbol of African Customary Law, in: Manfred Hinz (ed.), The Shade of New Leaves: Governance in Traditional Authority a Southern African Perspective, Berlin 2006, pp 351-374, pp. 352, 356. See also *MB Ramose*, In Memoriam: Sovereignty and the New South Africa, Griffith Law Review 16 (2007), p. 310.

239 *Madlingozi*, note 238, p. 179.

240 See *Modiri*, note 153, p. 306 (citing *John L. Comaroff / Jean Comaroff*, Law and Disorder in the Postcolony: An Introduction, in: *John Comaroff* / *Jean L Comaroff* (eds.), Law and Disorder in the Postcolony, Chicago 2006, pp. 1-56, p. 22).

241 In calling for the re-assertion of '"non-Western" grammars of dignity', *Madlingozi*, note 238, p. 9, is on firmer ground, but it is not obvious that this project requires the replacement of the 1996 Constitution as opposed to the culturally sensitive interpretation of its animating values.

clause.[242] In my own conversations with him, Modiri has indicated that his focus for now is on creating space for dialogue about the replacement of the 1996 Constitution in an environment in which the moral superiority of that document is (as he sees it) unchallenged.[243] While uncritical reverence for the 1996 Constitution is clearly unhealthy, it is not unreasonable to ask its decolonial detractors to present at least some ideas about what an alternative, decolonised Constitution would look like. In the absence of that, opponents of radical constitutional change may justifiably assume that there is indeed no alternative, or that the alternative that decolonial critics are putting up would be worse from the point of view of Southern democratic constitutionalism. Would a fully decolonised constitution provide for fourth-branch institutions, for example, or an enforceable right to equality? These are all reasonable questions and decolonial critics' avoidance of them detracts from the force of their argument.

There are certain problems, then, with decolonial critics' call for complete constitutional overhaul, even in the abstract. When the legal and political context in which this call would be implemented is considered, its persuasiveness declines even further. Two issues, in particular, are worth considering: the process through which the replacement of the Constitution would need to occur, and the risk that this process might be captured by political forces with an exclusionary conception of national identity.

As to the first issue, the formal process for replacing the 1996 Constitution is currently governed by that Constitution. This presents both a logical and a practical problem for decolonial critics. If their critique of the 1996 Constitution is correct, no process that occurred according to its procedures could possibly conform to the standards of Southern democratic constitutionalism. And yet that is how the change would have to occur, unless decolonial critics are proposing an extra-constitutional revolution, which would present challenges of its own, to say the least. Assuming this logical difficulty could be overcome, and the 1996 Constitution's amendment procedures were followed, it is very unlikely that a proposal to replace the current Constitution with a 'post-conquest' Constitution would attract the super-majority support required. If the 2024 election results are anything to go by, support for major constitutional overhaul in South Africa is currently around 25-30%.

The second difficulty facing decolonial critics is that the process of replacing the Constitution, assuming that it could be initiated, would occur in the political context just described. As in India, there is enough in that context to suggest that any attempt now to adopt a decolonised Constitution would run the risk of capture by political actors with an exclusionary conception of the South African people. The account given in Part F.II.1. of former Minister Sisulu's opportunistic use of decolonial theory for personal political gain provides an illustrative example of what might happen. While both Steve Biko's and Robert

242 The Transformative Possibilities of a Constitution, https://ohrh.law.ox.ac.uk/the-transformative-possibilities-of-a-constitution-with-joel-modiri-and-gautam-bhatia/ (last accessed on 18 July 2024).

243 Personal communication, September 2023.

Sobukwe's ideas about the basis for political membership and belonging in South Africa were admirably inclusive,[244] there is a strong possibility in the current political context that their ideas and prescriptions would be given an ethno-nationalist inflection.

Accordingly, what decolonial critics in South Africa need to do, as in India, is to work to ensure that the political context becomes as conducive as possible to the inclusive democratic discussion of the need for fundamental constitutional reform that they want to have. This means adopting a critically reflective attitude towards the constitutional institutions that are already in place to safeguard the possibility of such a discussion. As colonial as those institutions may be, there is no evidence that they are preventing discussion of the proposals that decolonial critics are making. If there is a barrier to discussion of those proposals, it is rather that they are currently being voiced by parties with at most a third of the national vote. What decolonial critics should be doing, this suggests, is building a political coalition for fundamental constitutional change that was unified around that idea as opposed to the charisma of particular political leaders.

Of course, if promoting Southern democratic constitutionalism is not the aim of the decolonial critique in South Africa, then these suggestions are superfluous. If what decolonial scholars want is the substitution of the 1996 Constitution by a more fully decolonised one *for its own sake*, whether it promotes Southern democratic constitutionalism or not, then the inclusiveness of the process or its aptness to produce the transformation envisaged does not matter. But then, by the same token, liberal progressivists committed to Southern democratic constitutionalism would have every reason to be suspicious of whatever constitution is being proposed and to argue against its adoption.

According to the LPN, as we have seen, the 1996 Constitution is already in a form that makes it apt to promote Southern democratic constitutionalism. While it was itself not drafted according to a perfectly democratic process – because its content was constrained by the thirty-four Constitutional Principles adopted during the Kempton Park negotiations process[245] – the 1996 Constitution places few limits on the content of democratic discussion, including – crucially – discussion of its own fitness for purpose. If one accepts the LPN's version of things, the 1996 Constitution also cannot be said to be somehow undemocratic because its drafters were in thrall to culturally alien Western values and therefore incapable of exercising a properly democratic choice. That allegation, the LPN contends, grossly understates the indigenous political agency at work during the constitution-making process.[246] Instead, the Constitution must be seen as an authentic synthesis of the main national liberation movement's views on constitutionalism, as articulated in the various documents adopted by the ANC and its allied organisations over the years, and the oppositional tradition of human rights lawyering that developed within the country during the struggle against apartheid. Given the destruction of indigenous forms of governance

244 See Part D.II.

245 Schedule 4 of the 1993 (interim) Constitution of the Republic of South Africa.

246 See *Olúfémi O. Táíwò*, Against Decolonisation: Taking African Agency Seriously, London 2022.

under colonialism and apartheid, that was the only genuinely autochthonous tradition of constitutionalism that could feasibly have been drawn on.

For all these reasons, the LPN denies that the road to Southern democratic constitutionalism in South Africa lies in complete constitutional overhaul. As far as it is concerned, the 1996 Constitution is Southern enough, democratic enough, and constitutionalist enough to serve as a vehicle for the promotion of that ideal. And yet, adherents of the LPN in South Africa need to concede, Southern democratic constitutionalism is far from being realised. Nearly three decades after the adoption of the 1996 Constitution, South Africa's democracy has been seriously undermined by a dominant political party that has actively worked to collapse the distinction between itself and the state. A potent mixture of corruption and slow economic growth is at the same time fuelling a brand of populist politics, both within the ANC and outside of it, that is threatening the 1996 Constitution's inclusive, tolerant vision. Exacerbated in part by these factors, South Africa still has one of the most serious economic inequality problems in the world, with a Gini co-efficient that has remained stubbornly high despite the growth of a significant black middle class.

While liberal progressives might contend that the 1996 Constitution is not causing these problems – that their causes lie elsewhere, in the workings of the global economy and geopolitical realignments that have set back the cause of democracy in almost every country – the fact is that they are happening on the Constitution's watch. At the very least, then, the 1996 Constitution could be said to have failed to prevent the problems that have arisen. What, then, should liberal progressivists be doing to promote Southern democratic constitutionalism?

In his book, a *Pandemic of Populists*,[247] Wojciech Sadurski argues that the principal step that liberal progressivists need to take in countries that are sliding into populism (including its ethno-nationalist variant) is to win elections. This is of course easier said than done, but there are prospects of this happening in South Africa. For all of its dominance, the ANC's share of the vote has been steadily declining over the last fifteen to twenty years. Until 2024, this had not affected its capacity to control the national government, but smaller political parties, either alone or in coalition with other smaller parties, were able to win control of large urban municipalities like Tshwane (Pretoria), Johannesburg and Cape Town. Unfortunately, many of these coalition governments have proved to be highly unstable. Only in Cape Town has the Democratic Alliance been able to govern long enough to demonstrate that a viable alternative to the ANC exists within South Africa. The Democratic Alliance also controls the Western Cape *provincial* government, where it has had similar success in showing that the 1996 Constitution's promises of improving access to employment opportunities, healthcare and education can be meaningfully realised through competent, non-corrupt government. For reasons previously stated, the Democratic Alliance is not a viable option to replace the ANC at the national government level. However, following the 2024 elections, it is now in a GNU with the ANC and has an op-

247 *Wojciech Sadurski*, A Pandemic of Populists, Cambridge 2022.

portunity in the ministries it controls and through its participation in the national executive to show that liberal-constitutionalist governance can produce meaningful improvements in the quality of South Africans' lives.

The GNU's first task is to repair existing constitutional institutions that have been damaged by years of nepotism, corruption and ANC in-fighting. Chief among these is the National Prosecuting Authority, which has struggled to cope with the burden of prosecuting the many offences uncovered by the Zondo Commission. Once this has been achieved, however, the GNU might be in a position to introduce an amendment to the Constitution to add a standing commission on corruption to the Chapter 9 institutions supporting constitutional democracy.[248] With government institutions liberated from corruption and free to perform their constitutionally appointed functions, the true worth of the 1996 Constitution in driving the post-apartheid social transformation process could again be tested.

G. Conclusion

When forced to consider the steps required to promote Southern democratic constitutionalism, the preceding section has shown, the gap between the CGN and the LPN narrows considerably. For adherents of both narratives, the unavoidable first step is to build a political coalition large enough, and durable enough, to implement their vision. For adherents of the CGN, this means accepting the terms set for coalition-building by a constitution that they believe is fatally compromised. But this conundrum cannot be avoided except through potentially disastrous, anti-constitutional revolution. For those for whom the LPN presents the best account of the constitutional transition, coalition-building is required to build broad societal support for democratic constitutionalist renewal under the banner of the existing Constitution. While the end goal envisaged by the two narratives is thus vastly different, the immediate step required is similar. In both cases, too, adherents of the two narratives need to act in ways that promote an inclusive definition of the relevant national people. Whether sourced in Western or non-Western ideas of governance, or some syncretic amalgam of the two, the right of minority groups to participate in any future constitutional reform process is a sine qua non of respect for Southern democratic constitutionalism.

248 See *Lauren Kohn*, The National Prosecuting Authority as Part of South Africa's Integrity & Accountability Branch and the Related Case for an Anti-Corruption Redress System, Constitutional Court Review 12 (2022) pp. 1-58.