Some Reflections on Theunis Roux's Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa

By *Catherine O'Regan*[*]

Theunis Roux's "Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa" is an important piece of comparative constitutional scholarship that will be of interest not only to scholars of the Indian and South African constitutional experience, but to all who are interested in the global practice of constitutionalism. It displays Roux's rare ability to traverse history, politics, social and political theory, and legal doctrine and to produce a thought-provoking argument that calls for engagement.

In brief, Roux argues that in both India and South Africa, widely acclaimed to be leading exemplars of the practice of Southern constitutionalism, there are two competing "grand narratives" about constitutionalism. On his account, grand narratives assert "comprehensive explanations of the causal logic behind long-run historical processes"[1] , in a manner that has legitimating power. He does accept that in the contemporary world, transmitters of these narratives are aware of the contingency of their narratives' truth claims and may exhibit "a certain insouciance" towards that contingency. The core of the disagreement between the two grand narratives in both cases, he argues, lies in whether the constitutions adopted in India in the transition from British imperial rule in the late 1940s and in South Africa in the transition from *apartheid* rule in the early 1990s can be welcomed as genuinely autochthonous examples of constitution-making. The liberal-progressivist grand narrative (Roux's term) claims that the Indian and South African Constitutions are "the fulfilment of a particular understanding of the nature and purposes of the anti-colonial struggle" which sought (though not uncontestedly) "the establishment of a liberal-democratic state based on universal values of freedom, equality and democracy".[2] The culturalist grand narrative (again Roux's label) asserts that "the Indian and South African Constitutions reflect the hegemonic hold of Western conceptions of governance at the time they were adopted" and in so doing, "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

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1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 10, in this special issue.

2 Ibid., p. 12.

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colonialism."[3] . Roux works with what he calls "a charitable version" of the culturalist narrative (as opposed to what he terms its "dark side"), which he asserts is committed to constitutionalism in some shape or form (provided it is genuinely authochthonous) and to building an inclusive democracy in which everyone has the right to participate on equal terms, whatever their religion or culture.[4]

Roux provides a brief account of how both narratives have roots in the historical processes that led to transition, and also outlines how the narratives relate to contemporary political debates in both India and South Africa. He then adopts a novel device: an imaginary dialogue between two putative supporters of the narratives as to their core disagreements. Instead of trying to determine which narrative has the better of the argument, Roux suggests, it is better to put them in "productive conversation" with one another to expose each other's "blind spots and convenient omissions".[5]

Two key points are considered in the debate. The first is whether the Indian and South African Constitutions can address the problem of what decolonial theorists call "the colonial power matrix" (that is, the power relations that prevailed under colonialism, and which they assert persist in the post-colonial period). The culturalist argues that the centrality of judicial or constitutional review channels "democratic politics into a system that is ostensibly committed to social justice but, in reality, frustrates meaningful social and economic transformation."[6] Judicial review, the culturalist argues, is "an alien Western institution [..] inextricably bound up with European enlightenment notions of the inherent dignity and worth of the individual"[7], is "at odds with the more communitarian, consensus-seeking approach that characterises indigenous traditions of justice"[8] and it will not undo the structural legacies of Western imperialism. The liberal-progressive speaker, however, considers that the practice of judicial review in both India and South Africa shows that it has moved beyond its origins in western constitutionalism. The second issue concerns whether the Indian and South African constitutions are developments of liberal constitutionalism in the global South in a way that responds to local conditions, values and ideas in an autochthonous and authentic manner. The liberal-progressive speaker argues that they are, whereas the culturalist, while agreeing that the constitutions are developments of liberal constitutionalism, argues that they remain predominantly western, particularly in their focus on individual freedom from state control.

Following this debate, Roux argues that there are fewer differences between the two grand narratives than might at first be perceived. Both acknowledge that the state needs to act to undermine the legacies of colonialism (and apartheid, in South Africa) and that it

3 Ibid., p. 26.
4 Ibid., p. 27.
5 Ibid., p. 8.
6 Ibid., p. 43.
7 Ibid., p. 44.
8 Ibid.

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should do so in terms of an appropriate constitution. Both, Roux asserts, seek to establish a legitimate form of Southern democratic constitutionalism. He then notes that although supporters of the cultural grand narrative consider that wholesale constitutional reform is required, he suggests that supporters of that grand narrative in both India and South Africa would concede that given contemporary political circumstances, now would not be an opportune moment for constitutional reform given that there is a risk that such a process may be hijacked by political actors pursuing ethno-nationalist ends (the so-called "dark side" of the culturalist narrative). He argues that the proper approach, then, for supporters of both narratives is to build political support for their views and to seek to pursue their narratives through the political process.

Roux's article warrants careful reading. It is a densely layered political and intellectual history and is full of insights. In my view, it marks a distinctly new and valuable approach to comparative constitutional scholarship. Yet, despite having found his article a gripping read, I am left with questions both about its approach and its conclusions, these I shall outline in the rest of this note.

The first set of questions concern the 'grand narrative' device: (a) whether the device masks significant differences between India and South Africa in relation to the use of grand narratives both by political actors and scholars, (b) whether by adopting "charitable" accounts of the grand narratives, Roux is excluding important aspects of the grand narratives which undermines the value of the exercise, (c) whether his decision to eschew any critical analysis of the substantive content of the grand narratives is for a satisfactory reason; and (d) what questions we should be asking of the scholarly culturalist accounts emerging in South Africa.

The second question flows from the first set of questions: whether the imaginary dialogue really works. Is it helpful (and indeed possible) to present a satisfactory account of each of the grand narratives so that they can be put into debate with each other? I remain unconvinced. It is somewhat ironic that the imaginary dialogue contains distinct echoes of persistent debates within constitutional theory in the global North, notably concerning the role of courts in modern democracies.[9] The third question is whether the asserted convergence between the two grand narratives as to their strategy going forward is plausible, particularly given the differences within the scholarship (and political activities) in India and South Africa that draw on the grand narratives.

A. The grand narrative device

The first difficulty with the grand narrative device is that in suggesting that the grand narratives are common across India and South Africa, considerable differences between the salience of the different narratives in contemporary India and South Africa, both in relation

9 *Jonathan Sumption*, Trials of the State: Law and the Decline of Politics, London 2020; *Martin Loughlin*, Against Constitutionalism, Oxford 2022.

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to politics and scholarship, may have been masked. Simply put, the culturalist grand narrative, particularly to the extent that it argues that the current constitutional frameworks are illegitimate and should be replaced, is far more in the ascendancy in South Africa than it is in India.

In South Africa, as Roux recounts in his article, a group of influential scholars, amongst others, Tshepo Madlingozi, Joel Modiri, Sanele Sibanda and Emile Zitzke have argued over the last decade that the 1996 Constitution is eurocentric and needs to be "decolonised."[10] Increasingly, claims made in the political sphere raise similar concerns. For example, as Roux has recorded, although the African National Congress (the ANC), the governing party, has generally not criticised the Constitution, at times senior figures within the ANC have. Roux notes, for example, that in January 2022, a senior ANC politician, Lindiwe Sisulu wrote an opinion piece in which she described the constitution as a "panadol", a palliative.[11] Since Roux wrote his piece, the newly established uMkhonto weSizwe party (the MK party), which is for the moment under the leadership of former President Jacob Zuma,[12] has published a manifesto in which the party commits to holding a referendum "to scrap the 1996 Constitution", and replace it with a parliamentary system, and establish an upper House of traditional leaders.[13] Although polling of voter preferences in South Africa is often unreliable, the MK party is now polling as the third most popular party in advance of the May 29th elections.[14]

In contrast, in India, as Roux acknowledges, there are not many scholars who have asserted a strong version of the culturalist grand narrative. Roux mentions two, Sai Deepak and Arghya Sengupta. The former is preparing a trilogy of works rooted in a Hindu nationalist account of Indian history and its constitution. However, the third book in the trilogy, which will deal with the Constitution is yet to be published, and so far, Deepak's work does

10 See, for example, *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; *Joel M Modiri*, Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence, South African Journal on Human Rights 34 (2018), p. 300; *Sanele Sibanda*, Not Purpose-made! Post-independence Constitutionalism and the Fight Against Poverty Stellenbosch Law Review 22 (2011), p. 482; *Emile Zitzke*, A Decolonial Critique of Private Law and Human Rights South African Journal on Human Rights 34 (2018), p. 492.

11 See *Lindiwe Sisulu*, Hi Mzansi, have we seen justice?, https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3 (last accessed on 23 July 2024).

12 At the time of writing, the question whether former President Zuma is eligible for election to the National Assembly is under legal challenge. The Electoral Court held that he was entitled to do so, and the Independent Electoral Commission (the IEC) has appealed that decision to the Constitutional Court, which heard argument on the matter on Friday 10 May 2024.

13 weSizwe, People's Manifesto, https://mkparty.org.za/our-manifesto/ (last accessed on 23 July 2024).

14 *Crystal Orderson*, Can Jacob Zuma emerge as kingmaker in South Africa's election?, https://www.aljazeera.com/news/2024/5/8/can-jacob-zuma-emerge-as-kingmaker-in-south-africas-election (last accessed on 23 July 2024).

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not seem to have sparked significant scholarly engagement. Sengupta's recently published book, *The Colonial Constitution,*[15] despite its title, does not in fact suggest that the Indian Constitution should be replaced. Instead, it points out that the drafters of the Constitution drew extensively on the Government of India Act 1935 when drafting the Constitution, and that they did not entrench either a panchayat (neighbourhood or village) tier of government, nor did they adopt other indigenous principles or values.[16] Such criticisms of the Indian Constitution are not new, as Roux and others have noted.[17] In addition, as Roux also acknowledged, the current governing party, the Bharatiya Janata Party (the BJP), although it may have a somewhat ambivalent relationship with the Indian Constitution, does not seek its replacement. Roux suggests that it may not be doing so both because of the strong popular attachment to the Constitution in India, and also because the BJP has been able to achieve its objectives without replacing the Constitution.[18]

These differences between the Indian and South African grand narratives arguably have roots in the different historical and constitutional trajectories of the countries. The Indian Constitution was drafted by an elected Constituent Assembly in the transition to independence in the late 1940s. The South African Constitution followed a negotiated settlement between primarily the *apartheid* government and the liberation movements, in particular, the ANC, in the early 1990s. In many senses, therefore, the South African Constitution is the product of a peace agreement, which is different to the Indian Constitution, but it is not an unusual source of a constitution. Many of the world's constitutions have their roots in peace agreements. An important measure of success for such constitutions, as Jennifer Widner has noted, is the extent to which the new constitutional framework removes violence from the streets and into institutions.[19] For this to happen, the people most able to cause violence in a particular setting must be willing for disagreements to be addressed in constitutional ways. The roots of the South African Constitution in the negotiated political settlement history appears to be core to the argument made by the culturalist scholars mentioned above who argue that the constitution is not autochthonous and should be replaced. The question of whether a constitution is fit for purpose is an important conversation to have in all constitutional settings, including the South African setting. But the key controversies in that conversation will be different depending on the history and constitutional context of each society. By suggesting that the grand narratives in

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

16 For a thoughtful review of Sengupta's book, see *Moiz Tundawala*, Why Not to Call the Constitution Colonial, https://www.nls.ac.in/blog/why-not-to-call-the-constitution-colonial/ (last accessed on 23 July 2024).

17 Ibid.

18 In this regard, see *Tarunabh Khaitan*, Killing a Constitution with Thousand Cuts: Executive Aggrandisement and Party-State Fusion in India, Law and Ethics of Human Rights 14 (2020).

19 See *Jennifer Widner*, Constitution Writing in Post-conflict Settings: An overview, William and Mary Law Review 49 (2008), p. 1515.

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India and South Africa are similar, important differences between the narratives in the two settings are somewhat concealed to the reader.

The second difficulty with the device is Roux's adoption of a "charitable" version of the grand narratives as opposed to their "dark side." The latter, it appears, are accounts which are anti-democratic, or exclusionary and discriminatory, for example, by denying the right of equal participation to all. In limiting his account of the grand narratives to those versions that propose inclusivist models of democracy, Roux is arguably ensuring that his conclusions will hold, something to which I return in a moment. In so doing, he appears to exclude from consideration important culturalist accounts, especially in India, such as those that assert a commitment to Hindutva (which he defines as an exclusionary, Hindu-centric account of being Indian).[20] It is not clear from his article what other scholarly or political versions of the culturalist grand narrative exist in India. While his approach is normatively attractive, it is not clear that by excluding exclusionary culturalist arguments, he is not presenting an empirically weak account of culturalism especially as it pertains to India which arguably undermines the value of his approach. Moreover, he may need to explain more clearly why, if exclusion and discrimination are a core feature of many culturalist accounts, they should be excluded from consideration.

The final difficulty with the grand narrative approach is Roux's careful avoidance of any assessment of the substantive arguments of the different scholarly accounts within the grand narratives. This approach is adopted, he asserts, given that the participants are so committed to the narratives that underpin their scholarship that "any purportedly neutral criteria"[21] will be dismissed as weighted in favour of one or the other. I find this approach troubling on two levels: first, because of what it says about the task of comparative constitutional scholarship, and secondly, its failure to identify some, in my view, worrying flaws in culturalist scholarship.

Comparative constitutional scholars are engaged in a field that is of direct political salience. As Liora Lazarus has noted, the work of eminent constitutional scholars such as Carl Schmitt and Albert Venn Dicey, has played an important legitimating role in different constitutional settings[22] and constitutional scholars therefore should be conscious of the ways in which their work may be used to shape, legitimate, and undermine constitutional systems.[23] Given the potential impact of their work, constitutional scholars should thus be committed to debating their work in an open-minded fashion. Vicki Jackson has recently argued that the principle of academic freedom encapsulates a commitment to objectivity in the pursuit of knowledge and entails what she calls "epistemic humility", a willingness to consider empirical, reasoned challenges to currently accepted forms of knowledge. This willingness should be founded on the realization that knowledge creation requires

20 *Roux*, note 1, p. 27.

21 Ibid., p. 8.

22 *Liora Lazarus*, Constitutional Scholars as Constitutional Actors, Federal Law Review 48 (2020).

23 Ibid., p. 495.

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the permanent acknowledgement of the possibility of revision or future correction.[24] If this is so, and I think it is, I am not convinced that it is appropriate to avoid engaging with the substantive aspects of colleagues' work in the field of comparative constitutional scholarship because those colleagues are understood to be so committed to their scholarly paradigm that they will dismiss any critiques of their work. There may be other reasons to avoid addressing the substantive aspects of the work of other scholars, but we should avoid accepting that a scholar's anticipated failure to respond to scholarly criticism with epistemic humility and openness is a basis for exempting scholarly work from legitimate critique.

This brings me to my second point in this regard, which is that there are questions to be asked of the substance of the work of the group of culturalist scholars in South Africa that warrant debate and that it would have been helpful for Roux to have identified those questions in his argument. I am going to raise three questions in particular, but before I do I acknowledge that nearly thirty years ago I made an affirmation as a judge of the South African Constitutional Court to uphold and protect the Constitution, an affirmation I would not have made if I thought the Constitution was deeply illegitimate and so my approach to this work arises from my own particular experience of and commitment to the Constitution.

My questions concern what forms of constitutional framework culturalist scholars propose. Roux notes that culturalist scholars in South Africa have made only very general statements about the implications of their critique for the reform of the South African Constitution.[25] In my view, given the influence that constitutional scholars may have, as discussed above, vague general statements about the constitutional way forward are unsatisfactory and arguably irresponsible.

There are many questions that could be addressed to those culturalist scholars who propose the radical replacement of the Constitution, but I am going to mention just three. The first relates to how they would propose in a new constitutional framework to address questions of inequality and poverty. It is beyond argument that one of the failures of the first thirty years of South African democracy is that patterns of deep inequality and poverty established during the colonial and *apartheid* eras, that run along sharp racial lines have not been eradicated, but instead appear to be as deeply rooted as ever. All the culturalist scholarship appears to be deeply concerned by this failure. The more difficult question is what it is about the 1996 Constitution that has been a causal factor in this failure, and how any new constitutional framework would correct the situation, or at the very least not make it worse. As Roux acknowledges in the imaginary debate, there are explanations for this failure, other than placing the blame on the 1996 Constitution, such as placing responsibility on the government for failing to address inequality and poverty

24 See *Vicki C. Jackson*, Knowledge Institutions in Constitutional Democracies: Preliminary Reflections, Canadian Journal of Comparative and Contemporary Law 7 (2021).

25 *Roux*, note 1, p. 67.

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through suitable policy interventions[26], as well as acknowledgements that the global world economic order has weakened the capacity of nation states to adopt economic and social policies to address poverty and inequality. Even if culturalist accounts do not consider that the primary purpose for replacing the constitution is to address this failure, because they all accept it is a matter of national concern, it is a question that needs to be addressed in proposing the constitutional way forward.

The second question relates to the role of traditional leadership in South Africa's constitutional framework. For example, Tshepo Madlingozi has argued that the constitutional framework in South Africa "subjugates indigenous sovereignties".[27] The role of traditional leadership has been placed into the political domain by the proposal in MK's election manifesto in April 2024 that the upper house of parliament comprise traditional leaders. In thinking what role should be accorded to traditional leadership in South Africa, scholarly accounts need to assess both the complex and contested history of traditional leadership in South Africa. There were close links between traditional leadership and the state in both the colonial and *apartheid* eras, and that relationship has continued since 1994, but it has also been deeply contested.[28] One would hope that scholarship would deepen our understanding of what is possible and appropriate in this field.

A third and related question to ask culturalist scholars is how they would address the question of gender. Sub-Saharan Africa has one of the highest levels of regional gender inequality,[29] and South African patterns of poverty and inequality run along gender lines. South Africa's 1996 Constitution contains a clear commitment to gender equality, binding not only the common law and statute law, but also African customary law.[30] There has been a rich jurisprudence under the 1996 Constitution on the intersection between customary law, and other systems of personal law, such as Muslim personal law and the constitutional equality guarantee.[31] There is of course, a wide array of different feminist approaches to constitutionalism as Shreya Atrey has argued,[32] but if a change to the South African

26 *Roux*, note 1, p. 43.

27 *Madlingozi*, note 10, p. 123.

28 See, for a brief overview, *Aninka Claassens* / *Catherine O'Regan*, Editorial: Citizenship and Accountability: Traditional Leadership and Customary Law under South Africa's Democratic Constitution, Journal of Southern African Studies 47 (2021), and also *John L. Comaroff* / *Jean Comaroff*, Ethnicity, Inc., Chicago 2009.

29 See United Nations Gender Inequality Index 2020, https://hdr.undp.org/data-center/thematic-composite-indices/gender-inequality-index#/indicies/GII (last accessed on 18 July 2024).

30 See Section 9 of the South African Constitution of 1996, as well as Section 211(3).

31 See *Bhe and Others v Magistrate, Khayelitsha and Others* [2004] ZACC 17, *Gumede v President of the RSA* [2008] ZACC 3, *Mayelane v Ngwenyama* [2013] ZACC 14, *Sithole v Sithole* [2021] ZACC 7, *Hassam v Jacobs NO* [2009] ZACC 19, *Women's Legal Centre Trust and Others v President of the RSA and Others* [2022] ZACC 23.

32 *Shreya Atrey*, Feminist Constitutionalism: Mapping a discourse in contestation, International Journal of Constitutional Law 20 (2022). See also *Ruth Rubio-Marín*, Global Gender Constitutionalism and Women's Citizenship: A struggle for Transformative Inclusion, Cambridge 2022.

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Constitution is proposed by scholars it is a legitimate question to ask how it might affect the current constitutional framework. Shireen Hassim has argued trenchantly that scholars who proffer a decolonial critique of the 1996 Constitution are wrong,[33] arguing that the equality clause in South Africa's constitution is "a product, albeit imperfect, of a century-long history of struggles by black women".[34]

Roux's chosen approach put these questions beyond the scope of his article, and perhaps one of the reasons for this was to be even-handed between the two grand narratives. However, there is a relevant difference here between scholars working within the liberal progressive grand narrative and those within the culturalist grand narrative. The former are not seeking a wholesale replacement of a constitutional order, and so a reader understands at least in broad terms what they propose, but scholars within the culturalist grand narrative are proposing fundamental change, and without greater clarity as to the changes they propose, it is impossible for those engaged in either critical analysis, or the praxis of politics, to assess their arguments. It seems to me that these are questions that Roux could legitimately have posed, and which warrant a response from those scholars who are seeking change.

B. Does the imaginary dialogue work?

Given the fact that the article cannot grapple with key substantive differences both within and between the grand narratives, it is perhaps not surprising that the imaginary dialogue provided in the article appears rather thin. It does not produce the rich conversation about omissions and blind spots that Roux hoped it would, which is a pity, because such a conversation might well be illuminating. But providing a richer engagement probably required a conversation between two real scholars rather than an imaginary conversation. If a series of such conversations were held between different scholars within the different traditions, and if their substantive arguments were properly engaged, it is likely that an array of blind spots and omissions would be identified on either side of the conversation.

What is also notable about the dialogue is that one of the key issues upon which the interlocutors engage is the proper role of courts in modern democracies. This issue has been raised by at least one culturalist scholar in South Africa, as Roux notes, Joel Modiri .[35] It is ironic that the imaginary dialogue traverses terrain intensely familiar to comparative constitutional scholars. The proper role of courts in democracies remains one of the perennial debates in constitutional law in the global North. Within the last five years, for example, Martin Loughlin and Jonathan Sumption have both published books in the United Kingdom arguing against giving courts the power of judicial or constitutional

33 *Shireen Hassim*, Decolonising Equality: the Radical Roots of the Gender Equality Clause in the South African Constitution, South African Journal on Human Rights 34 (2018).

34 Ibid.

35 *Roux*, note 1, pp. 58-59.

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review.[36] Roux does not comment on how this imaginary dialogue between global South scholars could, if one closed one's eyes, be a debate between scholars in the global North, and one is left wondering whether debates in the global South will inevitably traverse much of the ground traversed in the global North, which does make one wonder whether Southern constitutionalism necessarily will raise different questions to those raised in the global North.

C. The plausibility of the conclusion

As mentioned above, Roux concludes that scholars within the charitable version of both traditions are seeking to establish a form of Southern constitutionalism that is inclusive and founded on the principle of equal participation. Given that his definition of the charitable version of both traditions is founded on the proposition that they seek a form of constitutional democracy that is inclusive, this seems something of a *petitio principii*. If one broadened the ambit of the traditions to include forms of culturalist argument that are exclusionary, the conclusion would not have been reached. Given that the article does not fully make the case that there is such a culturalist scholarship in India, it does not seem either as if the common way forward identified by Roux is that plausible either. The common way forward conclusion is premised on Roux's charitable account of the culturalist grand narrative that those who adopt that narrative are seeking to establish a genuinely autochthonous form of Southern constitutionalism, and that those scholars would realise that contemporary India and South Africa are inopportune moments for constitution-making so that what remains, is engaging in the political sphere to build political support for their projects. Given the recent publication of the election manifesto by the uMkhonto weSizwe party, metioned above, that proposes a referendum to replace the 1996 Constitution in South Africa, it is arguable that events in the political sphere will demand a greater engagement with the specifics of constitutional design on the part of culturalist scholars who support a replacement of the Constitution than they have currently so far provided.

D. Conclusion

These questions aside, I wish to repeat that in my view Theunis Roux has produced a meticulously researched and thought-provoking piece of scholarship which will deepen and enrich the scholarly, and perhaps political, debates not only within India and South Africa, but more broadly. For that, we are in his debt.

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36 See *Sumption*, note 9 and *Loughlin*, note 9.

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