Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective

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This Article examines and compares, from a human rights perspective, both the constitution-making processes and the bills of rights of the Indian and the South African constitutions. The emphasis in this study is on the making of constitutions. It examines the impact of the radically divergent processes by which these constitutions were forged on their contents and the different international landscapes amidst which those processes occurred. This Article's overarching thematic argument is that a constitution can advance constitutionalism in four critical ways: (1) by defining the nature of the state, including a broad equality provision; (2) by addressing social oppression and past injustices; (3) by defining property and land rights; and (4) by defining social and economic rights. It compares how the framers in India and South Africa used the framework of rights to achieve these tasks and highlights the Indian influences on the South African Bill of Rights.

While the Indian Constitution was conceived and drafted before the adoption in 1948 of the Universal Declaration of Human Rights (UDHR), the South African Constitution was adopted in 1996, at the peak of the modern international human rights movement. The Indian Constitution was forged by an elitist process whereas the South African constitution was the product of a sharply participatory process. While this Article applauds South Africa for its participatory constitution-making, it draws on the Indian experience to challenge the premise that a constitution's legitimacy hinges on popular participation, arguing that this bit of accepted wisdom needs to be viewed critically.

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I. INTRODUCTION

"The freedom of India started in South Africa; and [India's] freedom will not be complete till South Africa is free."[1] These poignant words capture the historic links between India and South Africa. Indeed, Mahatma Gandhi, who later led the Indian freedom movement, had coined and first tested *Satyagraha*[2] and civil disobedience[3]—his unique nonviolent methods—in resisting discrimination as a young lawyer in South Africa.[4] Thereafter, on his return to India, he deployed these

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1. Nelson Mandela, Rajiv Gandhi Foundation Lecture (Jan. 25, 1995) (quoting India's Prime Minister, the late Rajiv Gandhi), http://www.anc.org.za/ancdocs/history/mandela/1995/sp950125a.html; *see also* Thabo Mbeki, Address of the President of South Africa, at a Joint Sitting of Houses of Parliament on the Occasion of the 10th Anniversary of the Adoption of the Constitution of the Republic of South Africa, Cape Town (May 6, 2006), http://www.info.gov.za/speeches/2006/06050817451001.htm (last visited Nov. 2, 2007): "As we have said before this year we will also mark the centenary of the launch of Satyagraha by that peerless son of India and South Africa, Mahatma Gandhi, which helped to define the course of the struggle for liberation in both these sister countries." *See generally* MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (1960).

2. *See* M.K. GANDHI, NON-VIOLENT RESISTANCE (SATYAGRAHA), AT VIII, 6 (Schoken Books 1961) (1951). *Satya* in Sanskrit means truth and *Agraha* is used to describe an effort or endeavor.

"The term *Satyagraha* was coined by me in South Africa to express the force that the Indians there used for full eight years . . . . Its root meaning is holding on to truth, hence truth-force. I have also called it Love-force or Soul-force." *Id.* at 6; *see also* D.G. TENDULKAR, MAHATMA: LIFE OF MOHANDAS KARAMCHAND GANDHI 120 (2d ed. 1960) ("Satyagraha is a process of educating public opinion, such that it covers all the elements of the society and in the end makes itself irresistible."); RONALD DUNCAN, GANDHI: SELECTED WRITINGS 55 (1972). For Mahatma Gandhi, nonviolence meant action based on the refusal to do harm, a "restraint voluntarily undertaken for the good of society." Satyagraha was not merely a form of political resistance but also a means of creating the new political, economic, and social order. DUNCAN, *supra*, at 55.

3. *See* G.N. DHAWAN, THE POLITICAL PHILOSOPHY OF MAHATMA GANDHI 221-22, 225 (1946). Under Gandhi's leadership India's freedom struggle morphed into a mass movement. His philosophy of nonviolence was expressed through civil disobedience. The strategies of civil disobedience and noncooperation stemmed from his philosophy on the political relations between the government and the people. *Id.*

4. *See* ROBERT C. COTTRELL, SOUTH AFRICA: A STATE OF APARTHEID 60 (2005). In South Africa, Gandhi campaigned against discrimination including the legislation that denied voting rights (in Natal) to Indians, the Transvaal Registration Law requiring Indians to carry

strategies of popular struggle which enabled all people—from peasants to princes—to participate in politics and receive lessons in both exercising political power and challenging its arbitrary exercise. Through these inclusive political campaigns and his "constructive work," he brought about revolutionary political and social change without bloodshed in India.[5] The heritage of Gandhi and of *Satyagraha* is thus a common heritage of South Africa and India.

Although constitutionalism is an elusive term, democratic governance and rights protection are broadly accepted as its essential elements, and judiciaries have traditionally been regarded as its key promoters.[6] This Article examines and compares, from a human rights perspective, both the constitution-making processes and the bills of rights of the Indian[7] and the South African Constitutions. The emphasis in this study is on the *making* of constitutions. It examines the impact on their contents of the radically divergent processes by which these constitutions were forged and the different international landscapes amidst which those processes occurred.

Constitutions have an exalted place in the lives of nations because they have the potential to shape institutions and transform society for the

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passes, the poll tax, and the draft South African Constitution which denied political rights to Indians. *Id.*

5. For an account of the unique features of India's freedom struggle, see BIPAN CHANDRA, INDIA'S STRUGGLE FOR INDEPENDENCE 1857-1947, at 14 (Penguin Books 1989) (1988). *See also* GENE SHARP, GANDHI AS A POLITICAL STRATEGIST (1979). Gandhi's constructive program was comprised of seventeen aspects and they included achieving communal unity, eradicating untouchability, popularizing the usage of *Khadi* (hand-spun cloth), restructuring the village economy, establishing cooperatives and voluntary associations with decentralized control, eradicating illiteracy, and working for the advancement of women. *Id.* at 80-83.

As the freedom movement progressed, Gandhi's constructive program expanded to include the debating for a new constitution through an assembly of the people. "I regard the Constituent Assembly as the substitute of satyagraha. It is constructive satyagraha." *See* M.K. GANDHI, GANDHIJI EXPECTS 19 (1965); *see also* DHAWAN, *supra* note 3. Mass participation in civil disobedience campaigns such as nonpayment of land revenue and taxes, violation of the salt laws, and other direct contraventions of specific laws served to educate the masses in politics and generated public opinion on vital issues. DHAWAN, *supra* note 3, at 221-22, 225.

6. *See generally* Louis Henkin, *Elements of Constitutionalism* 1, 3-4 (Center for the Study of Human Rights, Columbia University, New York, NY, Aug. 1994). For an intellectually provocative account of how constitutionalism flourished during the heyday of colonialism, see Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183, 1184 (2000).

7. Part III of the Indian Constitution contains "Fundamental Rights"—an array of judicially enforceable civil and political rights. Hereinafter, the terms "Part III" and "Fundamental Rights" shall be used interchangeably. Part IV of the Constitution enshrines an array of socioeconomic principles (judicially nonenforceable) that embody the social justice vision of its Framers. Hereinafter, the terms "Part IV" and "Directive Principles" shall be used interchangeably. These two parts together comprise the conscience of the Constitution. By Bill of Rights, I refer to the substantive provisions of Parts III and IV of the Constitution.

benefit of present and future generations. The overarching thematic argument of this Article is that a constitution may play a transformative role in advancing constitutionalism in four critical ways: (1) by defining the nature of the state, including a broad equality provision; (2) by addressing social and societal oppression and past injustices; (3) by defining property and land rights; and (4) by defining social and economic rights. I examine and compare how the framers in India and South Africa used the framework of rights to achieve these tasks. Interestingly, the Framers of the South African Constitution have keenly followed India's constitutional experience.[8]

A comparison of these two constitutions must take into account two important differences. First, the Indian Constitution, a postcolonial one, was conceived and drafted before the adoption in 1948 of the UDHR,[9] identified as the onset of the modern international human rights movement. Drafted some fifty years later, the South African Constitution of 1996 emerged when the hegemonic influence of the modern international human rights movement was at its peak, after an internationally scripted, normative constitutional framework had evolved.[10]

The second factor that accounts for differences between the two constitutions is the radically divergent processes by which they were forged. Constitution-making in India was the final stage of a protracted freedom movement; the actual drafting process was dominated by elites of the Indian National Congress (INC), a mass-based political party that was at the vanguard of the national movement and that, due to the exigencies of the time, allowed for little public participation.[11] Meanwhile, the South African Constitution is a more revolutionary document, emerging from a process that was consciously designed to be a sharply participatory one.[12]

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8. *See, e.g.*, Hassen Ebrahim, *The Making of the South African Constitution: Some Influences*, *in* THE POST-APARTHEID CONSTITUTIONS 85, 88 (Penelope Andrews & Stephen Ellmann eds., 2001); Dennis Davis et al., *Democracy and Constitutionalism: The Role of Constitutional Interpretation*, *in* RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 1, 62-63 (Oxford Univ. Press 1996) (1994).

9. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. 183d plen. mtg., U.N. Doc. A/810 (1948). Hereinafter the terms "UDHR" and "Universal Declaration" shall be used interchangeably.

10. *See, e.g.*, NAMIBIA: CONSTITUTIONAL AND INTERNATIONAL LAW ISSUES (Dawid van Wyk et al. eds., 1991).

11. *See generally* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 2 (1996); B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 1 (1968).

12. *See generally* HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA 240 (1998).

This study is a comparison of two constitutions: one conceived and drafted before the Universal Declaration,[13] the other sculpted long after its inception. The inspirational impact of the UDHR and international human rights law is a dominant theme in the mainstream literature on post-World War II constitutions, including the Indian Constitution. However, little attention has been given to India's role in the making of the UDHR. I argue that the Indian Constitution has contributed to the development of international human rights law, and accordingly, I will first preface my analysis of constitution-making in India with a brief discussion of India's active participation in the drafting of that historic text.[14]

This Article comprises five parts. In Part II, I briefly present the similarities and differences between the two countries and their constitutions that make a comparative study meaningful. In Part III, I examine the genesis of the Indian Constitution and underscore the efforts that India's nationalist leaders made to mobilize broad, popular support for resisting the British administration and to initiate fundamental political and social change. I also examine India's actual and elitist constitution-drafting process and point to the efforts that India's constitution-makers made nonetheless to render their process more participatory. South Africa's participatory constitution-making process is the topic of Part IV, with a preface summarizing the genesis of participatory constitution-making. I therefore analyze the African experience with the "independence" and "second-generation" constitutions and probe the factors that spurred the birth of participatory constitution-making on the continent. In Part V, I examine the making of the bills of rights of both constitutions, highlighting the influence of the Indian Constitution and the vibrant jurisprudence that has been woven around it on the content and interpretation of South Africa's Bill of

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13. *See generally* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 90 (2001). The genesis of the Indian Constitution began long before its actual drafting commenced in December 1946. However, factually speaking, the actual making of the Indian Constitution, the provisions of Part III in particular, and the making of the UDHR were parallel events. The Indian Constitution was drafted between December 1946 and November 1949, whereas the UDHR's drafting took place between January 1947 and December 1948. Therefore, chronologically speaking, the sculpting of the Indian Constitution precedes the making of the UDHR although the latter came into force one year before the Indian Constitution. *Id.*

14. For this purpose, I will first relate the circumstances that led to India's admission to the United Nations (U.N.) and then move on to examine India's contribution to the UDHR. It is against this background that I will turn to examining constitution-making in India.

Rights.[15] I conclude in Part VI by highlighting the Indian Constitution's contribution to international human rights law. While I applaud South Africa for its participatory constitution-making, I draw on the Indian experience to challenge the premise that a constitution's legitimacy hinges on popular participation, arguing that this bit of accepted wisdom needs to be viewed critically.

II. COMPARING CONSTITUTIONALISM IN INDIA AND SOUTH AFRICA

Constitutional experts argue that the presence of a certain number of common constitutional features makes a comparison of constitutions justifiable, including those divided by historical time and geographical space.[16] India's two centuries of British rule, which ended on August 15, 1947, began not with the swift fall of her frontiers to marauding foreign invaders. Indeed, because mercantile capitalism was the first phase of European imperialism, the English—lured by India's spices and silks—arrived as traders in the early seventeenth century.[17] South Africa's colonial history has similar beginnings.[18] The attraction of diamonds and gold in the Witwatersrand region beckoned the British to immigrate to and invest in South Africa.[19] Following the British victory in the Anglo-Boer wars, the fusion of the two independent Boer Republics with the British colonies gave rise to the Union of South Africa in 1910, that is, the racially divided South Africa.[20] South Africa acquired sovereign status (within the British Empire) in 1934 and became a republic in 1961.[21]

India and South Africa were both trying to escape a bitter past and usher in a new constitutional dawn of freedom and social justice.

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15. See, e.g., Pierre de Vos, *A Bill of Rights as an Instrument for Social and Economic Transformation in a New South African Constitution: Lessons from India*, *in* NEGOTIATING JUSTICE: A NEW CONSTITUTION FOR SOUTH AFRICA 81, 82 (Mervyn Bennun & Malyn D.D. Newitt eds., 1995).

16. *See* Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1, 6 (2004).

17. *See* V.D. MAHAJAN, MODERN INDIAN HISTORY: FROM 1707 TO THE PRESENT DAY 1-27 (S. Chand & Co. Ltd., New Delhi 2001). The English East India Company arrived in India in 1600, and by 1765 almost the whole of "British India" had come under the political domination of this impersonal corporation. *Id.*

18. *See* COTTRELL, *supra* note 4, at 14-15. An influx of the French, Huguenot refugees, the Dutch, and Germans (all of whom collectively comprise the Afrikaner population today) into South Africa followed the arrival of the Dutch East India Company in 1652. *Id.*

19. *Id.*

20. *Id.* at 65-66. The fusion of the two Boer Republics of Transvaal and the Orange Free State with the two British colonies of the Cape and Natal in 1910 gave birth to the Union of South Africa. *Id.*

21. *Id.*

Constitution-making was therefore transformative in both cases.[22] These two democratic countries have adopted written constitutions with entrenched bills of rights and embraced the doctrine of constitutional supremacy.[23] Significantly, they share a unified vision of human rights[24] and have reposed faith in the principle of judicial review in their commitment to not only limiting political power[25] but also translating their vision of social justice.[26]

Furthermore, India is a multiethnic and multireligious nation reflecting a breathtaking diversity of castes, religions, languages, and cultures. South Africa's diversity is equally seductive, with its Constitution recognizing eleven national languages[27] among many recognized ethnic groups. Thus, to quote Nelson Mandela, besides "the cold facts of geography and history; [and] the shared passion in pursuit of justice and happiness" that bind India and South Africa,[28] both these countries share a common law tradition and are also ethnically and culturally diverse nations.[29]

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22. *See generally* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 156 (1998).

23. The Indian Constitution does not explicitly set out the constitutional supremacy principle. However Article 13 declares the paramountcy of fundamental rights, constitutionalizes the doctrine of judicial review, and affirms this point. *See* INDIA CONST. art. 13 ("The State shall not make any law which takes away or abridges the rights conferred by this Part [III] and any law made in contravention of this clause shall, to the extent of the contravention, be void."); *see also* Kesavananda Bharati v. State of Kerala, A.I.R. 1978 S.C. 1461 (holding the "basic structure" of the Indian Constitution to be beyond the amending powers of Parliament).

24. Both constitutions emphasize the protection of civil and political rights *and* socioeconomic rights. But while the Indian Constitution's social objectives are embodied in the Directive Principles of State Policy, the South African Constitution enshrines socioeconomic rights in its array of judicially enforceable rights. *See, e.g.*, INDIA CONST. pts. III-IV; S. AFR. CONST. pmbl., Bill of Rights ch. 2.

25. CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, at xviii, xxi (Douglas Greenberg et al. eds., 1993) [hereinafter CONSTITUTIONALISM AND DEMOCRACY].

26. *See, e.g.*, INDIA CONST. pts. III—IV, pmbl. The Preamble states:

> We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:
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> *Justice, social, economic and political*; Liberty of thought, expression, belief, faith and worship;
>
> Equality of status and of opportunity; and to promote among them all
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> *Fraternity assuring the dignity of the individual* and the unity and integrity of the Nation; in our constituent assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution.

Id. pmbl. (emphasis added).

27. *See* S. AFR. CONST. § 6.

28. Mandela, *supra* note 1.

29. *See* Heinz Klug, *South Africa*, *in* LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1483, 1485 (Herbert M. Kritzer ed., 2002). South

India's actual constitution-making process was, broadly speaking, elitist in nature. Technically speaking, the Constituent Assembly was a body created and convened by the British but dominated by the INC members who were indirectly elected, not on the basis of universal adult franchise, but by the invidious principle of communal representation.[30] By contrast, the South African Constitution was forged by a sharply participatory process.

The Indian and South African constitution-making processes took place amidst radically different international political settings. Far from condemning colonialism, international law was central to its development.[31] Therefore, India's liberation was primarily the product, not of international pressure, but of a uniquely waged, prolonged, local anticolonial movement leavened by the cataclysmic effects of World War II. In contrast, international pressure in part contributed to dismantling apartheid in South Africa.[32] Interestingly, it was India's complaint to the U.N. General Assembly in 1946 about South Africa's discriminatory treatment towards Indians that first internationalized apartheid.[33] Within the next forty years, apartheid collided with the growing international human rights standards that characterized it as a crime and ostracized its practitioners until at last it collapsed under its own weight.[34]

Drawn up at a time when the modern international human rights movement was in its embryonic stage, there were no *coercive*—as opposed to inspirational—international influences over the Indian Constitution's content.[35] Rather, far from reflecting any powerful international influence, the Indian Constitution has arguably contributed to the development of international human rights law.[36]

Two developments in international law that have impacted South Africa's reconstruction and are quite dramatic when compared to the

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African common law has been described as a "mixed system of civil and common law" whose origins may be traced to the Roman-Dutch law. *Id.*

30. In tune with its "divide and rule" policy, the British government distorted the principles of representative government by introducing "communal electorates." The communal electorate was first applied to the Muslims in 1909 and thereafter extended to Sikhs, Indian Christians, Europeans, and Anglo-Indians. In simple terms under this system, Muslims would elect Muslims only, and so on. *See* CHANDRA, *supra* note 5, at 290; AUSTIN, *supra* note 11, at 5.

31. *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 310 (2005).

32. *See* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 55 (2000).

33. *Id.* at 52.

34. *Id.* at 137.

35. However, this is not to suggest that the Indian Constitution was made in total isolation. *See generally* SIR BENEGAL RAU, INDIA'S CONSTITUTION IN THE MAKING (rev. ed. 1963).

36. *See infra* Part VI.

international situation in the early 1940s when India was asserting its right to self-determination are the reception of democratic governance into international law[37] and the globalization of constitutionalism.[38] The adoption of "Constitutional Principles" by the Western Contact Group (on Namibia) in 1982, to guide both the process for creating and the final content of a new constitution for Namibia, contributed to the development, for the first time, of the notion of an internationally scripted, constitutional framework to guide the negotiations of local conflicts and constitution-making bodies.[39] Constitutionalism received yet another fillip with the democratization processes unleashed by the Soviet Union's demise.

A significant development that was directly tied to the South African reconstruction process was the World Bank's conclusion in 1989 that unless the rule of law and good governance were injected into the African political culture, there was no hope of reversing Africa's economic mess.[40]

These developments constitute the milestones in the globalization of constitutionalism and the backdrop against which South Africa's constitutionalism story unfolded. Finally, as stated earlier, South African leaders also looked to and drew from the Indian experience in crafting remedies for common problems.[41]

The foregoing demonstrates that constitution-making in India and South Africa differs in many respects while being similar in others and is thus an ideal situation for a coherent comparative analysis.

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37. *See* KLUG, *supra* note 32, at 56-58; Gregory H. Fox, *The Right to Political Participation in International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 48, 80 (Gregory H. Fox & Brad R. Roth eds., 2000). Assertions of the right to self-determination and the right to free political expression gave rise to practices of international election monitoring, which in turn contributed to the emergence of a right to democratic governance. Fox, *supra*, at 48-90. *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

38. *See* KLUG, *supra* note 32, at 61. In fact, even before its globalization, constitutionalism received a thrust in the post-World War II period with the wide adoption of written constitutions incorporating bills of rights in European states and the rapid expansion of the regional human rights system. *See* ARNOLD J. ZURCHER, CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II, at 2-3 (2d ed. 1955).

39. *Cf.* Marinus Wiechers, *Namibia: The 1982 Constitutional Principles and Their Legal Significance*, *in* van Wyk, *supra* note 10, at 1, 1. The 1982 Constitutional Principles developed by the Western Contact Group on Namibia included both a process for constitution-making through a democratic election and the creation of a Constituent Assembly and a set of principles to guide the Constituent Assembly in its formulation of the Constitution. *Id.*

40. *See* KLUG, *supra* note 32, at 65-66. The salient features of the World Bank's Rule of Law program were access to justice and rights protection. *Id.*

41. *See supra* note 15 and accompanying text.

III. CONSTITUTION-MAKING IN INDIA

A. Standard Setting: The Universal Declaration of Human Rights (UDHR)

Heralding the onset of the modern human rights movement, the UDHR was designed to serve as a model for national constitutions and thereby strengthen the domestic implementation of human rights.[42] It charted a bold new course for human rights by drawing a link between freedom and social security and by underscoring the inter-relatedness of both to peace.[43] Although some viewed its adoption to be the first step toward ushering in a just and equitable order, the Cold War—which unleashed a "distorting" effect on the decolonization process and the development of human rights—had already begun brewing by the time the UDHR was passed.[44] While India played a positive role in the UDHR's creation, apartheid South Africa did not vote for it, given the text's potential to create international legal liability for failure to uphold human rights.[45]

Recent scholarship on the UDHR has shed considerable light on its origins and "inclusive" drafting process and has dispelled many myths in this regard.[46] Drawing from these sources, I have constructed a brief narrative on how India contributed to the sculpting of the UDHR. It is to this interesting account that I now turn.

B. Sculpting of the UDHR

1. India's Membership in the United Nations

By the fall of 1944, although the Second World War raged, signs of peace and the contours of the United Nations were beginning to emerge in sharp clarity.[47] In the subcontinent, the British government announced

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42. Louis Henkin, *A Post-Cold War Human Rights Agenda*, 19 YALE J. INT'L L. 249, 249-50 (1994). More than thirty constitutions which have come into being either contemporaneously or later have been substantially influenced by the Universal Declaration. *Id.*

43. *See* GLENDON, *supra* note 13, at 238 ("Experience has shown how deeply the seeds of war are planted by economic rivalry and social injustice." (quoting U.S. President Harry Truman)).

44. SHELLEY WRIGHT, INTERNATIONAL HUMAN RIGHTS, DECOLONISATION, AND GLOBALISATION 20 (2001).

45. *Id.* at 14. The voting tally for the UDHR was as follows: forty-eight countries voted for it, none against, and eight countries abstained. *Id.*

46. GLENDON, *supra* note 13, at 193; Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44, 45 (2001); *cf.* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT, at x-xi (1999).

47. *See* GLENDON, *supra* note 13, at 4.

that once the hostilities ceased, it was eager to see the effective and immediate participation of Indian leaders in the councils of their country, of the Commonwealth, and the United Nations.[48] Thus, in April 1945, India was invited to the conference in San Francisco, where the U.N. Charter was drawn up.[49]

2. India and the Sculpting of the UDHR

The Commission on Human Rights (Commission) was explicitly tasked with writing an international bill of rights.[50] While the entire two-year process of creating the UDHR was an inclusive one and stretched to seven stages,[51] the drafting process can be broadly divided into two main stages: drafting (January 1947-December 1948) and debating (fall 1948).[52]

a. India's Active Participation in the Drafting Stages

Interestingly, unbeknownst to many, India was among the eighteen nations that constituted the first Commission.[53] At the second stage of

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48. By the mid-1940s, India's nationalist struggle had entered its final phase and events were moving quickly in the direction of her independence. Gandhi's civil disobedience campaign of 1942 which called upon the British to "quit India" manifested India's final desire to be totally disassociated with British rule. A war weary Britain, with its grip over India considerably diminished at last, came round to accepting this proposal. *See* CHANDRA, *supra* note 5, at 458, 483; RAO, *supra* note 11, at 37 (referring to the "Cripps Proposals" made by Sir Stafford Cripps, then Lord Privy Seal on behalf of the British government).

49. *See* GLENDON, *supra* note 13, at 245 n.24. The invitees to this conference included all those countries that had declared or would declare war on Germany and Japan by March 1, 1945. *Id.*; *see* RAO, *supra* note 11, at 27, 63. In 1939, the British Government had (without consulting Indians) made India a party to the war. As the war drew to a close, British Prime Minister Winston Churchill called for fresh elections, and Clement Attlee, the Labour Party leader, pledged granting independence for India in his party's election manifesto. RAO, *supra* note 11, at 27, 63.

Pledging her firm support to the United Nations, then a fledgling world body, India came to take her rightful place as a (founding) member on October 30, 1945. *See* U.N. Membership, http://www.un.org/aboutun/history.htm (last visited Oct. 14, 2007).

50. *See* GLENDON, *supra* note 13, at 32. The U.N. Charter skirted the issue of an international bill of rights and simply mandated the establishment of a Commission on Human Rights. The U.N. Economic and Social Council created the Commission on Human Rights. Although the Allied Powers were the key actors in scripting the U.N. Charter, human rights had a greater presence in it thanks to the strenuous efforts of smaller countries including India. The forceful pleas of these states for drawing up a binding human rights covenant as compared to a mere declaration were choked off by both the United States and the Soviet Union, both of which disfavored a binding covenant. *Id.* at 17-18.

51. *Id.* at 32.

52. *See* Waltz, *supra* note 46, at 49. By this time elections to India's Constituent Assembly had been completed. *Id.*

53. *See* MORSINK, *supra* note 46, at 4.

the UDHR's drafting process, an eight-nation drafting committee was constituted to complete the actual task of drafting the document.[54] The third stage (December 1947) consisted of the Second Session of the full Commission that met in Geneva and produced and considered what became known as the "Geneva Draft" of the UDHR.[55] By that time, one year had already passed since the drafting of Part III of the Indian Constitution had begun. Fourteen countries, including India, submitted their responses[56] on the Geneva Draft, which the Commission duly noted.[57] Furthermore, during this time, any country was free to submit its own draft, and India was one of the countries that did so.[58] Charles Malik[59] later affirmed that the present Universal Declaration reflects the numerous proposals made by governments, including those of the Indian government.[60] In addition, all countries were invited to submit their own drafts of a bill, and nine countries, including India, submitted their proposals.[61] Johannes Morsink wrote, "[I]n more than one case [these countries] found their suggestions hotly debated and incorporated in the final bill."[62]

By the time the fifth stage in the drafting process arrived (which extended to the middle of June 1948), what the members had before them was an overly bulky draft of the UDHR.[63] Following a series of joint proposals emanating from India and the United Kingdom, all the articles in this version were trimmed to their bare minimum.[64] At the sixth stage, in fall 1948, the completed draft was referred to the U.N. General Assembly's Third Committee for thorough scrutiny and formal debate by accredited delegations.[65] December 1948 constituted the last phase in the drafting process, wherein the modified draft UDHR was referred to a plenary session of the U.N. General Assembly and debated. The grand finale arrived when the UDHR was adopted on December 10,

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54. *Id.* at 7.
55. *Id.* at 9-10.
56. *Id.* at 10.
57. *Id.*
58. *Id.* India's submission can be found in U.N. Document: E/CN.4/11. *Id.* at 341 n.23.
59. The Lebanese scholarly delegate.
60. *See* MORSINK, *supra* note 46, at 10.
61. *Id.*
62. *Id.*
63. *Id.* at 10-11. The fourth stage of the UDHR drafting process occurred in May 1948. *Id.* at 10.
64. *Id.* at 11.
65. *Id.*

1948.[66] India provided its input to the UDHR during virtually all drafting stages.

Morsink's detailed account of the drafting process captured the active contribution that members of the Indian delegation (including Dr. Hansa Mehta,[67] M. Masani, Lakshmi Menon, Mohammed Habib, and Appadorai) made to discussions on the full gamut of rights under consideration.[68] Besides proposing additions and changes to the draft text of the UDHR, these members actively challenged and commented on proposals and also proposed changes put forth by other delegates.[69] Finally, in some instances, these members—given their inductions into relevant sub-committees—were tasked with drafting specific articles in the UDHR.[70] All this is not surprising because, as the account below reveals, Indians were not latecomers to the disquisition on human rights.

b. A Historical Flashback: The Rocky Road to Constitutional Liberties in India[71]

Indians did not have a charter of enforceable rights under the colonial constitutional structure, and their successive demands for one were spurned by the British.[72] Interestingly, demands for freedom from economic exploitation and political liberties were the two strands of the nationalist movement that were woven together in the eloquent expressions for rights during this time.[73] For example, the Constitution of India Bill of 1895 mirrored some of the earliest and most explicit aspirations of Indians, listing the right to free and compulsory education—an important socioeconomic right—alongside important

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66. *Id.*

67. Dr. Hansa Mehta was a Gandhian political activist and social worker.

68. *See generally* MORSINK, *supra* note 46.

69. *Id.* at 201.

70. *See, e.g.*, *id.* at 107; *see also* David Weissbrodt & Mattias Hallendorff, *Travaux Préparatoires of the Fair Trial Provisions—Articles 8 to 11—of the Universal Declaration of Human Rights*, 21 HUM. RTS. Q. 1061, 1072-73, 1079 (1999).

71. Appreciating India's overall active role in the drafting of the UDHR and its ardent support for some issues requires a quick peep into her colonial past and at the milestones in her own struggle for securing basic human rights from the British.

72. There were only the stray statutory safeguards that could be stripped off with utter ease by the British Parliament or the Indian Legislature. *See* RAO, *supra* note 11, at 170-71. For instance, the Government of India Act of 1935 forbade discrimination on the grounds of religion, place of birth, descent, or color with regard to holding any office under the Crown by a subject of His Majesty. *Id.*

73. Dadabhai Naoriji and R.C. Dutt were two of India's earliest nationalist leaders cum intellectuals who provided the first economic critique of colonialism. *See* CHANDRA, *supra* note 5, at 93-95.

civil and political rights.[74] The next milestone on the road to individual freedoms was the Commonwealth of India Bill of 1925, which contained, in addition to the rights previously demanded, the following two rights: freedom of conscience and the free profession and practice of religion and equality of the sexes.[75] This bill was a precursor of many fundamental rights, and its ideals are some of the Directive Principles in India's Constitution.[76] The rights enumerated in subsequent constitutional proposals mirrored the rights of the Commonwealth of India Bill and those expressed in the postwar European constitutions.[77] However, the prevalence of forced or bonded labor in some parts of India gave rise to certain special clauses, like "no breach of contract of service or abetment thereof shall be made a criminal offence."[78]

By 1929, attaining *purna swaraj* (complete freedom) became nationalist India's goal, and from then on the INC simultaneously spurned the imposed colonial constitutional orders and demanded the Indians' right to write their own constitution through an elected Constituent Assembly, free from any interference by a foreign authority.[79] The INC's Karachi Resolution of 1931, which holds a special place in the

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74. *See* CONSTITUTION OF INDIA BILL, 1895, *reprinted in* SHIVA RAO, 1 THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 5-14 (The Indian Institute of Public Administration, New Delhi, 1966). This bill also records for the first time the influence of the United States Constitution on the thinking of India's nationalist leaders during the early stages of their struggle. *Id.* at 5. The (Indian) colonial structure in the early nineteenth century was a centralized system capped with a British executive—irresponsible and unaccountable to Indians—in whom executive and legislative powers were broadly clubbed and participation in government (at any stage and in any form) denied to Indians. In the early years of the nationalist movement, the INC was dominated by "moderates," who, inspired by classic liberalism and the principles of the British Constitution, used constitutional methods of agitation such as prayers, public meetings, press campaigns and memorials to attain their political freedom. *See also infra* text accompanying note 111. Indians' modes of resistance against British rule changed radically with the arrival of Mahatma Gandhi who coined and introduced an indigenous political language of resistance. *See supra* text accompanying notes 2-3.

75. RAO, *supra* note 74, at 43-44. In 1925, George Lansboury, a leading Labour Party leader introduced this bill in the British Parliament, but it met with defeat with the fall of the Labour Government that year. *Id.*

76. *See* INDIA CONST. arts. 15(i), 19(g).

77. *See Nehru Report, August 1928*, *reprinted in* RAO, *supra* note 74, at 58, 60; AUSTIN, *supra* note 11, at 55.

78. AUSTIN, *supra* note 11, at 55. With ten of these rights finding their place in Part III and three other rights appearing in Part IV of the Indian Constitution, the rights in the Nehru Report were clearly a close precursor of the Fundamental Rights of the Indian Constitution. *Id.*

79. At its historic session in Lahore, the INC declared *Purna Swaraj* as its goal, and at midnight on December 31, 1929, the tricolor flag of Indian independence was hoisted amidst jubilation. The INC reiterated Indians' demand to write their own constitution through an elected constituent assembly in many provincial legislative assemblies and in the central legislative assembly in 1937, at the Congress sessions at Faizpur, Haripuram, Tripuri, and at the Simla Conference in 1945. AUSTIN, *supra* note 11, at 2.

history of rights in India, spelled out that "political freedom must include real economic freedom of the starving millions."[80] Besides enumerating basic civil rights articulated in previous demands, it promised "substantial reduction in rent and revenue, exemption from rent in case of uneconomic holdings, and relief of agricultural indebtedness and control of usury; better conditions for workers including a living wage, limited hours of work and protection of women workers; . . . control of key industries, mines and means of transport."[81]

As independence loomed on the horizon, the Muslim League stepped up its demands for a separate Muslim state.[82] As a result, national unity and minorities' protection became the dominant concerns of nationalist India. The Sapru Report stated:

> The fundamental rights [of the new Constitution] will be a standing warning to all that what the constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life.[83]

c. Issues for Which India Actively Campaigned

It is no wonder then that the Indian delegation actively campaigned for the incorporation of the following rights in the UDHR.

i. Antidiscrimination

The inclusion of clear antidiscrimination language in the UDHR can be traced to the persistence of the communists, and India weighed in strongly with them in expanding the grounds of discrimination in article 2.[84] Interestingly, the plight of the colonized peoples, the gross injustices

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80. *See* CHANDRA, *supra* note 5, at 284.

81. *Id.* at 284-85.

82. *See* PERCIVAL SPEAR, THE OXFORD HISTORY OF MODERN INDIA 1740-1975, at 363 (2d ed. 1979). Syed Ahmed Khan, the "acknowledged grand old man of Indian Islam" advocated the theme that "Muslims of India were a separate people or nation who must not be absorbed within Hinduism." He saw in the formation of the INC in 1885 a future dominance of Hindus and advised Muslims to keep away from it. He contributed to the founding of the Muslim League in 1906. *Id.* at 358-63.

83. While the above demands for express fundamental rights constituted nationalist India's efforts *at constitution-making*, the Sapru Report was the first important constitutional proposal dwelling on fundamental rights that emanated from Indians after the British government had accepted their demands for a Constituent Assembly in 1945. This report is named after the eminent lawyer Tej Bahadur Sapru who drafted it. *See Constitutional Proposals of the Sapru Committee, December 1945*, *reprinted in* RAO, *supra* note 74, at 151.

84. MORSINK, *supra* note 46, at 93. Indeed, as Morsink writes: "This nondiscrimination stamp [was] their [communist delegation] mark on the document." *Id.*

meted out to Indians in South Africa, and the rampant discriminatory practices against African Americans in the United States frequently cropped up as examples of glaring discrimination around the world.[85] Initially, the article on nondiscrimination did not proscribe discrimination on the basis of color because it was broadly understood that the term race included color.[86] However, it was Masani who proposed the inclusion of the word "colour," reasoning that "race and colour were two conceptions that did not necessarily cover one another."[87] Mehta seconded her compatriot's proposal.[88] Happily, this term ultimately found its way into article 2 of the UDHR.[89] Next, although "political belief" did not occur in the nondiscrimination lists of many constitutions then extant, a proposal to proscribe discrimination on this basis also emanated from the Indian delegation.[90]

ii. Economic and Social Rights

As can be recalled, India's nationalist leaders viewed human rights to be indivisible and interconnected.[91] As many of the INC resolutions reflect, socialist philosophy held a powerful sway on many prominent leaders (including Jawaharlal Nehru and Mahatma Gandhi) and, in fact, imbued the nationalist movement as a whole.[92] It is this vision that the Indian delegation brought with it to its task across the Atlantic.

According to Morsink, if the UDHR today trumpets the rights to food, clothing, shelter, and medical care as well as social security, education, and decent working conditions, the reason is that the "great majority of its drafters" shared a holistic view of human rights, with socioeconomic rights enjoying, not second class, but equal status in their "kingdom of human rights."[93] In particular, besides Sir John Humphrey's own socialist leanings, the socioeconomic rights in the UDHR owe their origin to the Latin American socialist constitutions, to the powerful

85. *Id.* at 94.
86. *Id.* at 102.
87. *Id.*
88. *Id.* at 103.
89. *Id.* Article 2 reads as follows: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration of Human Rights, *supra* note 9.
90. MORSINK, *supra* note 46, at 109.
91. *See* text accompanying *supra* notes 72-73.
92. *See, e.g.*, *supra* notes 80-81 and accompanying text (discussing the content of the INC's Karachi Resolution); CHANDRA, *supra* note 5, at 526-27.
93. *See* MORSINK, *supra* note 46, at 191.

lobbying by the Latin American delegation, and the strong assistance that this delegation received from former colonies, including India.[94]

As an example of the oral exchange, on the draft text of articles 23 and 24, the Indian and U.K. delegations jointly submitted a proposal: "Everyone has the right to work under just and favourable conditions."[95] Mehta argued for collapsing the right to work and the conditions for it into one article on the basis that "if each individual has the right to work, it was logical that someone had the obligation to guarantee that he had work."[96] The Indian delegation, along with other small state delegations, also fought hard to promote decolonization and the right to self-determination.[97]

iii. Gender Equality and Women's Rights

"All human beings are born free and equal in dignity," proclaims the UDHR. This inspiring and nonsexist phrase owes its place in the document to a "determined [Indian] woman," Mehta, who believed Sir Humphrey's initial gendered phrase "all men are created equal" to be "out of date" and strongly objected to it.[98] Although Eleanor Roosevelt found Sir Humphrey's gendered phrase acceptable, Mehta and the U.N. Commission on the Status of Women continued to press for its removal until the end.[99] Finally, although her inspiring phrase slipped into the final draft text by a sheer clerical error, no one can deny that the UDHR would have been tainted with sexist language but for Mehta's dogged perseverance.[100] It is no wonder that one finds a convergence in the provisions of the Indian Constitution and the UDHR, with most of the rights in the latter formulated either as a fundamental right or as a Directive Principle.

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94. *Id.* at 157. Sir John Humphrey was the Director of the U.N. Secretariat's Division on Human Rights and was tasked with drafting the Universal Declaration. *Id.* at 5.

95. *Id.* at 164.

96. *Id.*

97. *See* Waltz, *supra* note 46, at 44, 65.

98. *See* MORSINK, *supra* note 46, at 118; Waltz, *supra* note 46, at 44, 63. It was Sir John Humphrey who described Mehta as a "determined woman." Mehta's ardor for women's rights echoed even in the chambers of India's Constituent Assembly. *See infra* note 267 and accompanying text.

99. Waltz, *supra* note 46, at 63.

100. *Id.*

C. Constitution-Making in India: The Final Act in a Historic Freedom Struggle and India's First Hour of Freedom

India's constitution-making moment crested her nationalist wave that had gathered momentum in the aftermath of World War II and surged ahead with irresistible force, sweeping away the tottering columns of imperial might. The key to understanding constitution-making in India lies in deciphering what *Swaraj*[101] meant for Indians, the unique nature of their protracted freedom struggle, and the character of the colonial state against which they were pitted.

1. The Unique Nature and Goals of India's Anti-Imperialism Struggle

By the late nineteenth century, European states began to be directly involved in the furtherance of colonialism, and they replaced the mercantile corporation with their civilizing mission as the engine powering their imperialist expansion. Accordingly, in 1858, the rule of the East India Company was terminated, and thereafter India came to be governed "by and in the name of Her Majesty, the Queen of England."[102] Although establishing "self-governing" institutions in India was Britain's avowed goal, what was intentionally erected and sustained until the last day of the British rule was a form of benevolent "despotism" with a pinch of parliamentarism "controlled from home [England]."[103] At best (and only in the final stage) this offered a consultative status for Indians in the governance of their nation.[104]

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101. *Swaraj* means self-government or home-rule. Gandhi, *supra* note 2, at viii.

102. Mahajan, *supra* note 17, at 266 (quoting from the Government of India Act, 1858). "British India" refers to the states that were initially under the control of the East India Company and later came under the suzerainty of the British Crown. The terms "native states" or "Princely States" refer to those states or provinces that, though an integral part of the British Empire, remained under the nominal control of the Princes and were subject to the overall supervision of the British Crown through the "English Resident Officers." *Id.*

103. *See* CHANDRA, *supra* note 5, at 113 ("All experience teaches us that where a dominant race rules another, the mildest form of government is *despotism*." (quoting the Secretary of State Charles Wood, while moving the Indian Council Bill of 1861) (emphasis added)).

Opposed to the introduction and development of parliamentary government as being unsuitable to India's conditions, John Morley, the Secretary of State, had in 1908 candidly admitted: "If it could be said that this chapter of reforms [Minto-Morley Reforms] led directly or necessarily up to the establishment of a Parliamentary system in India, I, for one, would have nothing at all to do with it." *Id.* at 142.

Almost a decade later, the post-World War I policy of the British as announced by Montague, the Secretary of State in 1917, in the House of Commons had changed to: "Increasing association of Indians in every branch of the administration and the gradual development of *self-governing institutions* with a view to the progressive realization of *responsible government* in India as an integral part of the British Empire." RAO, *supra* note 11, at 4 (emphasis added).

104. *See generally* V.D. MAHAJAN, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA (S. Chand & Co. Ltd., New Delhi, 1966). The three major constitutional reforms made by the British

The colonial columns in India were not pulverized by a single revolutionary stroke. Semiauthoritarian (though based on rule *by* law, not rule *of* law) and an oppressive system sharply inimical to civil liberties, the colonial state and the cramped constitutional space it offered helped shape a nationalist struggle that successfully utilized both mass law-breaking, civil-disobedience campaigns and constitutionalist campaigns that educated the masses in politics.[105] As can be gleaned from nationalist India's demands, achieving political independence, social equality and justice, and freedom from economic exploitation were the interwoven strands of the freedom struggle.[106]

The INC, formed in 1885, came to embody the national movement.[107] Because the nationalist movement was, from its inception, conceived as an anti-imperialist struggle and woven around this unifying theme, the INC steadily attracted to its ranks men and women of all castes and creeds, young and old, rich and poor, intellectuals, and the masses.[108] Secular from its start, and therefore wedded to Hindu-Muslim unity, the INC never appealed to parochial tendencies and inveighed

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were the Government of India Act, 1909, Government of India Act, 1919 (providing a limited field of responsibility for and devolution of power to Indians at the provincial level) and Government of India Act, 1935 (installing an impure form of parliamentary (federal) government comprising a bicameral federal legislature with restricted powers and subordinate to the British Parliament, *an irresponsible and unaccountable executive* consisting of the (Governor-General) and the members of his executive council drawn from the federal legislature and a federal court). Under the 1935 colonial constitutional framework, the provinces were granted a new constitutional autonomy and their administration was to be carried out by the Governor and his popular ministers, who were drawn from among members of the provincial legislatures and were responsible to it. Elections to these provincial legislatures were held in December 1945. But given the provincial Governor's awesome discretionary powers, the avowed concept of autonomy was diluted, reducing the responsible provincial governments to a farce. A Federal Court—the precursor of free India's Supreme Court—from which all appeals lay to the Privy Council in England until 1949—with limited powers of judicial review of governmental action was created at the Centre. Because the inauguration of the federation rested on the integration of a specified number of princely states, princely noncooperation resulted in "the stillbirth of the federal legislature and executive and (the consequent) continuance of its irresponsible predecessor." Thus until the end, colonial India had an *irresponsible and unaccountable* executive. *Id.* at 177.

105. *Id.* at 13-14. For a brief period of twenty-eight months, the INC formed ministries in six provinces and later held office in two more provinces and thus held partial power under the colonial constitutional dispensation erected under the Government of India Act, 1935. The Congress decided to contest the elections under the Government of India Acts of 1919 and 1935 so as to educate people and ascertain their true voice on vital constitutional issues. These constitutionalist campaigns in turn provided the masses an opportunity to participate in politics, resist the imperialist forces, and translate the abstract principles of popular sovereignty and representative government debated and sought for during the freedom struggle. *Id.*; *see also* CHANDRA, *supra* note 5, at 323.

106. *See supra* notes 72-83 and accompanying text.

107. *See* CHANDRA, *supra* note 5, at 79.

108. *Id.* at 28.

against the colonizer's corruption of representative government and its bestowal of benefits on narrow parochial considerations.[109] In short, the INC stitched together India's diverse and scattered groups and, in the process, galvanized national unity.[110]

As a movement, the INC involved both theorizing and adopting several strategies, including instances of popular mobilization to develop new political ideas, all of which were influenced and enriched by the entry and exit of individuals and groups of various political hues, divergent ideological perspectives (including liberals, communists, socialists, leftists, and rightists), and varying degrees of political militancy (moderates and extremists).[111]

However, it was Gandhi who most profoundly influenced India's nationalist movement and, thereby, indirectly shaped its constitutional destiny.[112] For Gandhi, people were the genuine source of social and political power,[113] and, accordingly, he scripted the nationalist movement in the indigenous political language of *Satyagraha* and civil disobedience. Therefore, *Swaraj* (freedom) for him, and by extension for all Indians, became not just freedom from British subjugation but individual and national self-realization.[114] Ghandhi's inclusive campaigns dismantled the barriers between different social groups and allowed them

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109. *Id.* For instance, the British Government conceded to the Muslim leaders' demands for a separate and communal electorate for Muslims in 1909. For the meaning of communal electorates, see discussion *supra* note 30.

110. *See* CHANDRA, *supra* note 5, at 28. However, for reasons that are beyond the scope of this Article, a majority of Muslims perceived the INC as a predominantly Hindu organization, shied away from it, and conflated the success of the nationalist movement with the predominance of Hindus in a future constitutional set up. Britain's divide and rule policy further fueled this lingering suspicion of Muslims and fanned the growth of communalism in the country. SPEAR, *supra* note 82, at 362.

111. CHANDRA, *supra* note 5, at 24-25. The "moderates" in Congress like G.K. Gokhale were influenced by the classic liberal thought and the principles of the English constitution. However, by the early twentieth century, the influence of British constitutional thought on India's leaders had weakened. *Id.* at 113-16. The "extremists" in Congress were leaders like B.G. Tilak who conceived of *swaraj* or freedom as an indigenous concept of independence and who drew from Hindu classical traditions of thought to configure the notions and ideals of freedom, equality, dignity, and justice. *Id.* at 135. *See generally* K.P. KARUNAKARAN, INDIAN POLITICS FROM DADABHAI NAOROJI TO GANDHI (1975).

112. Gandhi chose to keep away from constitution-making and did not directly contribute to India's constitutional development. He was not a member of the Constituent Assembly. It was INC leaders like Jawaharlal Nehru, S.V. Patel, Rajendra Prasad, and Dr. B.R. Ambedkar, a leader of the *Harijans* (Untouchables), who were influential members of the Constituent Assembly and contributed directly to India's constitutional development.

113. "Gandhi expressed the truth first—that Indians must shape their own destiny. . . . [I]n 1922 he said that Swaraj would not be the gift of the British Parliament, but must spring from the 'wishes of the people of India as expressed through their freely chosen representatives.'" AUSTIN, *supra* note 11, at 1.

114. *Id.*

to deliberate freely and arrive at a consensus on vital social and political issues. He thus sowed the seeds of popular sovereignty in preindependence India itself.[115] The INC's demand that India would only accept a constitution that springs from the masses free from any foreign interference was a reiteration and logical culmination of this faith in the principle of popular will.[116]

Pitted against a racist colonizing power, nineteenth-century India also birthed an array of intellectuals who, through their radical critique of the values and practices of their own civilization and Western society, spurred a rich social and religious reform movement and national awakening.[117] This movement, coupled with Gandhi's relentless campaigns for emancipating women, eradicating the practice of "untouchability" (a form of caste-based slavery), and encouraging Hindu-Muslim unity, became the signature feature of India's freedom struggle[118] and also shaped her constitutional cathedral.

2. The Creation, Character, and Composition of the Constituent Assembly

In India, as it was in South Africa, the "constitutional moment" was of vital significance. It was only in 1945 that the British government yielded to nationalist India's *long* expressed demand for sculpting its constitution through a Constituent Assembly (Assembly) elected on the basis of universal adult franchise.[119] However, unwilling to extend adult suffrage to all Indians, the British government proposed using the

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115. *See generally* JUDITH M. BROWN, GANDHI AND CIVIL DISOBEDIENCE: THE MAHATMA IN INDIAN POLITICS 1928-34 (1977).

116. *See, e.g.*, Congress Resolution on the White Paper and the Communal Award, June 1934, *reprinted in* RAO, *supra* note 74, at 77-79; Congress Resolution on the Government of India Act, 1935, *reprinted in* RAO, *supra* note 74, at 80; Congress Resolution on the Demand for a Constituent Assembly and Withdrawal of the 1935 Constitution, *reprinted in* RAO, *supra* note 74, at 84.

For an account of why Gandhi disfavored the British concept of parliamentary supremacy, see KARUNAKARAN, *supra* note 111, at 175 ("The truth is that power resides in the people and it is entrusted for the time being to those whom they may choose as their representatives. Parliaments have no power or even existence independently of the people." (quoting Mahatma Gandhi)).

117. *See* Satish Saberwal, *Introduction: Civilization, Constitution, Democracy* to INDIA'S LIVING CONSTITUTION 1-2, 10 (Zoya Hasan et al. eds., Anthem Press 2005) (2002); CHANDRA, *supra* note 5, at 82-90.

118. *See* CHANDRA, *supra* note 5, at 224, 227.

119. Hereinafter the terms "Constituent Assembly" and "Assembly" shall be used interchangeably. *See, e.g.*, Nehru Report, 1928, *reprinted in* RAO, *supra* note 74, at 58-60; Congress Resolution on the White Paper and the Communal Award, June 1934, *reprinted in* RAO, *supra* note 74, at 77-79; Congress Resolution on the Government of India Act, 1935, *reprinted in* RAO, *supra* note 74, at 80; Congress Resolution on the Demand for a Constituent Assembly and Withdrawal of the 1935 Constitution, *reprinted in* RAO, *supra* note 74, at 84.

recently elected provincial legislatures to serve as electoral bodies for the Assembly.[120] Because the provincial legislatures provide a window to the composition and texture of the Assembly as a body, a few words about them are needed.

Created under the federal colonial constitutional dispensation of 1935,[121] elections to these bodies (1585 provincial assembly seats) were held in December 1945 on the basis of the separate and communal electorates then extant.[122] According to the Cabinet Mission Plan of 1945 (Plan), these legislatures, which were to serve as the Assembly's Electoral College, had to elect one representative for every 1,000,000 people.[123] However, for the purpose of elections to the Assembly, the Plan restricted the use of the communal and separate electorate principle by recognizing only three major communal groups: Muslims, Sikhs,[124] and General (Hindus and all other communities).[125]

The Princely States were allotted 93 seats in the Assembly (leaving them to hammer out the method of selecting their delegations), and the provinces were assigned 296 seats in total.[126] In elections to the Assembly held in July 1946, out of a total number of 296 seats,[127] the INC received 208 seats, of which 203 delegates were drawn from the General category, 4 were Muslims, and 1 was Sikh.[128] Thus, upon its

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120. *See* text accompanying *supra* notes 104-105; RAO, *supra* note 11, at 68. The British rejected the Congress's demand for adult franchise on the pretext that creating electoral rolls would take time. The Constituent Assembly came to be created under the Cabinet Mission Plan of 1945. *Id.* Hereinafter the terms "Cabinet Mission Plan" and "Plan" will be used interchangeably.

121. For a brief analysis of the colonial constitutional structure under the Government of India Act, 1935, see discussion *supra* note 104.

122. *See* AUSTIN, *supra* note 11, at 9. While the INC had captured 925, or 85%, of the non-Muslim seats in those elections, the Muslim League collared most of the Muslim seats in all the provinces and all the Muslim seats in some provinces. Members of these three groupings in the provincial assemblies then voted for this pre-fixed number of delegates assigned to them. *Id.*

123. *See* RAO, *supra* note 11, at 68. Hereinafter the terms "Cabinet Mission" and "Mission" shall be used interchangeably.

124. *See* AUSTIN, *supra* note 11, at 5. The total population of a given province or state was divided into these three groupings, and each grouping was allotted—according to its percentage of the province's population—its proportion of the provincial delegation to the Assembly. *Id.*

125. All other communities would comprise Anglo-Indians, Indian Christians, Parsis, Jews, and the *Harijans* (Untouchables). *Id.*

126. *Id.* For a definition of "princely states," see discussion *supra* note 102.

127. Total number of seats: 389. Princely States: 93. Provinces: 296 (Congress 208); 5 small non-Congress groups: 16; and Muslim League: 72 seats. *See* AUSTIN, *supra* note 11, at 9-10.

128. *See* RAO, *supra* note 11, at 96.

creation the Assembly comprised in total 389 indirectly elected members.[129]

Could these provincial legislatures, initially elected on the basis of the communal electorate, have produced a representative Constituent Assembly? Technically speaking, the answer is no. According to Granville Austin, who has mined the Indian National Archives, roughly 28.5% of the adult population of the provinces were eligible to vote in the provincial assembly elections of early 1946.[130] A restricted franchise with tax, property, and educational qualifications had denied the masses (including peasants, small traders, and countless others) voting rights.[131]

Following the announcement of the Plan, a key problem that remained unresolved by the British was how to devise a way of bringing both the Muslim League and the INC into the proposed Assembly. Formation of an interim government at the Centre, comprising representatives of the Muslim League and the INC, remained another irritant.[132] While the initial consent of the Muslim League and the INC led to the formation of the Assembly,[133] echoes of the idea of a separate state for Muslims rent the air and delayed the Assembly's convening.[134] Brushing aside the Muslim League's boycott, the British government set December 1946 as the date for the Assembly's first meeting, and by April 1947, three sessions of the Assembly had been held without the Muslim League's participation.[135] As the political and communal situation grew turbulent, the British government decided to partition the country.[136]

Having epitomized India's nationalist movement, it is not surprising that the INC emerged as the dominant political force in the Assembly.

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129. *Id.*; *see also* AUSTIN, *supra* note 11, at 10. At the time of the Assembly's creation, the Congress held sixty-nine percent of the Assembly's seats, and this figure spiked to eighty-two percent when the Assembly fractured upon partition in 1947 and lost the Muslim League members. AUSTIN, *supra* note 11, at 10.

130. *See* AUSTIN, *supra* note 11, at 10.

131. *Id.*

132. Unable to coax the Muslim League to join the Interim government, the Viceroy unilaterally proposed the formation of an Executive Council comprising fourteen members (not including the Viceroy). Finally, the Viceroy invited Jawaharlal Nehru, the President of the INC, to form the provisional government, and thus the new Executive Council comprised wholly of Congress members took office on September 2, 1946. RAO, *supra* note 11, at 74.

133. Although elections to the Assembly were completed by July 1946, the Constituent Assembly remained to be convened.

134. *See* RAO, *supra* note 11, at 73. In 1940, the Muslim League demanded a separate Muslim state for the first time. Thereafter, in 1945, it reiterated this demand, withdrew its acceptance to join the Assembly, and called upon the Muslims in India to respond to a program of "direct action." What ensued were bloody communal riots in Calcutta in August 1946. *Id.*

135. *Id.* at 76, 78.

136. As a result of the partition, the membership of the Constituent Assembly fell from 389 members to 299 members. *Id.* at 91.

Furthermore, the interim governmental framework, both provincial and national, following independence was imbued with the INC element, for the INC had formed the government, too.[137]

Viewed against the above electoral figures and given the dominance of the INC, India's constitution-making process can easily be characterized as being, at its core, a wholly homogenized, one-party dominated venture. However, the INC was a mass-political party composed of diverse and disparate elements that operated along democratic lines both in its internal functioning as well as on the floor of the assembly, facts which belie this characterization.[138] As Jawaharlal Nehru wrote, "The Congress has within its fold many groups, widely differing in their viewpoints and ideologies. This is natural and inevitable if the Congress is to be the mirror of the nation."[139]

a. Representative Element

Although according to the Plan only Muslims and Sikhs were guaranteed seats in the Assembly, the INC ensured that Parsis, Anglo-Indians, Indian Christians, *Harijans* (Untouchables), and women were elected on the INC ticket to the Assembly.[140] Furthermore, it is a tribute to the INC's visionary leaders that they also inducted non-INC talent into the Assembly by having individuals with expertise, knowledge, and practical experience in administration, law, and constitutional law.[141] Indeed, as one Assembly member put it, "There was hardly any shade of political opinion not represented in the Assembly."[142]

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137. For the formation of the Interim government, see discussion *supra* note 132.

138. *See* AUSTIN, *supra* note 11, at 13-14.

139. *Id.*

140. *See id.* at 12. For a complete list of the Assembly members, see RAO, *supra* note 11, at 846-47. Nine of the Assembly members were women. *Id.*

141. *See* AUSTIN, *supra* note 11, at 13.

142. *Id.* (quoting K. Santhanam, a prominent Constituent Assembly member). However, the members of three political organizations (the Communist Party, the Socialist Party, and the Hindu Mahasabha) that had dotted the preindependence landscape had found no place in the Assembly. AUSTIN, *supra* note 11, at 14. These three organizations had displayed fascistic communalism. CHANDRA, *supra* note 5, at 428-29.

Because most members of the Assembly were politically and emotionally committed to treading the socialist path after independence, the absence of the socialist party in the Assembly did not rob the Assembly of its all-India character. AUSTIN, *supra* note 11, at 14-15. As for the Hindu Mahasabha, because the secular INC—and by extension the Assembly—had been all along a place inhospitable to sprouting communal seeds, its presence in the Assembly would have hardly choked the blossoming of India's organic constitutional tree. *Id.* at 14.

b. Inchoate Participatory Element

No referendum was held either before or after the Indian Constitution was enacted. But a participatory element was imbued in the early stages of the constitution-making process when Dr. B.N. Rau,[143] the Constitutional Advisor, prepared and circulated a questionnaire on the salient features of the proposed Constitution among all the members of the Central and Provincial Legislatures.[144] His memorandum, embodying the opinions elicited through this process and his own ideas on the main principles that should govern the formulation of the Constitution,[145] served as a template in drafting the Constitution.[146]

As noted earlier, at the time of its birth, the Assembly was only a constituent power that met with the permission of the British government. What was its status? Was it a sovereign body? And what was its authority in the light of the absence of Muslims—a large chunk of the population—given the Muslim League's withdrawal?

Answers to these questions can be found in the rules of procedure that the Assembly itself wrote wherein it conferred on itself a sovereign status and disallowed its dissolution "except by a resolution assented to by at least two-thirds of the whole number of [its] members."[147] Within eight months of the Assembly's creation, India emerged independent, and the Assembly served as India's Parliament. In short, it acquired a legal status that it had assumed on its inception.[148] After three years of transparent, democratically conducted debates and decision-making by consensus, the Assembly concluded its historic task in 1949 when it adopted the Indian Constitution. By entrenching the principles underpinning her anti-imperialist revolution in a constitutional text, India's dream of shaping her own political, social, and economic destiny became not illusory, but a reality.

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143. *See* RAU, *supra* note 35, at 42-67 (containing a reprint of the questionnaire).

144. *See* RAO, *supra* note 11, at 111.

145. *Id.*

146. *Id.*

147. *See* AUSTIN, *supra* note 11, at 7 (quoting the Constituent Assembly).

148. *See* RAO, *supra* note 11, at 91. Although constituent assemblies that were created in the wake of revolutions sped up their constitution-writing tasks, India's Assembly accomplished its task in three years, (December 1946—November 1949) when it formally adopted the Indian Constitution on November 26, 1949. The Constitution came into force on January 26, 1950. *See* PATRICK FAFARD & DARREL R. REED, CONSTITUENT ASSEMBLIES: A COMPARATIVE SURVEY 24 (Institute of Intergovernmental Relations, Ontario, 1991).

IV. CONSTITUTION-MAKING IN SOUTH AFRICA

A. Participatory Constitution-Making: Its Genesis

Traditionally, constitution-making has been an elitist process dominated by political elites and legal experts.[149] However, this trend has been shifting as the decade of the 1990s witnessed the birth of participatory constitutionalism—a new form of democratic constitution-making in many countries, including South Africa.[150] These inclusive, constitutive processes are rooted in the belief that constitutions are about people; therefore, unless people are involved in their making and accept them as their own, the constitutions will be tainted with illegitimacy.[151] Furthermore, this line of thinking theorizes a direct relationship between the form of constitution-making and its final content.[152] Understanding the factors that spurred the evolution of this new form of constitution-making in Africa necessitates a critical look at Africa's overall historic and bleak constitutional past.

1. Constitutions without Constitutionalism: The First Two Generations of Constitution-Making in Africa

a. The First Wave of Decolonization: The "Independence" Constitutions[153]

The three evils of slavery, colonialism, and apartheid rendered the African political soil inhospitable to human rights and constitutionalism.[154] The constitution-making processes during the first wave of decolonization were top-down, co-opted, and opportunistic ones marked by limited consultation between the colonizers and the local elites and a

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149. Vivien Hart, *Democratic Constitution Making*, SPECIAL REPORT NO. 107 (United States Institute of Peace, Washington, D.C.), July 2003, at 2, *available at* http://usip.org/pubs/specialreports/sr107.html. The United States Constitution that was drawn up in 1787 by a "hand-picked elite group" is a classic example of the traditional constitution-making process. *Id.*

150. *Id.*

151. *Id.*; Julius Ihonvbere, Discussion Chair, Address Before the International Conference on Comparative Constitutionalism (May 17-20, 2001), *in* CONSTITUTIONALISM IN TRANSITION: AFRICA AND EASTERN EUROPE 93, 105 (Mihaela Şerban Rosen ed., 2003) [hereinafter CONSTITUTIONALISM IN TRANSITION].

152. Ihonvbere, *supra* note 151, at 99.

153. The constitutions forged during Africa's first wave of decolonization are called "independence" constitutions. Issa G. Shivji, *Three Generations of Constitutions and Constitution-Making in Africa*, *in* CONSTITUTIONALISM IN TRANSITION, *supra* note 151, at 74.

154. *See* JOHN HATCHARD ET AL., COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH 7 (2004). Together they destroyed Africa's precolonial traditional social and political organizations, arbitrarily fractured united African communities and stunted the African agrarian economy. *Id.*

lack of broad public participation.[155] To safeguard their overall economic interests, the departing colonial powers simply erected liberal Westminster model constitutions on a despotic foundation in which the right to property, and not social justice provisions, was exalted.[156] The undemocratic governments that these constitutions birthed soon stamped out legitimate dissent and squelched civil liberties to perpetuate their rule.[157] The African economic decline and a political landscape littered with constitutions without constitutionalism[158] were the unhappy results.[159]

b. Africa's Second Generation of Constitution-Making: Its Sabotage by International Forces

Unfortunately, Africa's second wave of constitutive processes that occurred at the peak of the Cold War also failed to unfurl constitutionalism.[160] To begin with, the African political elites had succumbed to the locally driven demand for accumulating international capital.[161] Before long, they were sucked into the hellish vortex of the global arms race.[162] And last, they could not escape the state-exalting, asphyxiating, "modernization" and "developmentalist" fumes[163] spewed by the Western powers and international financial institutions.[164]

These forces together distorted their constitutional vision, and they began to perceive the state as the sole agency of social change. They accordingly supported constitutions that typically enshrined authoritarian presidential systems of government, weak judiciaries that kowtowed to the authoritarian executive, and emaciated legislatures and that stunted all forms of civil society organization.[165] In short, during this period, the state-centric developmentalist ideology, and not constitutionalism, underpinned political legitimacy in Africa.[166] Therefore, although African countries had become free in the 1960s, in the two decades that followed,

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155. Shivji, *supra* note 153, at 75.

156. *Id.* Clearly, the safety of the colonial power's overall economic and strategic interests provided the impetus for this preferred constitutional choice. *Id.*

157. *See* HATCHARD, *supra* note 154, at 15.

158. *See* H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 25, at 65.

159. *See* HATCHARD, *supra* note 154, at 15.

160. The second wave brought forth the "second-generation" (or "postcolonial") constitutions. *See* Shivji, *supra* note 153, at 76.

161. *See id.* at 78.

162. *Id.* at 76.

163. *Id.*

164. *Id.* at 78.

165. *Id.* at 77.

166. *Id.* at 76-77.

they had jeopardized their sovereignty internationally[167] and their legitimacy nationally.[168]

2. A Theory of Constitution-Making: Participatory Constitution-Making and "Third Generation" Constitutions

The upside of the successive authoritarian and illegitimate constitutional regimes was that they sparked wide-spread internal resistance, human rights debates, and democratization movements in Africa.[169] These democratization movements spurred new and engaging constitutional talk contesting the traditional paradigms of constitution-making, advocating the participatory formulation of rights,[170] and calling for the creation of constitutions that could accelerate social transformation, empower women and civil society, and address pressing socioeconomic issues hitherto widely neglected.[171] While the thrust of constitutionalism in liberal political discourse is to limit the power of the rulers and to protect individual rights, the new African discourse on constitutionalism sought to "recast" constitutional issues within a different conceptual framework and have them guided by a new democratic perspective.[172]

a. Participatory Constitution-Making: New Strategies

Thus began the practice of participatory constitution-making with its slant towards legitimacy, rather than legality, in numerous countries including Uganda, Eritrea, Benin, Rwanda, South Africa, Zimbabwe, and Kenya.[173] Several constitutional reconstruction strategies were deployed, ranging from amendment of existing constitutions preceded by public debates, to constitutional commissions mandated to receive input from a wide cross-section of people, to constitutional review commissions with specific mandates, to slow-paced constitutional reforms.[174] According to

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167. By the late eighties, Africa "was on its knees," swamped by its international debt-burden. *Id.* at 80-81.

168. *Id.* at 81.

169. *Id.* at 84.

170. *Id.*; *see also* Julius O. Ihonvbere, *Constitutions Without Constitutionalism? Towards a New Doctrine of Democratization in Africa*, *in* THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 137, 139 (John Mukum Mbaku & Julius Omozuanvbo Ihonvbere eds., 2003) [hereinafter THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA].

171. *See* Marek Nowicki, *Foreword* to CONSTITUTIONALISM IN TRANSITION, *supra* note 151, at vii; Ihonvbere, *supra* note 170, at 137, 139. *See generally* ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 19 (1990).

172. *See* Ihonvbere, *supra* note 170, at 144 (quoting Issa Shivji).

173. *See* Hart, *supra* note 149, at 7.

174. *See* Ihonvbere, *supra* note 170, at 145.

Issa Shivji, it was the National Sovereign Conference that "was literally born in the streets [of Africa] as a culmination of street protests and demonstrations," and was thrust upon the ruling parties, that bears a distinct African stamp.[175]

b. Determining, Distilling, and Accepting People's Views: Potential and Problems

How did the Africans render their constitution-making processes truly participatory? Eritreans successfully used songs, poems, stories, plays in vernacular languages, radio, and mobile theater as civic education tools. These tools enabled them to identify the issues of concern for various groups and then to educate their public about the importance of the constitution in a democracy, the drafting process, and the importance of public participation in it.[176]

Using public tours as their promotional tools, the Rwandan constitution's drafting commission members teamed up with thousands of trained assistants to fan into the provinces to educate the people.[177] Foreign financial and technical aid helped the Rwandan drafting commission to target women by educating and involving them in the process of drafting the new Constitution and facilitating a dialogue among women's groups and parliamentary members on how to incorporate gender considerations into the Constitution.[178] Following this sustained public educational campaign, Rwanda witnessed an increase in the percentage of women at the national convention to review the draft Constitution.[179]

However, the Ugandan, Zimbabwean, and Kenyan participatory constitution-making processes dampen our enthusiasm for participatory constitution-making. In Uganda, a government-appointed commission consulted with the public and produced a constitution in 1995.[180] One empirical study conducted to test the claim that this participatory process built support for the new Constitution has found, contrary to expectations, that public consultation and participation did not cause

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175. *See* Shivji, *supra* note 153, at 85. The National Sovereign Conference approach was first adopted in Benin. Thereafter this practice was followed in Mali, Niger, Gabon, and Togo with varying degrees of success. *Id.*

176. Jolynn Shoemaker, Constitutional Rights and Legislation, http://www.huntalternatives.org/download/29_constitutional_rights.pdf (last visited Sept. 24, 2007).

177. *Id.* at 17.

178. *See* Hart, *supra* note 149, at 10-11.

179. *Id.*; *see also* Shoemaker, *supra* note 176, at 18.

180. *Id.*; *see also* Devra C. Moehler, *Participation and Support for the Constitution in Uganda*, 44 J. MODERN AFR. STUDIES 275, 281 (2006).

citizens to view their Constitution as legitimate or illegitimate.[181] Rather, the local political leaders who communicated with the citizens to educate them about their participation, the process, and the resulting constitution caused citizens to perceive the Constitution as legitimate.[182] Furthermore, the study also exposed the government's use of public participation as a ploy to manipulate the process.[183]

In Zimbabwe, the steady build-up of presidential power spurred civil society to campaign for public participation in the creation of a new "people's" Constitution. In response, President Robert Mugabe appointed a Constitutional (Drafting) Commission (Constitutional Commission), and this body coined an outreach program of public hearings through town hall meetings,[184] community activities, and a multilingual media campaign to elicit the public's views on the new Constitution's contents.[185] To help the public focus on key issues, the Constitutional Commission produced and publicized in the national press a "List of Constitutional Issues and Questions."[186] However, the nature of some of the 400 questions—which were befitted to be in a constitutional law exam rather than in a public laymen debate—minimized the value of the whole participatory exercise.[187] Furthermore, although the Constitutional Commission created nine thematic committees to which the thousands of submissions and reports of the public meetings were channeled, the reports emanating from these committees displayed a wide range of views on several key issues.[188] This situation, where it was possible for the constitutional drafters to come up with several very different constitutions each mirroring the submissions made to the Constitutional Commission, led to the imposition of the government-preferred constitutional model draped as an autochthonous document.[189]

Bowing to public pressure, Kenyan President Daniel arap Moi inaugurated a constitution review process in 2003. The process gave rise

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181. *See* Moehler, *supra* note 180, at 289.

182. *Id.* at 295-97.

183. *Id.* at 297.

184. *See* John Hatchard, *Some Lessons on Constitution-Making from Zimbabwe*, 45 J. AFRICAN L. 210, 210-11 (2001).

185. *Id.* at 211.

186. *Id.*

187. *Id.* The following are two examples of those questions: (1) "Should the amendment process for the constitution be simple or should it be difficult? Why? [2] What state structures should Zimbabwe have? Why?" *Id.*

188. *Id.*

189. *Id.* at 211-12. The commission's draft constitution was sent to President Mugabe without any opportunity for further public comment. He quickly forwarded it for a referendum vote without possibility of amendment. In February 2000, the electorate rejected the draft constitution by 54 to 46 percent. *Id.*; *see also* Hart, *supra* note 149, at 9.

to widespread public mobilization, participation, and vocalization of a radical agenda calling for the adoption of local self-government and direct forms of democracy, such as the recall of Members of Parliament and the reform of traditional institutions.[190] Sadly, this intense political engagement gave birth to an acclaimed, though still-born, constitutional child. Why? If the final constitution is to accurately mirror the aspirations of the public, the constitution-making process must have a device that distills and channels the people's view to the drafting body which in turn must be immune from the pressures of the ruling party or government. But this was not the legal position in Kenya. Once the initiative of the people passed from them to the politicians, the process was hijacked. Given the potential of the draft Constitution to restructure the government (a colonial relic) and society radically, President Moi, who reserved for himself all powers to enact it, refused to do so.[191] Thus Uganda, Zimbabwe, and Kenya showcase the context and challenges of participatory constitution-making and warn us of the dangers in extolling its virtues.

B. Constitution-Making in South Africa: A Bridge to a New Constitutional Dawn?

1. The Evil of Apartheid

The postapartheid 1996 South African Constitution belongs to the "third generation" of constitutions discussed above.[192] The story of its making is in fact the story of the rebirth of South Africa, from the ashes of apartheid, as a new democratic and racially undivided nation.[193]

The utterly racist constitutional regime existing under the pre-1996 constitutional set-up explains why a new constitution was thought necessary or desirable. The Afrikaner white minority regime erected the apartheid system (a system of racial separateness) in South Africa, with a slant on power, propped up by deeply discriminatory laws and a massive

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190. *See* Jill Cottrell & Yash Ghai, *Seeking Democratisation, Accountability and Social Justice: The Constitution Building Process in Kenya (2000-2004)*, *in* INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, STOCKHOLM, SWEDEN, THE ROLE OF CONSTITUTION-BUILDING PROCESSES IN DEMOCRATIZATION 26, 30 (2004), *available at* http://www.idea.int/conflict/cbp/upload/CBPkenyaFInaliss-2.pdf.

191. *Id.* at 26-30.

192. *See* discussion *supra* Part IV.A.2.

193. *See* NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA 469 (1994); Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. OF COMP. L. 67, 67 (1999).

repression of rights.[194] This system ignored the multiethnic, multilingual, and multicultural nature of South African society. Stripped of their basic human rights, compelled to lead a segregated existence in all spheres of their lives (and thereby denied access to amenities, institutions, and opportunities), politically disenfranchised, and dispossessed of their lands and citizenship, the black South Africans were reduced to being slaves in their motherland.[195]

Founded in 1912 to confront apartheid, the African National Congress (ANC), soon evolved into the most influential and dominant liberation group in the antiapartheid struggle.[196] Akin to the INC, the ANC was pro-poor and historically committed to recognizing women's rights.[197] The National Party (NP) stamped out all opposition to its apartheid policies through draconian laws and emergency regulations.[198] Packing the courts with men sympathetic to its apartheid policies, the NP choked off the blacks' hopes of using the courts to dismantle the apartheid structure.[199] Banned in 1960,[200] and with its key leaders, including Nelson Mandela, locked up in prison for life, the ANC was compelled to go underground.[201]

However, the dramatically transformed international political climate of the late 1980s beamed rays of hope on South Africa's dark constitutional landscape. Nelson Mandela's release in 1990, a consequence of gathering international pressure on South Africa, signaled a new constitutional dawn in the offing.[202]

It is relevant to ask what forms of constitution-making the South Africans had considered all along, and what options for constitution-making were available to them at that time. The ANC's long asserted right of South Africa's black majority to self-determination implied that it was open for them to opt for any political system, including a one-party state, state socialism, or any other system that prevailed during the Cold

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194. *See* EBRAHIM, *supra* note 12, at 10-11; Sarkin, *supra* note 193, at 67; RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 4-8 (2000).

195. Prior to the 1996 Constitution, South Africa had three constitutions, in 1910, 1961, and 1983. *See* Sarkin, *supra* note 193, at 67; SPITZ & CHASKALSON, *supra* note 194, at 6.

196. *See* EBRAHIM, *supra* note 12, at 11.

197. David Pottie & Shireen Hassim, *The Politics of Institutional Design in the South African Transition*, *in* CAN DEMOCRACY BE DESIGNED?: THE POLITICS OF INSTITUTIONAL CHOICE IN CONFLICT-TORN SOCIETIES 60, 62 (Sunil Bastian & Robin Luckham eds., 2003).

198. *See* SPITZ & CHASKALSON, *supra* note 194, at 4-6.

199. *Id.* at 6.

200. *Id.* at 7.

201. *Id.*

202. EBRAHIM, *supra* note 12, at 30, 37.

War.[203] The ANC had envisaged a constitution written by a democratically elected Constituent Assembly.[204] However, recognizing the advantages of opting for an internationally acceptable framework, such as that established for Namibia, the ANC strove to have its set of constitutional principles—which it had adopted in 1988—receive international blessing.[205] Ultimately, the post-Cold War era's political culture that was "increasingly dominated by a consolidating conception of democratic constitutionalism" shaped and reinforced particular political options in South Africa's constitution-making process.[206]

2. The Two Stages of Constitution-Making

Broadly speaking, the South African constitution-making process took place in two stages, with the first stage stretching from February 1990 to April 1994, when the Interim Constitution came into force. During the first stage, key agreements on process were negotiated and forged by the warring parties in private and public sessions.[207] The anxieties of the white minority, that they would lose their leverage and be smothered by the new constitutional dispensation, and the fears of the long-oppressed majority, that apartheid would never be dismantled, were the major obstacles from the start. The second stage spanned from 1994 to 1996 when the final constitution was adopted. Patience and perseverance on the part of the negotiating parties helped smooth the bumps, and a way out was eventually devised.

Rejecting the idea of an outright transmission of power from the old order to the new, the parties agreed to a transition in two stages.[208] The Multi-Party Negotiating Process (MPNP), an unelected forum, drafted an interim constitution that included thirty-four basic constitutional principles that the parties had agreed would be binding on the final constitution. They had also agreed that the constitutional text would have to be certified by the constitutional court as being in consonance with these principles.[209] These principles shaped both the process of making

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203. Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, *in* THE POST-APARTHEID CONSTITUTIONS, *supra* note 8, at 128, 132.

204. *See* EBRAHIM, *supra* note 12, at 58; Klug, *supra* note 203, at 136.

205. Klug, *supra* note 203, at 137; *see* Harare Declaration, *reprinted in* EBRAHIM, *supra* note 12, at 451-55.

206. Klug, *supra* note 203, at 132.

207. EBRAHIM, *supra* note 12, at 44-45, 48-50, 53.

208. *See* SPITZ & CHASKALSON, *supra* note 194, at 3.

209. *See* EBRAHIM, *supra* note 12, at 150-51, 619 (reproducing the constitutional principles); SPITZ & CHASKALSON, *supra* note 194, at 3, 41.

and the content of the new constitution.[210] The existing government or the *pouvoir constitute* adopted the interim constitution, which resulted inter alia in the immediate establishment of a constitutional court and a bill of rights.[211] The Interim Constitution included a "sunset clause" that entrenched a system of power-sharing for five years after the first democratic election.[212]

While public participation at this stage was indirect and several different groups vying to influence the MPNP process staged mass demonstrations and submitted petitions, successful multiparty strategies of women's groups led to the recognition of gender equality and the provision of a Commission on Gender Equality in the Interim Constitution.[213]

3. Participatory Constitution-Making

In 1994, the first ever free, nonracial elections were held to select a new parliament in South Africa, which doubled as the Constitutional Assembly tasked with framing a new constitution within a stipulated period.[214] It was at this stage that the South African Framers chose to give the public a direct role in constitution-making.

The Constitutional Assembly's fundamental task was to produce a constitution that was legitimate, inclusive, durable, and accessible through a credible and transparent process.[215] But how was it expected to achieve this *legitimacy*? First, the constitution it would produce had to comply with the predetermined constitutional principles; second, the drafting process had to be credible and accessible to the public; and finally, the constitution had to be accepted by the public.[216] To achieve this, the South Africans launched a public participation program to incorporate the views of all "role-players" in a draft text.[217] Subsequently, they publicized the draft text to elicit further views from the public. Negotiation and adoption of the Constitution comprised the final phase of this process.[218]

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210. The constitutional principles related to the form of the national government, the relationship between the national and sub-national, minorities' interests, human rights, public-sector organizations, and amendment procedures. S. AFR. CONST. 1993, sched. 4, arts. I-XXXIV.

211. *See* SPITZ & CHASKALSON, *supra* note 194, at 3.

212. *See id.* at 31; Klug, *supra* note 203, at 141.

213. Klug, *supra* note 203, at 142.

214. *See* EBRAHIM, *supra* note 12, at 177; Hart, *supra* note 149, at 8 (stating that approximately, eighty-seven percent of the population voted).

215. *See* EBRAHIM, *supra* note 12, at 177.

216. *Id.*

217. *Id.* at 179.

218. *Id.*

To ensure transparency, the Constitutional Assembly threw open its meetings to the public and disseminated all its materials to them through the Internet.[219] Serving as the bridge between the public and the Constitutional Assembly, "Theme Committees" soaked up public opinion on diverse issues by collating and processing public petitions, attending national hearings organized by various sectors of civil society, and then channeling the information to the Constitutional Assembly.[220]

What challenges did the South Africans face in eliciting people's participation, and how did they overcome them? The presence of a dominantly rural and illiterate population and the long absence of a constitutionalism culture in the country made practicing participatory constitution-making daunting.[221] To overcome these obstacles, the Constitutional Assembly engaged in a massive media, education, and advertising campaign to spread constitutional awareness, stimulate interest in the ongoing constitution-making process, and to invite the public and interest groups to make submissions.[222] Advertisements blaring "You've made your mark, now you have your say," and "It's your right to decide your constitutional rights" slathered on television, radio, in local newspapers, and on outdoor billboards, reminded South Africans of the importance of the ongoing constitution-making process to not only their lives, but also those of future generations and of the consequent need for their serious participation in it.[223]

Although a national survey exposed a public that was skeptical about the participatory component of the constitution-making process and the seriousness with which its submissions would be received, the Constitutional Assembly nonetheless received 1.7 million submissions, the bulk of which were petitions.[224] These petitions highlighted issues ranging from animal rights, sexual orientation, abortion, pornography, and the death penalty to the seat of Parliament. Just over 11,000 of the petitions were substantive and embodied people's wish lists.[225]

Public participation was invited even at the certification stage by allowing anybody wishing to object in the course of the certification hearings to submit his views to the Constitutional Court. Although the Constitutional Court first declined to approve the 1996 constitution on

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219. *Id.* at 190, 246-47.

220. *Id.* at 182, 190.

221. *Id.* at 241.

222. More than 4.5 million copies of the draft constitution were distributed throughout the country. *Id.* at 194.

223. *Id.* at 243.

224. *Id.* at 244.

225. *Id.*

the ground that it did not adhere to the binding constitutional principles included in the Interim Constitution,[226] the Constitutional Court eventually certified the Constitution when it was submitted with the necessary amendments.[227] In a final step marking the public's "ownership" of the Constitution, 7 million copies of the Constitution were distributed amongst the general populace.[228]

C. Analysis

Dr. Upendra Baxi argues that "contexts"[229] must be factored in while analyzing constitution-building practices, and in this regard, he reminds us that modern constitutionalism flourished during the early halcyon days of colonialism.[230] And indeed, although historically the Constituent Assembly—a directly elected body tasked specifically with writing a constitution and enjoying political and constitutional legitimacy—is the heritage of the liberal constitutionalist tradition,[231] Great Britain, besides holding a nation in bondage, also denied a large section of its people their right to participate in shaping their constitutional future. Thus an elitist constitution-making process came to be created for India. But again, it was not top-down or co-opted akin to those processes that characterized the rushed African decolonization.

As has been argued, although the British created and convened India's Constituent Assembly, it was ultimately an unfettered body. The Constitution as a whole reflects the ideology and concerns of its influential members.[232] But this does not mean that their presence

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226. *Id.* at 233-34. The Constitutional Court's certification judgment identified the following nine elements of the new text which failed to comply with certain constitutional principles: (1) the right to engage in collective bargaining on employers' associations but not on individual employers (Section 23); (2) the amendment of the Constitution by a two-thirds majority of the National Assembly (Section 74); (3) the removal of the Public Protector and the Auditor General (Section 194); (4) the framework of the Public Service Commission which did not set out its functions and powers (Section 196); (5) the local governments' power to raise excise taxes (Section 229(1)); (6) section 241(1) which did not incorporate the provisions of the Labour Relations Act in the Constitution; (7) fiscal procedures of the local government (Chapter 7); (8) clause 22(1)(b) of Schedule 6 which placed the Truth and Reconciliation Act beyond constitutional scrutiny; and (9) powers and functions vested in the provinces which were substantially inferior to those which the provinces enjoyed under the Interim Constitution. *See* SPITZ & CHASKALSON, *supra* note 194, at 425-27.

227. SPITZ & CHASKALSON, *supra* note 194, at 427.

228. *Id.* at 249.

229. Baxi, *supra* note 6, at 1184.

230. *Id.*

231. *See* EDWARD MCWHINNEY, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE 33 (1981).

232. *See* AUSTIN, *supra* note 11, at 22; *see* discussion *supra* note 112; *see also* eminent scholar Rajeev Dhawan's comment that "an influential member of the 'inner group' *spoke for*

prevented serious differences or sharp and free exchanges on several issues among the members.[233] In fact, all contentious issues were papered over after a transparent and democratically conducted debate.[234] Although the Constituent Assembly lost some of its Muslim members—following partition—this neither deprived it of its "highly representative" character[235] nor dimmed its vision in creating an inclusive social and secular democracy based on equality and justice. These factors have lent legitimacy to the Indian Constitution.

Both India's and South Africa's constitution-making processes unleashed a range of claims for the recognition of specific social identities and interests.[236] Many Indian Muslim leaders both within and outside the Assembly sought to retain the personal laws. Some even argued for retaining the communal electorate. An Untouchable who had suffered untold miseries at the hands of caste Hindus, Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, understood the Untouchables' plight better than anyone.[237] Having championed their cause during the freedom struggle, he used his influential position in the Assembly to campaign actively for entrenching affirmative action for Untouchables in the Constitution.[238] These observations confirm Daniel Elazar's argument that constitution-making is "pre-eminently a political act."[239]

A key distinction between the Indian and South African processes is tied to the role of "constitutional principles" in a constitutive process. While Indians were creating a society and polity solely by and for themselves in which their colonial masters would be physically and psychologically absent, the black South Africans were sculpting a new constitution to reconfigure their society and polity, not exclusively for themselves, but as one in which they would have to coexist on equal

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virtually the entire Assembly" when he asserted that in light of the communal violence engulfing the nation, public order, security and safety could legitimately be made the grounds for limiting *all of the* fundamental rights. *See* Rajeev Dhawan, *Republic of India, The Constitution as the Situs of Struggle: India's Constitution Forty Years On*, *in* LAWRENCE W. BEER, CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 373, 378 (University of Washington Press, Seattle, 1992) (emphasis added).

233. *See* AUSTIN, *supra* note 11, at 22.

234. *Id.*

235. *Id.* at 14.

236. *See* Klug, *supra* note 203, at 128.

237. Dr. B.R. Ambedkar received his Ph.D. in economics from Columbia University, United States and was admitted to the Gray's Inn, England.

238. *See* AUSTIN, *supra* note 11, at 19-20.

239. Daniel J. Elazar, *Constitution-Making: The Pre-eminently Political Act*, *in* REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE 232, 232 (Keith G. Banting & Richard Simeon eds., 1985).

terms with their past oppressors.[240] In short, the presence of two mutually distrusting groups in the constitutional negotiations in South Africa made almost inevitable the use of constitutional principles as tools for assuring all involved that the end product would mirror their mutually agreed upon vision. South Africa's example indicates that besides placing a check on the politics of constitution-making, constitutional principles also have the potential to foster reconciliation and make the process more inclusive. However, constitutional principles also run counter to democracy in that they are, as the South African process demonstrates, principles formulated by the political elites primarily to place a substantive limit on constitution-making, which is essentially a political process and therefore counter-majoritarian.

A comparison of the Indian and the South African constitution-making processes captures the dramatically different forms that international interactions between constitution-makers and foreign experts have assumed and the changing perceptions among indigenous constitution-makers about the role and advice of foreign advisors in the period following World War II. For India, Dr. B.N. Rau[241] freely traveled to the United States, Canada, Ireland, and England to discuss the framing of the Constitution with jurists and statesmen.[242] The American Supreme Court Justice Felix Frankfurter advised Rau to drop the due process clause from the draft constitution, and therefore, on his return to India, Rau advised the Assembly to implement Justice Frankfurter's suggestion.[243]

Compare this with the South African constitution-making process from which foreign experts were *formally excluded*.[244] "In the 1950s, Europeans summoned African leaders from twenty-five to thirty

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240. *See, e.g.*, S. AFR. CONST. pmbl. ("We, the people of South Africa, Recognise the injustices of the past; . . . Believe that South Africa *belongs to all who live in it*, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." (emphasis added)).

241. Dr. B.N. Rau was the Constitutional Advisor to India's Constituent Assembly. His memoir is an authoritative account of India's constitution-making process. *See* RAU, *supra* note 35, at xxiii.

242. *Id.* at xi, 328.

243. *Id.* at 329. Justice Frankfurter advised Rau that the due process clause was undemocratic because it allowed a few judges to veto legislation enacted by the people's elected representatives and that it threw an "unfair" burden on the judiciary. *Id.*; *see also* AUSTIN, *supra* note 11, at 103. In the end, while the Constituent Assembly dropped the due process safeguard for the right to property, the procedural safeguard was retained for the right to life and personal liberty. *Id.*

244. Louis Aucoin, *The Role of International Experts in Constitution-Making: Myth and Reality*, 5 GEO. J. INT'L AFF. 89, 90 (2004) (emphasis added).

countries to capitals like London, Paris, and Brussels and shoved constitutions down their throats."[245] The lingering memory of this illegitimate, postcolonial, constitution-making practice may well explain the South African ban on foreign advisors. However, I concur with some scholars who find the "correct" version of history—that South Africa's political transition was a "local miracle"—problematic because it does not factor in the new, indirect, and nuanced (but pervasive) modes of interaction in this age of globalization.[246] And indeed, as one scholar observed, the formal ban on the participation of foreign advisors in the South African constitution-making process ironically led to the "hearings" of foreigners being programmed into the Constitutional Assembly's programs, while the voices of local "experts" were silenced unless they worked for a political party.[247]

A considerable number of women had daringly participated in Mahatma Gandhi's *Satyagrahas* and civil-disobedience campaigns, and in fact, the INC had elected a woman, President Annie Besant, in 1925,[248] almost "fifty years earlier than the election of the first woman leader of a major British political party."[249] However, only a negligible number of women were elected to the Assembly.[250] Nonetheless, the Indian Constitution has turned out to be a progressive constitution that guarantees universal adult franchise, equality before the law, and equal protection of the laws; subjects religious practices to the rigor of the fundamental rights ethic; outlaws discrimination on the basis of sex; and provides for affirmative action for women and disadvantaged groups. The engendering of India's Constitution can thus be traced to the emancipatory goals and the inclusive nature of its freedom struggle.

In contrast, the participatory approach to constitution-making adopted in South Africa opened up new opportunities for women to make a direct contribution to the process and to influence the text.

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245. *Id.* (quoting Prof. B. Selassie).

246. *See* KLUG, *supra* note 32, at 69.

247. *Id.* at 70 (quoting Christina Murray, one of the constitutional advisors to the Constitutional Assembly).

248. *See generally* SURUCHI THAPAR-BJÖRKERT, WOMEN IN THE INDIAN NATIONAL MOVEMENT: UNSEEN FACES AND UNHEARD VOICES, 1930-1942, at 44, 54 (2006); Aparna Basu, *The Role of Women in the Indian Struggle for Freedom*, *in* INDIAN WOMEN: FROM PURDAH TO MODERNITY 16, 19 (B.R. Nanda ed., 1976).

249. *See* AMARTYA SEN, THE ARGUMENTATIVE INDIAN 6-7 (2005). The second woman to head the INC was Nellie Sengupta in 1933. *Id.*; *see also* CHANDRA, *supra* note 5, at 272-75 (discussing the enthusiastic participation of women in the "Dandi march"—the famous civil disobedience campaign where Gandhi led a band of freedom fighters to the seacoast at Dandi where he symbolically manufactured salt in defiance of the Salt Act).

250. While the total membership of India's Constituent Assembly stood at 299, only 9 of these members were women.

Furthermore, akin to the INC, the ANC has historically been gender-sensitive and envisioned a nonsexist South Africa. As a result of the ANC Women's League's demonstrations during the MPNP process, its demand for each of the two-member delegations to contain at least one woman was accepted, and South Africa became the first country in which a constitution-making body comprised an equal number of men and women.[251] This is not a small gain given that South African society is still "deeply sexist."[252]

How did the South-African constitution-makers successfully elicit, distill, and incorporate their people's views? By adopting a well-structured consultation method, they ensured that views were drawn from the widest possible section of the population and were distilled, refined, and channeled in a manageable form to the Drafters of the constitution. Next, the constitution-drafting body was of a manageable size. It comprised representatives of all political parties and stakeholders and its discussions were channeled along constitutional issues. Finally, and above all, the parties involved had the will to conclude a settlement.

V. CONSTITUTIONALIZATION OF HUMAN RIGHTS IN COMPARATIVE PERSPECTIVE

A. Constitutional Supremacy and Judicial Review in India and South Africa: Two Divergent Paths to the Same Constitutional Destinations

Daniel Elazar argues that the essence of constitution-making has to do with questions of constitutional choice, and the vital questions to be asked, then, are not just about "what is chosen but who does the choosing and how it is done."[253] Indian and South African constitution-makers traversed two divergent paths in arriving at the same destination of constitutional supremacy and judicial review. Indians' long-expressed demands for a written proclamation of court-policed rights attest to their unwillingness to conform to the Dicean view of rights.[254] Scholars have argued that being long suspicious of their colonial masters' designs, Indians found, in a written bill of judicially enforceable rights, tangible

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251. *See* Klug, *supra* note 203, at 142.

252. *Id.* at 143.

253. Elazar, *supra* note 239, at 232, 244.

254. *See* Nehru Report, 1928, *reprinted in* RAO, *supra* note 74, at 58-60; AUSTIN, *supra* note 11, at 91, 171. In the Constituent Assembly, Munshi, A.K. Ayyar, and Ambedkar, the Chairman of the Drafting Committee, were votaries of judicial review. In separate memoranda, Ayyar and Munshi emphasized that the Supreme Court must be explicitly vested with the power of judicial review. AUSTIN, *supra* note 11, at 91, 171.

safeguards against oppression.[255] The presence of different religious groups also spurred them to steer in the direction of juridical constitutionalism to both assuage minorities' fears of being trampled by a Hindu majority and to disprove Britain's dubious claims in this regard.[256] However, the true reason explaining India's historical rupture with the English constitutional principle of parliamentary supremacy is the indigenous political language of popular sovereignty that developed during and underpinned its resistance to British rule.[257]

Unlike India, a reading of South Africa's constitutional history indicates an initial outright rejection of judicial review.[258] South Africans' unwillingness to repose faith in judicial review, even in their new constitutional order, is understandable given the judiciary's abetment in perpetuating the apartheid regime.[259] Although the ANC's attempts at constitution-making illustrate its long advocacy of and aspirations for human rights, the notion of a bill of rights, arguably at least until 1987, conjured up the fearsome specter (among South Africans) of a mechanism that would perpetuate the white minority's privileges.[260]

According to Heinz Klug, the answer to South Africa's "dramatic constitutionalist turn" from parliamentary supremacy to judicial review is rooted not only in the dynamics of local developments, but also in the globalized constitutionalism of the twentieth century.[261] Eventually, each of the parties, ANC and NP, saw in a justiciable constitution a viable mechanism to resolve their distinct concerns.[262] Furthermore, the World

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255. *See* AUSTIN, *supra* note 11, at 54.

256. *Id.*; *see supra* note 83 and accompanying text.

257. *See, e.g.*, Nehru Report, Aug. 1928, *reprinted in* RAO, *supra* note 74, at 58, 60; Constitutional Proposals of the Sapru Committee, *reprinted in* RAO, *supra* note 74, at 151; Some Facts of Constituent Assembly: Objectives Resolution (Dec. 13, 1946), http://parliamentofindia.nic.in/ls/debates/facts.htm ("This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution; . . . WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are *derived from the people*." (emphasis added)); *see also* M.K. GANDHI, INDIA OF MY DREAMS 7 (1947) ("Swaraj [is] the government of . . . the people. . . . [It] is to be obtained by educating the masses to a sense of their capacity to regulate and control authority.").

258. *See* KLUG, *supra* note 32, at 70. "With the adoption of the 1996 'final' Constitution, the history of constitutionalism in South Africa may be summarized as the rise and fall of parliamentary sovereignty." *Id.* at 30.

259. *Id.* at 35; SPITZ & CHASKALSON, *supra* note 194, at 6.

260. *See, e.g.*, A.B. Xuma, *Africans' Claims in South Africa*, *reprinted in* EBRAHIM, *supra* note 12, at 396; KLUG, *supra* note 32, at 74.

261. *See supra* notes 38-40 and accompanying text. By the time South Africa became free, an American style-constitutionalism with a written constitution and bill of rights was the signature feature of the new international normative order.

262. *See* KLUG, *supra* note 32, at 76.

Bank's "rule of law" mantra to cure the ailing African economy, coupled with South Africa's desire to be attired in a globally accepted constitutional robe before it took its rightful seat in the international community, were other factors that pushed its elites to make the preferred constitutional choices.[263]

B. India: Crafting Transformative Constitutionalism

1. Social Justice, Gender Equality, and Affirmative Action

One fundamental way in which a constitution can forge national unity and aspire to be legitimate is by laying the foundations for an inclusive society by securing equal rights for all members, especially when some groups have long suffered historic injustices. India's Constitution Framers outlawed untouchability and made the practice a criminal offense.[264] However, recognizing that such a deeply embedded, socioreligious, exploitative practice[265] such as untouchability would not be easily uprooted unless the constitutional ban were extended to civil society, the constitution-makers decisively made even private conduct bow to this constitutional ethic.[266]

In the Assembly, Mehta reminded the members that women's groups were demanding not separate electorates, reservations, or privileges, but social, economic, and political justice.[267] Therefore, in carving out the scope and limits of freedom of religion, the Framers were careful to blunt religions' powers to mandate social evils like untouchability, *purdah*, or *Sati*.[268] They also explicitly made "social reform" another ground for limiting freedom of religion. Besides throwing open Hindu religious institutions of a public character to all

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263. *Id.* at 48.

264. *See* INDIA CONST. pt. III, art. 17 ("'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.").

265. *Id.* pt. III, art. 23(1) ("Traffic in human beings and *begar* [bonded labor] and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.").

266. Articles 17 and 23 are not addressed merely to the State. They are applicable to even relations within civil society. *See, e.g.*, People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473 (declaring the freedom from exploitation is available against not just the state but the "whole world").

267. 1 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORTS DEC. 9-23, 1946, 138 (1947).

268. *Sati* refers to the ancient Hindu custom where widows burnt themselves on the funeral pyres of their husbands. Accordingly, the State is not precluded from intervening in and regulating any economic, financial, political, or other secular activities associated with religious practice. *See* INDIA CONST. art. 25(2) ("Nothing in this article shall affect the operation of any existing law or prevent the State from making any law . . . regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.").

classes and sections of Hindus, including the "untouchables,"[269] they extended the principle of nondiscrimination to citizens' use and access to publicly-funded wells, tanks, bathing *ghats*, roads, and places of public resort.[270]

In tune with their progressive outlook, the Framers conferred on all citizens the right to "equality before the law" and "the equal protection of the laws,"[271] explicitly outlawed discrimination on many grounds including sex (though not sexual orientation), and sanctioned affirmative action for women and children, *Harijans* (Untouchables), and socially and educationally deprived classes of citizens.[272] Finally, by constitutionally mandating quotas in the national and state legislatures in proportion to the *Harijan* population, they laid the foundations for a truly participatory democracy.[273]

2. Minorities' Rights: Cultural and Educational Rights

Despite India's partition on religious lines, the leaders, in tune with their unwavering pledge of protecting minorities[274] and creating a secular democracy, wrote into their national parchment guarantees of equality of citizenship, freedom from discrimination, and religious liberty.[275] The British had distorted representative government by using diabolical tools such as the communal electorates and communal quotas or group rights in the form of reservations for representation in the legislature or public service. Although the Framers, by adopting universal adult franchise and jettisoning these reservations, had leaned towards a liberal framework, the question of addressing minorities' cultural rights nevertheless remained.

The Framers granted minorities the right to preserve their languages, script, and culture, and to establish their own educational facilities.[276] In doing this, they were guided by the principle of enlightened accommodation of diverse faiths; consequently, the

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269. *Id.* ("Nothing in this article shall affect the operation of any existing law or prevent the State from making any law . . . providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.").

270. *Id.* art. 15 ("Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.").

271. *Id.* art. 14.

272. *Id.* art. 15(4).

273. *Id.* art. 330.

274. *See Constitutional Proposals of the Sapru Committee*, *reprinted in* RAO, *supra* note 74, at 151.

275. *See* INDIA CONST. arts. 14-16, 25-28.

276. *Id.* arts. 29-30.

Constitution creates a secular society and, by implication, proscribes the establishment of a theocratic state.

One point of contention that arose in the constitution-making process was the right of religious minorities to be governed by their own personal laws. Although the Framers rushed to divest Hindu religious beliefs and practices of some of their inhumane content, such as untouchability and *Sati*, they dithered when it came to the reform of non-Hindu religious traditions. Mehta and Masani argued that the existence of separate personal laws was hampering national unity and recommended that the provision of a uniform civil code be made a justiciable right.[277] However, deferring to the objections of Muslim leaders both inside and outside the Assembly, the Framers compromised and decided to make this proposal a Directive Principle.[278] Therefore, as things stand today, there are different laws governing personal matters for different communities in India.[279]

3. Property Rights

One of Nehru's first assertions in the Constituent Assembly was: "The first task of this Assembly is to free India *through a new constitution, to feed the starving people, and to clothe the* naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity."[280]

How did India's constitution-makers approach their task of constitution-making in their quest to build a substantive vision of social justice? This can be best seen in their approaches to carving property rights and the state's socioeconomic obligations in the Constitution. I will take up the right to property first.

a. The Right to Property

India's nationalist leaders had long begun advocating and designing land reform measures to ameliorate the plight of poor peasants.[281]

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277. *See* RAO, *supra* note 11, at 325.

278. *See* INDIA CONST. art. 44.

279. Personal matters are marriage, divorce, maintenance, adoption, and inheritance. *See generally* FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 21, 88, 100, 135, 215 (1999).

280. 2 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORTS, JAN. 20-25, 1947, at 316-17 (1947) (emphasis added).

281. *See* CHANDRA, *supra* note 5, at 327. To assist peasants, the Congress ministries that had held power for twenty-eight months under the 1935 colonial constitutional framework had introduced agrarian laws for debt relief, to restore lands lost during the great Depression of the

Extending the state's power to deprive a person of his property in the name of social justice was an issue that they could not escape, and therefore, the debates in the Assembly veered around devising the type of constitutional protection that should be accorded to the right to property without hampering the goal of achieving social justice.[282] Although initially they adopted a due process clause in its classic form,[283] on seeing the dangers it would pose to "expropriatory legislation," they ultimately decided to deny due process protection to property rights.[284]

b. Directive Principles of State Policy

India's leaders embraced a unified vision of human rights.[285] However, realizing that speeding the country's economic progress overnight would be nearly impossible, they were compelled to make a distinction between judicially enforceable rights (Fundamental Rights) and positive socioeconomic obligations of the State (Directive Principles of State Policy) in the Constitution.[286] Some members feared that the nonenforceability element of the Directive Principles would render them inefficacious.[287] To prevent this, they constitutionalized the Directive Principles as "fundamental in the governance of the country" and imposed a "duty" on the State "to apply these principles in making

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1930s, and to ensure security of tenure to tenants. *Id.* See also the substance of the Karachi Resolution in the text accompanying *supra* notes 80-81.

282. *See* AUSTIN, *supra* note 11, at 84-87, 92; RAO, *supra* note 11, at 322.

283. The due process clause in its classic form can be found in the U.S. Constitution. *See* U.S. CONST. amend. V:

> *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Id. (emphasis added).

284. *See* AUSTIN, *supra* note 11, at 87.

285. *See supra* note 11 and accompanying text.

286. *See* AUSTIN, *supra* note 11, at 50. The content of Part IV has expanded since the Constitution was first made. Initially, Part IV contained principles that gave directives such as securing for men and women equally the right to an adequate means of livelihood and equal pay for equal work; protecting children and youth against exploitation and moral and material abandonment; providing public assistance in cases of unemployment, old age, sickness, and disablement and in other cases of undeserved want; providing just and humane conditions of work and maternity relief; and providing free and compulsory education for all children up to the age of fourteen years. *Id.*

287. *See also* PARAMJIT S. JASWAL, DIRECTIVE PRINCIPLES JURISPRUDENCE AND SOCIO-ECONOMIC JUSTICE IN INDIA 72 (1996).

laws."[288] In short, they relied on the political process to provide the impetus for the fulfillment of the Constitution's social promises.

These social promises include: securing for men and women equally the right to an adequate means of livelihood,[289] equal pay for equal work for both men and women,[290] and a living wage for workers.[291] The emphasis on *Panchayats*[292] and the prohibition on alcohol consumption[293] in Part IV of the Constitution embody the Gandhian vision.

C. The Story of Constitutionalism and Rights: Social Action Litigation and the Indian Supreme Court's Socioeconomic Jurisprudence

The story of constitutionalism and rights in India has unfolded in the form of a poignant three-act play with the last part still on. While the ornate Indian Supreme Court (Court) is still the setting, the characters of those acting as judges and crowding the stage as litigants have undergone a dramatic transformation while the scriptwriters (judges) continue to be prominent characters.

1. Part I: 1950-1977 (Ascendancy of Property Rights)

The play opens in the year 1950 with India's robed brethren embarking on their ordained task to uphold the infant republic's Constitution. A.K. Gopalan, a communist leader detained under the Preventive Detention Act of 1950 (PDA), is the first litigant-entrant on the human rights stage.[294] Contending that the word "law" in Article 21 of the Indian Constitution[295] does not mean mere state-made law, he

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288. *See* INDIA CONST. art. 37 ("The provisions contained in this Part [IV] shall not be enforceable by any court, but the principles therein laid down are nevertheless *fundamental in the governance of the country* and it shall be the *duty* of the State to *apply these principles* in making laws." (emphasis added)). While the Directive Principles *guide* the exercise of legislative power they, however, do not *control* the same.

289. *Id.* art. 39(a).

290. *Id.* art. 39(d).

291. *Id.* art. 43. While some of these principles are ideals that the State ought to strive for, some others like the duty to provide free education to all children are goals that the State should achieve within a specified time period. *See* Marybeth Lipp, *Legislators' Obligation To Support a Living Wage: A Comparative Constitutional Vision of Justice*, 75 S. CAL. L. REV. 475, 505-07 (2001).

292. INDIA CONST. art. 40 (Development of Village Self-Government).

293. *Id.* art. 47.

294. A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27, 31-32 (Judgment of Kania, J.).

295. *See* INDIA CONST. art. 21. It is the seminal clause of the Indian Constitution and reads: "No person shall be deprived of his life or personal liberty except according to procedure

argues that the procedure of the PDA, which curtailed his right to life, must be infused with natural justice if it has to be constitutionally sound.[296] Sadly, turning deaf to this cogent plea, the Court affirms the validity of the PDA.[297] Following Gopalan, a majority of the litigants streaming onto the stage are disgruntled landlords and princes distressed at being stripped of their lands with little compensation or royal privileges.[298] Their storylines and dialogues revolve around the right to property and the successive amendments made by Parliament to implement the Directive Principles.[299]

By the time the curtains close on the first part of the play, two and a half decades had sped by with the Court's narrow ruling in *Gopalan* holding the field, its alignment with the propertied classes leaving the constitution's social justice promise unfulfilled and the Court's subsequent kowtow to the executive transforming India—a constitutional democracy—into a constitutional dictatorship.[300]

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established by law." *Id.* Hereinafter the terms "Article 21" and "right to life" shall be used interchangeably.

296. It is on this basis that he challenges the validity of the Preventive Detention Act, 1950. *Gopalan*, A.I.R. 1950 S.C. at 32.

297. *Id.*

298. During the first two decades after independence, Parliament and the Court were locked in a fierce battle over land reform legislation, compensation for expropriation of private property, and the abolition of the privy purses (compensation for erstwhile princes). The Court aligned itself with the propertied classes and repeatedly blocked Parliament's attempts to water down the right to property through constitutional amendments to implement the directive principles. In *Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643, the Court affirmed the primacy of Fundamental Rights over Directive Principles and held that Parliament had no power to amend the Fundamental Rights including the right to property. The Court's antipoor judgments became an issue in the 1971 general elections, and Indira Gandhi, who was swept to power on her popular "drive away poverty" slogan, enacted a series of constitutional amendments that made any law implementing *any or all* of the directive principles immune from judicial review. In the historic case of *Keshavananda Bharati v. State of Kerela*, A.I.R. 1973 S.C. 1461, a thirteen-judge constitutional bench elaborating on the scope of Parliament's constituent powers conceded that although Parliament had unlimited powers to amend any part of the Constitution (including the right to property), such sweeping away of judicial review was destructive to the "basic features" or "basic structure" of the Constitution and therefore unconstitutional.

299. *See, e.g.*, Keshavananda Bharati v. State of Kerela, A.I.R. 1973 S.C. 1461 (declaring constitutional supremacy and judicial review to be the pillars on which the constitutional cathedral is mounted and which are immune from the crushing impact of even a constitutional amendment); Minerva Mills v. Union of India, A.I.R. 1973 S.C. 1461; JASWAL, *supra* note 287, at 165-71.

300. In 1975, the then Prime Minister, Indira Gandhi, declared an "emergency," ostensibly to safeguard the country's unity from "internal disturbances," but in effect to perpetuate her rule. During the emergency, opposition parties' leaders were tossed into prison, the press was muzzled, strong willed judges were arbitrarily transferred or superseded, and the Constitution and the fundamental rights therein were suspended. In *Additional District Magistrate v. Shivkant Shukla*, A.I.R. 1976 S.C. 1207, the Supreme Court unfortunately upheld this emergency and declined to issue a writ of *habeas corpus* for the enforcement of the plaintiff's right under Article 21. In

2. Part II: The Post-Emergency Period: 1978-Early Nineties

The play reopens in 1978 against the backdrop of a public exultant at having ushered in a new government that promises to resuscitate constitutional safeguards extinguished during the dreaded emergency. A fervor of freedom fills the air, with the judiciary, press, civil servants, and the public all determined to prevent their liberties from being eclipsed ever again.

A young citizen, Maneka Gandhi, challenges the government's impoundment of her passport without affording her an opportunity to be heard in her defense. Supreme Court justices Krishna Iyer and P.N. Bhagwati—the principal characters and in a sense the scriptwriters of the unfolding human rights story—are part of the constitutional bench deciding the case.[301] In a remarkable show of judicial statesmanship, the Court overrules its 1950 holding[302] and declares that "life" in Article 21 does not mean mere animal existence and that the overarching purpose of fundamental rights is the self-development of a person.[303] It asserts the doctrine of substantive due process as integral to Part III of the Constitution and emanating from a collective understanding of the scheme underlying Articles 14 (the right to equality), 19 (the fundamental freedoms) and 21 (the right to life).[304] It affirms that any procedure that curtails life and liberty must be "just, fair and reasonable."[305] The procedure cannot be "arbitrary, fanciful or oppressive."[306]

Post-1978: The far-reaching impact of the *Maneka Gandhi* ruling is visible from the assorted characters, now armed with novel issues, posting plain postcards[307] and flocking to the Court for redress: prisoners,[308] slum-dwellers,[309] bonded laborers,[310] fiery journalists,[311]

March 1977, Gandhi lifted the emergency and called for general elections. As expected, she and her party were routed in the election. The Janata party that came to power enacted the 44th Constitution Amendment Act, 1978 to undo the damage inflicted on the Constitution by Gandhi.

301. Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597.

302. *Gopalan*, A.I.R. 1950 S.C. at 31-32.

303. *Maneka Gandhi*, A.I.R. 1978 S.C. at 620.

304. *Id.* at 622-23.

305. *Id.* at 622.

306. *Id.*

307. There are several cases where the victims have penned their woes in plain cost cards or letters to the Court, and the Court has treated them as writ petitions. *See infra* note 347 and accompanying text (discussing epistolary jurisdiction).

308. *See, e.g.*, Sunil Batra v. Delhi Admin., A.I.R. 1978 S.C. 1675 (prohibiting the imposition of solitary confinement by prison authorities without judicial supervision); Sunil Batra v. Delhi Admin., A.I.R. 1980 S.C. 1565 (expanding prisoners' fundamental rights to include freedom from mental and physical torture); Charles Sobraj v Delhi Admin., A.I.R. 1978 S.C. 1590 (prohibiting the use of chains and fetters on prisoners); Prem Shanker Shukla v. Delhi

zealous environmentalists,[312] social-activist law school professors,[313] public interest lawyers, and nongovernmental organizations.[314]

What do the judges do then? Do they forsake these new litigants and these legitimate causes and revert to their earlier role of simply presiding over adversarial proceedings and passing orders? How do they draw from constitutional normativity to carve new rights and design novel remedies? In short, how does the Supreme Court *of* India morph itself into the "Supreme Court *for* Indians"?[315] This is, in essence, the story of constitutionalism and rights in India.

a. A Substantive Vision of Social Justice—An Array of New Economic and Social Rights

Following *Maneka Gandhi*, the Court sought to address broader social issues and thus began to protect socioeconomic rights. How did it do this? Using the flavor of Directive Principles to enrich the content of the right to life, it carved out an array of new social and economic rights, including the right to live with dignity, right to a livelihood, right to free legal aid, right to a clean environment, right to education, right to health and medical care, right to shelter, and right to food.[316] The historic

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Admin., A.I.R. 1980 S.C. 1535 (prohibition on handcuffing of prisoners without judicial sanction); Francis Coralie Mulin v. Union Territory of Delhi, A.I.R. 1980 S.C. 849 (articulating the right for prisoners and detainees to meet with their lawyers).

309. *See, e.g.*, Olga Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180.

310. *See, e.g.*, Bandhua Mukti Morcha v. Union of India, A.I.R. 1982 S.C. 802.

311. *See, e.g.*, Sheela Barse v. State of Bihar, A.I.R. 1981 S.C. 1543 (right to speedy trial); Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 1543 (right to speedy trial); Sheela Barse v. Sec'y, Children Aids Soc'y, A.I.R. 1987 S.C. 656; Sheela Barse v. Union of India, A.I.R. 1986 S.C. 1773; Hussainara Khatoon v. Home Sec'y, State of Bihar, A.I.R. 1979 S.C. 1360 (right to speedy trial and free legal services for those accused of a crime).

312. *See, e.g.*, Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652 (ordering the closure of limestone quarries in the Himalayan mountain ranges on the grounds that their operation were upsetting India's ecological balance and harming the environment); M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086.

313. Upendra Baxi v. State of Uttar Pradesh, A.I.R. 1987 S.C. 191 (right to a quality life even for those housed in a public reformatory institution).

314. *See, e.g.*, People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1473; People's Union for Democratic Rights v. Union of India, A.I.R. 1985 Del. 268; People's Union for Democratic Rights v. Union of India, A.I.R. 1987 S.C. 355.

315. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *in* THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 32 (Radhika Coomaraswamy & Neelan Tiruchelvan eds., 1987).

316. It was the early social rights jurisprudence (of the late eighties) in the Court and the lessons of the Indian experience that inspired and informed South Africans in their tumultuous journey of crafting a transformative constitution.

Maneka Gandhi ruling triggered the blossoming of Article 21 in the criminal justice realm as well.[317]

i. Right to Dignity and Right to Livelihood

In a case concerning the plight of bonded laborers, the Court emphatically declared that the right to life included the right to live with human dignity, and this right derived its "life breath" from the Directive Principles.[318] Accordingly, the Court ordered the State to release and rehabilitate bonded laborers and ensure that they received minimum wages.[319] Significantly, the Court conceived forced labor as covering situations where workers' "utter grinding poverty" compels them to accept work for less than the minimum wage.[320]

In *Olga Tellis v. Bombay Municipal Corp.*,[321] the Court upheld the plea of a group of pavement dwellers who were resisting evacuation by the Bombay Municipal Corporation and asserted that in light of the State's duty to secure for its citizens an adequate means of livelihood and the right to work,[322] it would be "sheer pedantry to exclude the right to livelihood from the content of the right to life."[323] "Deprive a person of his livelihood and you shall have deprived him of his life," said the Court.[324]

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317. *See, e.g.*, Sunil Batra v. Delhi Admin., A.I.R. 1978 S.C. 1675 (right to lead a convict's life in prison with dignity and freedom from torture); Prem Shanker v. Delhi Admin., A.I.R. 1980 S.C. 1535; Citizens for Democracy Through Its President v. State of Assam, A.I.R. 1996 S.C. 2193 (freedom from cruel and unusual punishment or treatment); Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360 (right to speedy trial); Kedra Pahadiya v State of Bihar, A.I.R. 1981 S.C. 1675 (right to speedy trial); Francis Coralie Mullin v. Delhi Admin., A.I.R. 1981 S.C. 746 (right to live with dignity which includes right of a detainee to meet her family and lawyers); Nelabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1966 (right to be compensated for violation of right to life); Jolly George Varghese v. Bank of Cochin, A.I.R. 1989 S.C. 420 (freedom from imprisonment for the nonfulfillment of a contractual obligation).

318. Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802. The Court also ordered the State to improve the working conditions in the quarries by installing dust-sucking and drinking water machines. *Id.* The Directive Principles the Court looked to for guidance included article 39(e) (health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength). *Id.*

319. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. at 811; *see also* Chameli Singh v. State of Uttar Pradesh, A.I.R. 1996 S.C. 1051.

320. *See* Neeraja Choudhary v. State of Madhya Pradesh, A.I.R. 1984 S.C. 1099, 1490.

321. A.I.R. 1986 S.C. 180.

322. *Id.* at 193; *see* INDIA CONST. arts. 37, 41; M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1312 (2003).

323. *Olga Tellis*, A.I.R. 1986 S.C. 193.

324. *Id.*

ii. Right to Free Legal Services

Similarly, drawing support from the Directive Principle of free legal aid,[325] the Court, in a series of cases, created a socially sensitive judicial process by carving the right to free legal services from Article 21.[326] The Court reasoned that "a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer cannot possibly be regarded as fair[,] just[,] and reasonable."[327]

iii. Right to a Clean and Wholesome Environment

In 1978, the conferment of a new duty on the State to protect and improve the environment[328] led to the greening of the Constitution and to the further protection of broad social interests under the Article 21 umbrella. Reiterating that life in Article 21 meant a quality life, the Court held that a person's right to live with human dignity would be violated if he were compelled to eke out an existence in a polluted, unhygienic, and unhealthy environment.[329] On this basis, the Court halted mining in limestone quarries,[330] shut down tanneries which were polluting water,[331] slapped heavy fines on polluting industries, compelled them to compensate their environmentally injured victims to pay for the cost of the damaged ecology,[332] and called for the creation of powerful environmental courts.[333]

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325. *See* INDIA CONST. pt. IV, art. 39A:

> Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

326. *See, e.g.*, Hussainara Khatoon v. Home Sec'y, State of Bihar, A.I.R. 1979 S.C. 1360; M.H. Hoskot v. State of Maharashtra, A.I.R. 1978 S.C. 1548; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378.

327. *Khatoon*, A.I.R. 1979 S.C. at 1373; Khatri v. State of Bihar, A.I.R. 1981 S.C. 928 (holding that governments cannot use the pretext of financial or administrative inability to escape their constitutional obligation).

328. *See* INDIA CONST. art. 48A. This provision was inserted in the constitution by the 42nd Constitution Amendment Act, 1978.

329. *See, e.g.*, Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1987 S.C. 359; Sri Satchinanda Pandey v. State of West Bengal, A.I.R. 1987 S.C. 1109; M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086; Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420.

330. Rural Litigation & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1987 S.C. 359.

331. *See, e.g.*, M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1037; Vellore Citizens' Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2721.

332. *See, e.g.*, Tarun Bhagat Sangh Alwar v. State of Uttar Pradesh, A.I.R. 1993 S.C. 293.

333. *See* A.P. Pollution Control Bd. v. M.V. Nayudu, A.I.R. 1999 S.C. 812.

iv. Right to Health[334]

In *Paschim Banga Khet Mazdoor Samity & Others v. State of West Bengal*,[335] a hapless laborer was refused proper and timely emergency treatment at a series of government hospitals either because of no vacancy there or unavailability of sophisticated medical facilities for treating serious injuries.[336] He therefore, incurred heavy expenditure at a private hospital.[337] A nongovernmental organization of agricultural laborers petitioned the Supreme Court on his behalf.[338] The main issue before the Court was whether the nonavailablity of facilities for treatment of serious injuries—sustained by the petitioner—in the various government hospitals that he had turned to for aid had violated his fundamental right to life under the Indian Constitution.[339] The Court repeated its earlier warning[340] that financial constraints were no excuse for the State to forego its constitutional obligations and directed the

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334. Although it was not until 1995 that the Court clearly carved out a right to health from Article 21, glimpses of this right's origins can be detected in the links the Court drew between quality of "life" in Article 21 and the health of a person in its environmental and prison jurisprudence. References to right to health can be found in the following five Directive Principles:

1) Art. 47 (State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties);
2) Art. 38 (State has to secure a social order for the promotion of the welfare of the people);
3) Art. 39 (e) (health of workers, men, women and children must be protected against abuse);
4) Art. 41 (The State shall make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want);
5) Art. 48 (a) (State's duty protect and improve the environment).

Drawing from these sources, the Court for the first time held that right to health and medical aid to protect the health and vigor of a worker—while in service or post-retirement—is integral to Article 21. *See* Consumer Education & Research Centre v Union of India, A.I.R. 1995 S.C. 922 (a case involving occupational health hazards of workers in asbestos factories).

335. Paschim v. State of W. Bengal, A.I.R. 1996 S.C. 2426.

336. *Id.* para. 2.

337. *Id.*

338. *Id.* para. 3.

339. *Id.* para. 4.

340. *Id.* para. 16 (referring to its earlier decision in Khatri v. State of Bihar, A.I.R. 1981 S.C. 928); *see also* discussion *supra* note 327. In *Paschim*, the Court stated:

> In the context of the constitutional obligation to provide free legal aid to a poor accused, this Court has held that the State cannot avoid its constitutional obligation . . . on account of financial constraints. The said observation *would apply with equal, if not greater force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life.*

Id. para. 16 (emphasis added).

government to compensate the laborer.[341] The Court reasoned that because the Constitution envisaged a welfare state, providing adequate medical facilities by running adequately staffed and equipped hospitals and health centers is the government's primary duty.[342] Furthermore, the constitutional mandate to safeguard the right to life of every person, made "preservation of human life" paramount.[343] Therefore, failure of the government hospitals to provide timely medical treatment to the petitioner denied him his right to health—an integral part of the right to life.[344] However, the Court did not stop there. It went on to list positive steps that the government needed to take up on a "time-bound" basis to improve emergency health care infrastructure and services.[345]

v. Novel Procedural Innovations To Advance Social Justice

The Court also designed socially sensitive procedural innovations. First, by relaxing the stern Anglo-Saxon principle of *locus standii*, it began to allow public-spirited citizens to approach the Court on behalf of those who, by reason of "poverty, helplessness or disability or social or economically disadvantaged position[,] were unable to do so."[346] The recognition of "epistolary jurisdiction" allowed many helpless persons to use the plain postcard or telegram to ring the constitutional bell of justice.[347] Where it has been difficult for public-spirited citizens and organizations to establish or prove effectively violations of rights, the Court has come to their assistance by appointing social activists, teachers, journalists, and judicial officers as commissioners for fact and data gathering purposes and to make appropriate recommendations under judicial supervision.[348] The Court's zeal to dispense distributive justice and enforce the performance of "public duties" by the monolithic state

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341. *Id.* para. 9.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* paras. 10-14.
346. *See* S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 188; cases cited *supra* notes 321-322, 324.
347. *See, e.g.*, Sunil Batra v. Delhi Admin., [II] A.I.R. 1980 S.C. 1579 (conversion of a postcard written by a death-row convict into a petition); Nilabeti Behera v. State of Orissa, A.I.R. 1993 S.C. 1960 (acceptance by the Court of a letter written by a poor widow complaining of the disappearance of her son). Beginning in the late seventies, a "Public Interest Cell" for receiving and culling out bona fide postal complaints for further judicial attention has become an integral part of the Court.
348. *See* P.N. Bhagwati, *Social Action Litigation: The Indian Experience*, *in* THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 20, 27 (Neelan Tiruchelvan & Radhika Coomaraswamy eds., 1987).

bureaucracy has also led to its involvement in administrative implementation.[349] For example, in a case involving the pitiable conditions in a mental institution, the Court went to the extent of determining the amount to be allocated for providing meals and scaling up the official limit placed on the purchase of drugs.[350]

D. Constitutionalization of Human Rights in South Africa: Crafting Transformative Constitutionalism

1. Equality and Social Justice

The South African Constitution states that its Bill of Rights is a "cornerstone of democracy" and "enshrines the rights of all people in [the] country and affirms the democratic values of human dignity, equality and freedom."[351] Significantly, the rights are made applicable not only vertically, between individuals and the state, but in certain circumstances also horizontally, between individuals and other private institutions.[352] Article 39 calls upon the courts in the interpretation of rights to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[353]

As with the Indian Constitution, the orientation of the South African Constitution regarding equality and social justice can be gleaned from its provisions relating to equality, property, economic, social, and cultural rights. The white minority leaders and the ANC conceptualized the role of constitutionalism and a bill of rights in a postapartheid South Africa in two diametrically opposite ways. The ANC understood constitutionalism to be both a check on the state's predatory impulses and a means to empower the state to erase the vast inequalities it would inherit from apartheid.[354] But the white minority, wedded to the nineteenth-century liberal conception of constitutionalism, visualized the Bill of Rights as a tool solely to protect the status quo from state interference.[355] These

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349. Baxi, *supra* note 315, at 42.

350. *See, e.g.*, Rakesh Chand Narain v. State of Bihar, A.I.R. 1978 S.C. 928; *see also* Upendra Baxi v. State of Uttar Pradesh, A.I.R. 1987 S.C. 191 (giving directions for the day-to-day working of the Agra Protective Home for Women).

351. S. AFR. CONST. art. 7(1).

352. *Id.* § 8(2) ("A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.").

353. *Id.* § 39(1)(a). This Article also requires courts to consider international law and permits them even to consider foreign laws. I will revisit this point later in this section.

354. *See* KLUG, *supra* note 32, at 91; *see also* Katharine Savage, *Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiation Process*, *in* THE POST-APARTHEID CONSTITUTIONS, *supra* note 8, at 164, 177.

355. *See* KLUG, *supra* note 32, at 90.

tensions surrounded the constitutionalization of property rights and socioeconomic rights in South Africa.

A commitment to a more inclusive and egalitarian regime is a vital building block in a transitional society, particularly one such as South Africa, given its painful past of racial inequalities and segregation. It is no wonder that the South African Constitution declares in its evocative preamble:

> We, the people of South Africa . . . Believe that South Africa belongs to all who live in it, united in our diversity. We therefore . . . adopt this Constitution as the supreme law of the Republic so as to . . . *Heal the divisions of the past* and *establish a society based on democratic values, social justice and fundamental human rights*.[356]

As a first step, the Constitution guarantees not only formal equality but also substantive equality.[357] The equality clause was strengthened in the 1996 Constitution by the addition of this substantive dimension to it.[358] Furthermore, a "restitutionary" dimension to equality is endorsed by providing for affirmative action for the advancement of persons previously disadvantaged by unfair discrimination.[359]

Being a recently written Constitution, it has sexual orientation—an issue that has grabbed public and international attention only lately—as one of the explicitly prohibited grounds for discrimination.[360] Furthermore, the prohibition on discrimination extends to private persons.[361]

2. Right to Property

Given South Africa's utterly discriminatory land regime during the apartheid era, the topic of the constitutionalization of the right to property evoked strong feelings on both sides. The opponents saw in the

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356. *See* S. AFR. CONST. pmbl. (emphasis added).

357. *Id.* § 9; *see* IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 232-33 (5th ed. 2005).

358. *See* Sarkin, *supra* note 193, at 80. The term "right to equal benefit of the law" was added in the 1996 Constitution. *Id.*; *see* S. AFR. CONST. § 9(1)-(2):

> Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

359. *See* CURRIE & DE WAAL, *supra* note 357, at 233.

360. *See, e.g.*, The Amsterdam Treaty: A Comprehensive Guide, http://europa.eu/scadplus/leg/en/lvb/a10000.htm (last visited Oct. 15, 2007).

361. *See* CURRIE & DE WAAL, *supra* note 357, at 233.

constitutionalization of property rights the perpetuation of white privileges and the racially skewed maldistribution of property. Those who favored their inclusion in the Constitution argued that their presence in the document would boost investor confidence.[362] The Constitution reflects this balancing of interests because it is both backward- and forward-looking.[363]

What does the property clause do? It first protects private property from confiscation by the State and requires any expropriation of property to be compensated.[364] However, it has a distributive dimension which is clear from its mandate that the property may be taken for the purpose of land reform and to other reforms devised to bring about equitable access to all of the nation's natural resources.[365] The right also entitles a person or community whose land tenure is legally insecure due to past racially discriminatory laws or practices to legally secure tenure or comparable redress.[366] Furthermore, a person or community who has had property dispossessed after June 19, 1913, as a result of past racially discriminatory laws or practices is entitled to restitution or equitable redress.[367] And it is for the Parliament to determine the scope of rights to tenure and restitution.[368] Finally, the property clause categorically states that nothing in it "may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."[369]

3. Cultural Rights

The South African Constitution confers on "everyone" the right to use the language and to participate in the cultural life of his choice, consistent with the Bill of Rights.[370] Furthermore, it guarantees persons belonging to a cultural, religious, or linguistic community the right to "enjoy their culture, practise their religion and use their language; and to form . . . associations" for this purpose.[371] Finally, it provides for the creation of a Commission for the Promotion and Protection of the Rights

362. *Id.* at 533.
363. *See* S. AFR. CONST. § 25.
364. *Id.* § 25(1), (2)(b).
365. *Id.* § 25(4)(a).
366. *Id.* § 25(6).
367. *Id.* § 25(7).
368. *Id.*
369. *Id.* § 25(8).
370. *Id.* § 30.
371. *Id.* § 31.

of Cultural, Religious and Linguistic Communities.[372] This provision was formulated with an eye toward traditional leaders and some of the right-wing sections of the population.[373] The institution, status, and role of traditional leadership according to customary law are subject to the Constitution, and courts must apply customary law as long as it is consistent with the Constitution and relevant legislation.[374] This approach, according to Yash Ghai, represents a significant victory for South African women, given their inferior status under traditional customary law.[375]

4. Social and Economic Rights

The Constitution's transformative character is manifest in its recognition of social rights as judicially enforceable rights. An affirmation of the indivisibility of human rights can be found in the South Africans' aspirations for "houses, security and comfort" amongst other civil and political rights in their ringing declaration of 1955.[376] However, given the difficulty of adjudicating socioeconomic rights claims and the paucity of resources, it is not surprising that the question of whether and how to constitutionalize socioeconomic rights that arose during India's constitution-making also hovered over the proceedings of the South African Constitutional Assembly.[377]

An intense academic and public debate on this question preceded the final decision to include a broad array of socioeconomic rights as judicially enforceable in the Constitution.[378] It is worth noting that the South Africans had only the Irish and Indian constitutional examples as guidance.[379] Although in both these countries socioeconomic rights were

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372. *Id.* § 185.

373. Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095, 1128 (2000).

374. *See* S. AFR. CONST. art. 185.

375. *See* Ghai, *supra* note 373, at 1129.

376. *See* Freedom Charter of 1955, *reprinted in* EBRAHIM, *supra* note 12, at 415-19.

377. *See* Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 41-1, 41-3 to 41-4 (S. Woolman et al. eds., Kenwyn: Juta, 2001).

378. *Id.*; *see* Albie Sachs, The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case 6, http://www.borini.info/uploads/documents/Albie%2020Sachs.pdf (last visited Oct. 15, 2007) (manuscript on file with the author). Three distinct positions had congealed in the debate on this topic. While some supported the idea of making socioeconomic rights mere aspirational goals, some others supported listing them as nonenforceable "guiding principles" in the Constitution. The third current favored coining appropriate language to make socioeconomic rights as enforceable constitutional rights. Sachs, *supra*.

379. Sachs, *supra* note 378.

in the form of directives of state policy,[380] the South Africans were conversant with the interesting twist in the Indian constitutional story: the Supreme Court's "creative" use of Directive Principles to expand the scope of civil and political rights.[381]

The South African Constitution also affirms the influence of the international human rights model. After all, by the time South Africa's founding moment had arrived, the cleavage in the concept of human rights had faded and the world community had reiterated the indivisibility and interdependence of human rights.[382] According to Sandra Liebenberg, the impetus for the South African drafters to draw the concepts of progressive realization and resource capability[383] from the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[384] was their desire to make their constitutional law consonant with international human rights norms and nudge their courts toward using international law as a tool to interpret these socioeconomic rights.[385]

Reflecting the inspirational influence of both postcolonial Indian practices and the international human rights model, the South African Constitution includes an array of judicially enforceable socioeconomic rights: the right to adequate housing;[386] right to health care, food, water, and social security;[387] and the right to a clean environment.[388] It also guarantees a right to basic education, which extends both to children and adults.[389]

5. Access to Justice

The South African Constitution also affirms its commitment to social justice by ensuring that even the poor, downtrodden, and vulnerable have access to justice. It empowers vulnerable groups by explicitly expanding the categories of persons who may approach a court for redress. "Anyone acting as a member of, or in the interest of, a group

380. *Id.*
381. *Id.*
382. *See, e.g.*, The Vienna Declaration and Programme of Action, *adopted by* the World Conference on Human Rights, U.N. Doc. A/CONF. 157/23, pt. I, para. 5 (June 14-25, 1993).
383. *See* Liebenberg, *supra* note 377, at 41-4.
384. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI, 21) U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
385. Liebenberg, *supra* note 377, at 41-1, 41-3 to 41-4.
386. S. AFR. CONST. § 26.
387. *Id.* § 27.
388. *Id.*
389. *Id.* § 29.

or a class of persons"[390] and "anyone acting in the public interest"[391] may also approach the court alleging that a right in the Bill of Rights has been infringed or threatened.

E. Analysis

What lessons does a comparison of the stories of constitution-making in India and South Africa offer? The Indian constitutionalism story tells us that the principles enshrined in a constitution are arguably more important than the actual process of drafting.

A core set of rights contained in the UDHR finds a place in both the Indian and South African Constitutions. However, the following civil and political rights are explicitly listed in the South African Constitution but are not listed in the Indian Constitution: freedom from torture, right to speedy trial, right to human dignity, right to political participation, freedom from deprivation of citizenship, and right to privacy. They have nonetheless become a part of India's constitutional *dharma* thanks to the Supreme Court's judicial exegesis.[392] Thus a judiciary can adapt a constitution to pressing socioeconomic needs.

The above analysis clearly proves that what the post-emergency Indian Supreme Court did, in part, for constitutionalism in India was the whole of what the constitution-makers accomplished for constitutionalism in South Africa. This then leads us to an interesting question about constitutional design: What crucial provisions must be included in a constitution such that they will in the future unlock its transformative potential? To put it in another way: What would be the salient difference between a constitution that is protective of the status quo and a constitution that is transformative? As per the lessons drawn from our two case studies, the answer is clearly a powerful and independent judiciary constitutionally mandated to be an *engine* of the transformative process.

But a comparison of constitutionalism in India and South Africa also underscores a second issue, not exclusive of the one that I have raised immediately above: namely, the possibility of a transformative constitution being used by the courts to *disallow* too much and too quick a change. An analysis of two important socioeconomic rights cases by the Indian Supreme Court and the South African Constitutional Court underscores this point. In the *Paschim* case,[393] as we have seen, although

390. *Id.* § 38(c).
391. *Id.* § 38(d).
392. *See, e.g.*, cases cited *supra* notes 317, 321, 326-327.
393. *Paschim*, A.I.R. 1996 S.C. 2426.

absent an explicit right to health care (including emergency medical treatment) in the Indian Constitution, the Indian Supreme Court was willing to use the Directive Principles to go so far as imposing a (judicially enforceable) positive obligation on the government to provide emergency medical treatment to the people.

But in *Soobramoney v. Minister of Health*—a health rights case—the South African Constitutional Court was unwilling to use the right not to be refused "emergency medical treatment" to fulfill the Constitution's transformative mandate.[394] In other words, the Constitutional Court used the South African Constitution—a "transformative" constitution—as a brake rather than as an accelerator and blunted the Constitution's capacity to overturn apartheid's socioeconomic legacy. In that case, the petitioner, an unemployed man in the final stages of chronic renal failure, approached the court to direct a provincial hospital to provide him with ongoing dialysis treatment.[395] The complainant relied on the right to life[396] and on Section 27(3)[397] of the Constitution.[398] He argued that without this treatment he would die because he could not afford to take treatment at a private clinic.[399] The Constitutional Court found no breach of these rights and accordingly dismissed the petitioner's appeal.[400]

Although the Constitutional Court looked to *Paschim*[401] for guidance in shaping the content of the right to emergency medical care,[402] it narrowed the scope of this right.[403] It contended that this right aptly applied only to the situation that arose in *Paschim*,[404] that is, where emergency medical care was denied at various public hospitals either because the hospitals did not have the necessary facilities for treatment or because they did not have room to accommodate the petitioner.[405] According to the Constitutional Court, freedom from arbitrary denial or exclusion of emergency medical care was the essence of the right to emergency medical treatment.[406] Because Soobramoney's renal failure

394. Soobramoney v. Minister of Health, 1998 (1) SALR 765 (CC).
395. *Id.* at 769 (para. 1).
396. S. AFR. CONST. § 11.
397. *Id.* § 27(3) ("No one may be refused emergency medical treatment.").
398. *Soobramoney*, 1998 (1) SALR 771 (CC).
399. *Id.* at 770 (para. 5).
400. *Id.* at 778 (para. 36).
401. *Paschim*, A.I.R. 1996 S.C. 2426.
402. *Soobramoney*, 1998 (1) SALR 773 (CC) (para. 18).
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* para. 20.

was not an "emergency" which calls for immediate remedial treatment, no relief was granted to him.[407]

Both the Indian and South African constitutional Framers used the framework of rights to negotiate differences and claims and to balance interests. The balancing of interests in both Constitutions is perhaps nowhere more clearly evident than in relation to the property and social justice provisions. And as we have seen, the type of protection afforded to property affected the legitimacy of Constitutions in both countries.

Said Arjomand argues that given the powerful sway of international political culture on constitution-making, the "timing" of constitution-making is important.[408] The impact of the radically different international political cultures amidst which constitution-making in India and South Africa occurred is best seen in these countries' interaction with the international framework of rights and responsibilities. One finds only a symbolic importance with respect to international law in the Indian Constitution.[409] While the Indian Supreme Court has frequently used international human rights law to support its constitutional interpretation, it has recently held that international conventions and norms must be used to interpret domestic laws when there is no inconsistency between them, and there is a void in the domestic laws.[410]

In contrast, one finds an exalted status for international law in the South African Constitution, which explicitly mandates that the Courts *must* consider international law in the interpretation of rights.[411] This reflects the readiness of states such as democratic South Africa, in whose creation international law played an important role, to venerate

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407. *Id.* at 774 (para. 21).

408. *See* Klug, *supra* note 203, at 131 (quoting S. Arjomand).

409. *See* INDIA CONST. art. 51. This provision states: "The State shall endeavor to—promote international peace and security; maintain just and honourable relations between nations; foster respect for international law and treaty obligations in the dealings of organised people with one another; and encourage settlement of international disputes by arbitration." So far as treaty law is concerned, it cannot become a part of Indian Constitutional law unless Parliament first enacts implementing legislation incorporating the terms of the treaty. Analogizing English common law, the courts in British India applied common law doctrines in many fields. Since the Constitution provides for the continued operation of the law in force immediately preceding its commencement, there is arguably no change even after independence, and courts are free to incorporate customary international law into India's municipal law. *Id.*

410. Visakha v. State of Rajasthan, A.I.R. 1997 S.C. 3011; *see also* Apparel Export Promotion Council v. A.K. Chopra, A.I.R. 1999 S.C. 625. The international conventions and norms are to be read into fundamental rights in the absence of enacted domestic law occupying the field, when there is no inconsistency between them. It is now an accepted rule of judicial construction that must be regarded.

411. S. AFR. CONST. § 39(1) (emphasis added).

international law, especially in the area of human rights.[412] The Constitution also enjoins the courts to *harmoniously construe* legislative provisions with applicable principles of international law in the event of a conflict.[413] With regard to treaties, the 1996 Constitution continues with the pre-1993 interim constitutional practice of incorporation, but calls for the parliamentary ratification of treaties.[414]

In the decade following the commencement of the 1996 Constitution, South African courts have taken their constitutional mandate seriously and have been deferential to international human rights law. Thus, although the constitutional positions on reception of international law in the domestic system are not quite the same in both countries, there seems to be a substantive convergence in using international human rights law to enrich constitutional law.

The constitutional commitment to social and economic rights in India can be traced to the interwoven themes of the freedom struggle and the ideological leanings of the elites who both led the freedom struggle and thereafter dominated the constitution-making process. Akin to the INC, the ANC was wedded to social and economic rights from its inception, as is evident in its Freedom Charter of 1955. But in South Africa, besides political elites, civil society also provided the thrust for constitutionalizing social and economic rights. For example, a coalition of human rights and labor groups clamored for the explicit recognition of socioeconomic rights in the new constitutional order.[415]

F. Indian Influences on South African Constitutionalism

Besides the official Web site of the Constitutional Court of South Africa that affirms the "strong" influence of the Indian Constitution on the making of the South African Constitution, Hassen Ebrahim is one scholar who explicitly affirms the influence of the Indian jurisprudence on the content of the South African Bill of Rights.[416] A draft proposal for a bill of rights—including social and economic rights—prepared by the ANC in 1990 mirrored the social justice provisions in the Indian Constitution and the jurisprudence that had evolved around them. Conversant with and inspired by the poignant story of the judicial

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412. *See, e.g.*, Thomas M. Franck & Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. OF INT'L L. 467, 518 (2003).

413. *See also* S. AFR. CONST. § 39(2).

414. *See* Franck & Thiruvengadam, *supra* note 412, at 509.

415. Klug, *supra* note 203, at 145.

416. The Constitutional Court of South Africa—History, http://www.concourt.gov.za/site/thecourt/history.htm (last visited Nov. 2, 2007); EBRAHIM, *supra* note 12, at 85.

protection of socioeconomic rights in India, the South Africans who initially considered adopting socioeconomic Directive Principles ultimately endorsed judicially enforceable socioeconomic rights. Not surprisingly, in advancing the social justice promise of its Constitution, the South African Constitutional Court has drawn from the Indian Supreme Court's socioeconomic jurisprudence.[417]

By liberalizing rules of *locus standii* and enabling any member of the public acting bonafide to commence an action on behalf of the disadvantaged class claiming legal injury, the Indian Supreme Court revolutionized popular access to justice.[418] The inspirational impact of this procedural innovation is evident in the South African Bill of Rights, which provides that "anyone acting as a member of, or in the interest of, a group or a class of persons"[419] and "anyone acting in the public interest"[420] may also approach the court alleging that a right in the Bill of Rights has been infringed or threatened. Finally, Dr. Upendra Baxi, India's leading constitutional scholar was one of the foreign experts whose advice the South African constitution-makers had elicited.

VI. CONCLUSION

In analyzing the Indian and the South African Constitutions, this study has resisted the mainstream or dominant comparative constitutional law discourse that identifies the older Western constitutional models or the international human rights system as the models par excellence to which other entities must aspire. Instead, it has showcased the Indian and the South African Constitutions for their innovation, arguing that these two texts improve upon the older models, and that, in particular, the Indian Constitution has contributed to international human rights law.

As we have seen, far from influencing the Indian Constitution, the UDHR—an embodiment of international human rights law that draws the link between social conditions and the enjoyment of civil and political rights—was itself shaped in part by the practices of postcolonial Indian and socialist constitutionalism. Economic and social rights typically are not considered to be within the core of constitutionalism,

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417. *See generally* Comparative Constitutionalism in Practice: Sixth World Congress of International Association of Constitutional Law, Santiago, Chile (Jan. 12-16, 2004); Santosh Hedge, *India*, 3 INT'L J. OF CONST. L. 519, 560-67 (2005) (analyzing the influence of the Indian Supreme Court's jurisprudence on various countries including South Africa).

418. S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 188.

419. S. AFR. CONST. § 38(c).

420. *Id.* § 38(d).

and few states have been inclined to enshrine them in their national founding charters, even though the link between social conditions and the enjoyment of civil and political rights is one of the salient themes of the UDHR. The failure of international law to continue to acknowledge this independence meant that only weak enforcement mechanisms were developed to monitor the implementation of economic, social, and cultural rights guarantees. India's constitutional Framers, however, chose to recognize socioeconomic rights in their constitution in the form of Directive Principles, whereas South Africa went so far as to incorporate a list of directly enforceable socioeconomic rights into its Constitution. The holistic vision of human rights initially held by the Indian Framers foreshadowed what was expressed almost two decades later by the international community in the International Covenant on Civil and Political Rights and the ICESCR.[421]

Scholars have criticized the discourse surrounding political participation rights in international human rights instruments for its emphasis on electoral legitimacy rather than the promotion of more flexible and participatory forms of democracy.[422] Interestingly, the Indian Constitution envisages a truly participatory democracy by not only eschewing the insidious colonial practice of communal representation and separate electorates, by adopting universal adult franchise, and by providing for reservation of seats for India's Untouchables and members of indigenous groups, both at the federal and state level.[423] This is another meaningful contribution of Indian constitutionalism to international human rights law.[424]

Constitutional rights typically serve as limitations on the powers of the legislature and executive. But the Framers of the Indian and South African Constitutions were not content to use them merely as restraints on the powers of the government, vis-à-vis individual liberty, but proceeded to make even civil society subject, at least to some extent, to the ethic and discipline of their respective bills of rights. These

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421. *Cf.* Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 436 (1998); Baxi, *supra* note 6, at 1204. While state parties to the ICCPR are mandated to ensure immediate implementation of the rights expressed therein, the economic, social and cultural rights in the ICESCR Covenant are subject to "progressive realization." *Id.*

422. *See, e.g.*, Diane Otto, *Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 371, 373 (1993).

423. *See* INDIA CONST. arts. 330, 341-42.

424. *See* Baxi, *supra* note 6, at 1204.

innovations are praiseworthy, but they raise fundamental questions about the role and forms of constitutions.

Indeed, there have been truly different purposes for different rationalizing discourses, different legitimizing ideologies of constitutions over the years, and remarkably different ways in which they have been conceptualized and drawn up. While India's preindependence constitutions and South Africa's pre-1996 constitutions were designed to oppress and divide and rule, free India's Constitution and the 1996 South African Constitution liberate and empower. On the other hand, while the classic constitutions, such as the United States Constitution, were designed to create political institutions and limit the powers of the rulers, the contemporary constitutions, such as those of India and South Africa, are far more ambitious and seek radical political and socioeconomic transformation. The Indian Constitution emerged in the era of decolonization amidst the swirling rhetoric of the right to self-determination. In contrast, "globalization" has been the South African Constitution's rationalizing discourse, and "democratic constitutional-ism" through "rule of law," its legitimating ideology. The "hegemony of any set of ideas . . . is not socially and politically neutral or self-evident" but remains "contested terrain."[425] This is equally true of the prevalent ideology, globalization, which affects constitution-making both positively and negatively. Present day constitutional tapestries need to be embossed with international human rights, and it is these provisions that contribute to universalizing constitutional norms and constitutionalizing international human rights norms. But on the other hand, globalization has heightened states' vulnerability, eroded their sovereignty, fostered the emergence of a more powerful executive,[426] and imperiled constitutions' commitment to social justice.[427]

Few Indians today recall how unrepresentative India's Constituent Assembly was. This is because its members did not fail to constitutionally affirm that final political and constituent authority resided in the people, constitutionally define and regulate the scope of

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425. *See* Shivji, *supra* note 153, at 74.

426. *See* Yash Ghai, A Journey Around Constitutions: Reflecting on Contemporary Constitutions (Int'l Inst. For Democracy & Electoral Assistance, Stockholm, Sweden), at 12, *available at* http://idea.int/conflict/cbp/upload/journey.pdf (last visited Oct. 15, 2007).

427. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1996/53 (Feb. 6, 1996) (*prepared by* Radhika Coomaraswamy) (lamenting the development policies that international financial institutions coin without factoring in the horrendous socioeconomic effects that such policies have on women's lives including causing the "feminization" of poverty and the rise of prostitution).

power exercised by the people's representatives, and cement these features through judicial power of review. The leaders also used the framework of rights to define and construct an egalitarian society and state, achieve redistributive justice, facilitate the fulfillment of the Constitution's social justice promise, address and remedy past injustices, and protect minorities' rights. In short, when their first hour of freedom arrived, India's nationalist leaders remained true to the lofty principles that were shaped during and underpinned their freedom struggle and embedded those principles in their constitutional cathedral. And indeed today, it is from those glittering crystal-principles that radiates the legitimacy of the Indian Constitution.

Meanwhile, the African innovation of "participatory constitution-making"—with its emphasis on legitimacy and not legality—has now become *de rigueur* in many parts of the world. However, as this comparative study demonstrates, one cannot take for granted that the legitimacy of a constitution hinges on public participation in its actual making. On the one hand, the experience in Uganda shows that public participation does not necessarily support legitimacy for the constitution, while the Zimbabwean and Kenyan constitutional stories display how easy it is to use a participatory process to mask a manipulative one or sideline a constitution which is the product of intense public engagement. On the other hand, one can point to instances where constitutions—such as India's—were drawn up with limited local participation but have endured and become highly respected. It is therefore necessary to be critical of what is now becoming accepted wisdom on the relationship between legitimacy and participation.