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# PRELIMINARY NOTES ON TRANSFORMATIVE CONSTITUTIONALISM

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*'There must, however, be agreement at any rate on some basis for an understanding of transformative constitutionalism. I would suggest that the Epilogue, also known as the postamble, to the interim Constitution provides that basis. The Epilogue describes the Constitution as providing: 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.' This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change. But how must we change? How does the society on the other side of the bridge differ from where we stand today*?'

--Justice Pius Langa, Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

*….The political is the horizon of the revolution, not terminated but always continued, by the love of time. Every human drive in search of the political consists in this: in living an ethics of transformation through a yearning for participation that is revealed as love for the time to constitute. …The dynamic, creative, continual, and procedural constitution of strength is the political … the expression of the multitude and the continual creation of a new world of life remains its fundamental element. To take away this element from the political means to take away everything from it; it means to reduce it to pure administrative and diplomatic mediation, to bureaucratic and police activity—that is, exactly to that against which constituent power, as the origin of the political, continually struggles to emerge in order to emerge as strength. … [T]he routine of unchanged repetition [constitute] … the effects of dead labour, perverse inversions of constituent power, and cannot be used to define the political.*

*…Between 1968 and 1979, our generation has seen the love for time oppose any and all manifestations of being for death. The movement of the multitude has expressed its strength everywhere, with that extraordinary massive force that does not indicate its possible exceptionality but its ontological necessity.*

*Is what is awaiting us a history of freedom? I would be foolish to say so, confronted as we are by the horrid mutilations of that constituted power continues to inflict on the ontological body of human freedoms and by perpetuating negation that the unbreakable series of freedom, equality, and strength, of the multitude posed in*

*contrast….It is out task to accelerate this strength and recognize its necessity in the love of time.*

---Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (1999.)

### *1. The Romantic Transformation of the Transformative*

These three quotes assign a world historic meaning to making and interpreting of the postcolonial constitutions. Thus, Antonio Negri, with all possible caveats, still regards these articulations as heralding an uncertain promise of the 'future' history of freedom. Justice Pius Langa expresses this in a typical South African constitutional idiom of crossing of a 'bridge.' Jawaharlal Nehru announced the moment of Indian independence as articulating 'a tryst with destiny.' Equivalent expressions abound such as the constitution as a 'cornerstone of the nation' and as a 'charter of social revolution[1]' or even as a 'moral autobiography' of a nation.

For Justice Langa, the constitution expresses a 'magnificent goal' of the South African transformation. It is to make a deeply wounded society whole again. South African constitution (SAC) cannot serve this goal without having both a profoundly *diagnostic* (of the past 'wounds') and *therapeutic* character and potential. The diagnostic dimension entails a full understanding of *'a deeply divided society characterised by strife, conflict, untold suffering and injustice*.' The therapeutic dimension consists in the making of the interim and the constitutional court certified SAC via popular participation which shapes the 'future' of a new society. In the originary moment, the constituent power was not transferred to an unelected oligarchy (as is the case with most postcolonial and some postsocialist societies) but articulated a historic movement of popular sovereignty. In this moment, the SAC was not so much about political (governance) transformation; rather the transformative element concerned in creating a distinctive constitutional and societal 'we-ness.' In a sense, the making of this 'we-ness' signifies the art and craft of the narrative genera of 'magical realism.' The making of the constitution is simultaneously based on the cathartic process of the Truth and Reconciliation Commission enacting *'responsibility towards memory*.[2]' Incidentally, the contrast with the making of the Indian Constitution (IC) cannot be greater; written amidst the Holocaust of the Partition, it lacks the SAC-making diagnostic and therapeutic dimensions and overwhelmingly concerned to transcend the traumatic sufferings by forging a strong postcolonial state.

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[1] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Delhi, Oxford University Press, 1966); Upendra Baxi, "'The Little Done, The Vast Undone': Reflection on Reading Granville Austin's *The Indian Constitution*,' *Journal of the Indian Law Institute* 9: 323- 430 (1967.)

Incidentally, Article 7 (1) of the South African Constitution proclaims the Bill of Rights as the 'cornerstone of democracy in South Africa.'

[2] To invoke here a fecund phrase of Jacques Derrida.

For the markers of the IC, the metaphor of crossing the bridge remains poignantly irrelevant; in contrast. Justice Langa speaks to us about 'the *society on the other side of the bridge'* that may after all may continue to *'differ from where we stand today'* The 'bridge' metaphor is in a sense a spatial notion because institutionalized state racism created many a geography of injustice and if its reversal is what constitutes the 'transformative,' the making of a constitution may only mark the first, howsoever crucial, step. The 'transformative' consists in the movement of crossing and the movement stands richly described by the postamble. What remains difficult to understand is notion of what may await at the 'other side of the bridge,' beyond the difficulties of realizing a new society via constitutionally ordained forms of governance, society, and economy. Perhaps, the other side of the bridge also refers to the North-South divide, aggravated by the current moment of hyperglobalization imperilling the movement of crossing towards a just South African society and devouring its constitutional values in the orgies of economic rationalism and market fundamentalisms. Perhaps, Justice Langa did not have all this distinctly in his view; even so, it remains no exaggeration to say that the other side of the bridge represents the difficulties of preserving and promoting the *élan vital* of the original 'transformative' vision. The *Ubuntu*-formed 'we-ness' may continue to well serve a cathartic and therapeutic notion of constitutional 'we-ness' but it also now remains besieged, at every corner, by the global geopolitics of hyperglobalization.

The constitution of 'we-ness emerges differently in Brazil. The 1988 Brazilian Constitution (hereafter BC) is a successor to as many as seven or eight constitutions(depending on how one distinguishes changes *of*, as contrasted with changes *in*, constitution) starting with 1824 Imperial Constitution. In particular, it succeeds two major periods of authoritarian rule (1937-1945; 1964-1985.) Neither India nor South Africa had such a rich variety of constitutional forms either to emulate or to discard. In a sense, the 'transformative' here signifies some basic changes in political structures and constitutional cultures. But the 'transformative' also emerges in the preambulatory assertion that speaks to the creation of 'fraternal, pluralist and unprejudiced society, based on social harmony' and the very first article the BC constitutionalizes the elimination of 'poverty' in the contexts of the rolled-up constitutional values of 'political pluralism.' Further, it locates itself in a wider pan-Latin Amercian solidarity: 'The Federative Republic of Brazil shall seek economic, political, social, and cultural integration of the peoples of Latin America, in order to form a Latin American community of nations.' In this, the Brazilian constitution goes the farthest in terms of constructing (at least normatively) the froms of constitutional we-ness.

As concerns the making of the making of the Indian constitution, Jawaharlal Nehru strove to combine the best (creative) elements that will somehow fuse into an 'organic whole' some forms of 'nationalism and political freedom' and 'social freedom as represented by socialism, which will promote a 'classless society' as setting the theatre of the political in which the removal of 'all invidious social and customary barriers which come in the way of the full development of the individual as well as of

any group' constituted the leitmotif of Indian constitutionalism[3]. Nehru further insisted that the legitimacy of the force-monopoly of the Indian state derived its best justification 'with the dispassionate desire to remove 'obstruction' to the transformative vision. Elimination of mass impoverishment was recurrent theme in Nehru's constitutional vision. In contrast, Dr. Bhim Rao Ambedkar, the principal 'untouchable' architect of the Indian Constitution, did not speak of 'obstructions' and their 'removal; he summated the transformative task rather explicitly in terms of the dialectic contradictions when he said memorably the following:

> On the 26th January, 1950, we are going to enter into a life of contradictions. In politics, we shall be recognizing the principle of one man one vote one value. In our social and economic life, we shall, by reason of economic structure continue to deny [this principle.] How long shall we continue to live this life of contradiction? If we continue to deny it for long, we will do so by putting our democracy in peril[4]. '

Ambedkar's articulation is perhaps a rare occurrence in the history of liberal postcolonial constitution-making and comes closest to the notion of constitutional insurgency enunciated by Antonio Negri. Negri carries the understanding of TC the farthest, as entailing normative, institutional, and material labours requiring us all actually living an 'ethics of transformation.' He engages the dialectics of the *constituted* and *constituent* power and the differential logics/rehtorics of these forms of power. The making (and remaking) of constitutions, designated as the *constituent* power, manifests the power, strength, and movement of the multitudes. Constitutions as grammars of the *constituted* power often tend towards the reduction of the *constituent* power, thus diminishing the range of the *political*. If we were to regard constituent power as 'the origin of the political,' then the negation of the political by the constituted power invites continual 'struggles to emerge in order to emerge as strength.' Thus, the very idea of constitution necessarily involves its other, which Negri names as 'insurgencies.' Constitutions may not be best understood, or narrativized, outside the discourse/event of constitutional insurgencies. He frames this imagery in terms of the 'massive' and exceptional force of the movement of constituent power which has its 'fundamental element' the 'continual creation of a new world of life.'

Lest this 'ontology' of constituent power meet theory- aversion/resistance, we need to ask simply this much: Is there any *other way* of grasping the making of post-colonial/imperial (and now the post-socialist) constitutions? The transformative element is here best conceptualized in world-history terms, which acquires a *transcendent global edge, transformative of the constructions of global 'politics' and the 'political.'* Anti-colonial and anti-Empire movements of popular sovereignty enunciate a radical principle of self-determination which confronted

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[3] I derive thee quoted words respectively from 7 *Selected Works of Jawaharlal Nehru* 60-61 (…….1975) , and 4 *Selected* Works at119(1973. ) See also, Partha Chatterjee, Nationalist Thought and the Colonial World: A Derivative Discourse (1976, ….)

[4] Constituent Assembly Debates, Vol. XIX, at 979.

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colonialism/imperialism/apartheid via a quest for the 'continual creation of a new world of life.' Insurgencies thus invented this principle and inaugurated a new Age of Human Rights, contrary to all the strange talk which still continues to insist on the sole authorship by the 'Western' world of contemporary human rights[5].

Justice Langa's rhetoric speaks, as do the constitution-makers of India and Brazil, of the transformative in terms of 'the recognition of human rights, democracy and peaceful co-existence and development opportunities.' No context-sensitive reading will ever conflate the history of these phrases with some extraordinary and mythical claims of authorship of human rights, freedom, rule of law, and good governance because all these 'values' stood harnessed, as a matter of history, to the tasks of colonial, imperialistic, and racist subjection of the 'non-European' peoples. Yet this facile phrase-regime poses a moment of danger as well. Antonio Negri directs our attention rather fully to the fact that these may also often mask constitutional *regression*; that is, 'the horrid mutilations … that constituted power continues to inflict on the ontological body of human freedoms and by perpetuating negation that the unbreakable series of freedom, equality, and strength, of the multitude posed in contrast.'

On this imaginative landscape, the notion of transformation at the very least speaks in the idiom of 'Never Again!' TC remain 'contingent necessities' but never to a point of reversion to an old order of things where law and state remained mere instruments of predation, in turn justifying the production of states of radical evil and human rightlesness as unproblematic affairs of political domination. The TC talk remains imbued by an aspiration that still speaks to the inhibition or amelioration of the inherent barbarism of domination by the normative and the further distinctive itineraries of interpretive orders of constitututional 'legality.' Entailed here are some multiplex orders of the TC discourse which carry both the birthmarks of 'progressive Eurocentrism as well as of a 'million mutinies' *de-justifying* this 'inheritance.'

## *2. Transformation and Judgement*

Transformative constitutionalism (TC) presents at best a distorted lens! Very rarely does it come to pass that the acts of making constitutions define the 'nature' or 'character' of 'transformation' understood as forms and processes of large-scale historical change. Struggles that shape historical change are seldom born in the constituent assemblies; 'transformation' is a process that remains transcendent of the acts of constitution-making, and even un-making. How then may we speak of the 'transformative' aspect of the TC?

Perhaps, a materialist understanding of the transformative furnishes a good starting point. A remark in *The Eighteenth Brumaire of Louis Napoleon* (1852) fully

[5] See, Upendra Baxi, *The Future of Human Rights*, Chapter 2 (3rd Edn (Delhi, Oxford University Press (2008; cited hereafter as Baxi, Future.) See also, Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (London, Routledge-Cavendish, 2008.)

suggests that constitutions and laws constitute the 'necessities of class struggle.' Bourgeois constitutions enact the Rule of Capital, usually described as the Rule of Law. Put another way, even as the normative core of constitutions marks the '*contract social* between the government and the bourgeoisie,' it opens up spaces for critical judgement among the ruling classes. So do, in the course of development, the forms of constitutional mediation of conflicts between capital and labour. Constitutions themselves become 'a material force' because they entail practical and material labours of governance and of résistance. The question is whether a materialistic understanding of constitutions provides the bases for some shared critical/ethical judgement concerning the practices of *politics* and the constructions of the *political*. I believe it does and the contrast between non-Marxian moral and structural readings (traced partially in Section 3 of the paper) remains instructive.

Transformation remains an epochal conception, marking a series of breaks with old forms of state, society, and culture (social formations) and inaugurating a new order of things. The break is never complete but marks a dialectic relation between the elements of the 'old' and the 'new,' or (to borrow here the phrase regime of Raymond Williams) struggles between the dominant, emergent and residual cultures[6]. Already then transformation remains a value-freighted notion and the very notion of values remains thus heavily at stake, On distinctive Marxian registers, values are no more than rationalizations of strategic interests; on the plane of normative ethics values are 'things' that we *ought* to desire[7]. The discourse of transformation thus remains haunted by what 'we' actually desire and what we 'ought' to desire. And the constitution of that we-ness is always problematic.

Understood thus, judgements about the justice–qualities of transformation remain complex and contradictory because various change-agents and change-constituencies may espouse diverse interest-based understanding of what justice may mean. Further, what may be regarded as just or unjust depends on the growth of relatively autonomous public moral sentiment and not just on the important philosophic labours explicating the meanings of justice. In this zodiac the normative core of values, howsoever untidily assembled in constitutional design and detail, seems at least to provide some thresholds for shared critical morality. This core often

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[6] See Raymond Williams, R. Williams, *Marxism and Literature* 17 (Oxford, Oxford University Press, 1977.)

In a sense that here matters, we need to take a step beyond Negri, and proceed to more fully cognize historical articulations of constituent power in the BISA constitutional law regions( hereafter CLR) which must now surely go beyond the archival by Negri of the doctrinal histories of forms of progressively Eurocentric (from Machiavelli to Marx.) If so, how may we proceed to proceed to trace different histories of ideas concerning the constitution of 'legal' and 'popular' sovereignties in the exploration of BISA/CLR? Put another way, how may we begin to take even the first tentative steps in grasping the notion of the 'transformative' beyond the 'shores of (European) politics?'

[7] See, Julius Stone, *The Social Dimensions of Law and Justice* at …(Sydney, Maitland Publication, 1966.)

entails retrospective ethical practice of *de-justification* of the orders of 'ethical' truths produced by the practices of political domination and retrospective judgements on past or even ancient inhuman wrongs. This critical practice constructs a 'difficult freedom' (to adapt here Emmanuel Levinas's striking phrase) if only because it must remain solicitous of value pluralism, it must adhere to certain types of pre-commitment to some basic values. Thus, howsoever few in type and number and in reach of global endorsement these may be, situations of radical evil de-justify certain constructions of the dominant political and of politics[8].Put another way, neither the conduct of politics nor the construction of the political may argue that radical evil is justified because it may produce some contingent good. De-justifying practices thus foreground a deontological, rather than conseqentialist ethic.

However, and beyond these crucial spheres, the 'banality of evil' occupies a high ground littered with justifications of 'necessary' and even 'surplus' suffering in the name of 'development' or 'progress.' What constitutes this distinction remains an affair of contentious politics[9]. Thus even Karl Marx regarded conquest colonization and the encyclopaedic verities of human and social suffering and destruction this entailed as productive of some new horizons of human futures. Overall, the frankly described the *regressive* Eurocentric Enlightenment Idea of Progress enacted a species divide—between White and non-White, the Christian and heathen, slaves and freemen, colonized subjects and metropolitan citizens, civilized and uncivilized, and women and men. Howsoever regressive, this Idea (and the divide) sought to justify itself in various normative and doctrinal languages, which sought shelter for colonial/imperial predation in terms of some future-history justified practices of the production of 'contingent necessities' replete with unnameable human violation and suffering. The practice of de-justification, put shortly, entails many different types of normative and historical labours of understanding, analysis, and explanation than in the situations of radical evil and its agreed outlawry, outside naming colonization/imperialism as such.

Forms of contentious politics are often triggered by the normative core of constitutions, mow much in evidence in the 'New' social movements, even as these de-privilege the 'old' ones. The 'old' social movements that articulated some global languages of solidarity not merely de-justified practices like slavery and unconscionable labour exploitation but also prepared the very ground on which the 'new' social movements now occupy such commanding heights[10]. It is true of course that the theories of 'new' social movements now enable more distinctly at a normative level the critique of the 'dark side of Enlightenment.' Whatever short and long run sense one may wish to impart to the notion of 'progressive Eurocentrism,' this now acquires an abiding presence in the making and working of postcolonial

[8] Such as human chattel slavery, genocidal violence against the First Nations peoples, conquest colonization, patriarchy-based violence against women, apartheid as the foundation of governance, and some Holocaustian practices of power.

[9] See Doug McAdam, Sidney Tarrow, and Charles Tilly, 'To Map Contentious Politics,' *Mobilization* 1: 17-34 (1996); Michel P. Young, 'Reply to Tilly, Contention and Confession; *Am. Soc. Rev*. 67: 693-695 (2002.)

[10] Baxi, *Future*, at199-216.

constitutionalisms. The 'transformative' in TC still present a mix of 'progressive' (utopic) and 'regressive' (dystopic) constituent elements. Further, juristic understanding of constitutionalism at national levels assigns to it an illusory history of autonomy. Many a constitution in the Global South was made or affected by the killing fields of the early, middle, and late Cold War. And now the post 9/11 wars *of* and *on* 'terror' impose afresh some extraordinary threats to the futures of constitutionally enshrined human rights norms and standards So do now the forms of nascent global economic constitutionalism, emerging variously as 'disciplinary,' 'transactional' and 'regulatory globalization[11]. Understanding the transformative dimension today entails burdens of judgement that far exceed conventional and dogmatic realms of self-constituted constitutional, public law, and the COCOS scholarship.

### *3. Some Threshold Questions Concerning the Reading of Transformative Constitutionalism (TC)*

These summary observations raise several concerns about the TC notions, the questions about understanding the notions of 'constitutions' and of 'constitutionalism', and how 'transformative' may these ever *initially be* or *actually remain* in changing circumstances. Here, of course the normative needs to be distinguished from the empirical; it is a well known fact that normative promises of any the original inspirations continue to be betrayed by everyday experience of life under the actually existing constitutions. This is scarcely a world-shaking discovery simply because outside norms that constitute the promise, no possibility of naming its betrayal may exist[12]!

The question then is one that concerns the 'nature 'of the constitutional promise and our ways of reading it. If the promise itself is normatively flawed/ fractured (that is ambiguous, or even contradictory, or even when clear or consistent only partially addressing the overall transformative element), betrayal occurs only when national policy-makers, including Justices, fail to repair this original deficit. However, neither writing constitutions nor reading them is an easy task; thus the 'instrumentalist' and 'structural' readings remain pitted against the 'romantic.'

The romantic reading grasps the constitution-making endeavour in terms sculpting the moral imagination of a future society; in contrast the instrumentalist

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[11] See for these notions, Frank J Garcia, 'The Global Market and Human Rights: trading Away the Human Rights Principle,' *Brooklyn Journal of International Law* 25:51-97(1999); John Braithwaite, and Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000);Stephen Gill (2000) 'The Constitution of Global Capitalism,' www.theglobalsite.ac.uk (last visited May 28, 03); Stephen Gill, Power *and Resistance in the New World Order* (New York, Palgrave-McMillan, 2003); David Schneiderman, 'Investment Rules and the New Constitutionalism', *Law & Social Enquiry*, 25:757-786 (2000) and his latest work cited infra.

[12] J. Hans Miller '(In) Felicitous Speech Acts in Kafka's *The Trial*', Tympanum 4: http://www.usc.edu/dept/comp-lit/tympanum/4/miller.html (visited April 18,2007.)

reading suggests, in the main, the writing of an originary constitutional text in terms of power-sharing among the extant dominant social, economic, and political groups who expect (as it were) a full and continuing return on their investment! Even so, the twin notions of 'investment' and 'return' stand complicated because a relatively 'neutral' state form remains indispensable for mediating contradictions amongst the fractions of the capital on the one hand the 'class conflict' between those who own and operate the means of production and those who only own their labour-power. This is rather well-known at least outside the now proliferating charmed circles of the liberal, libertarian, and now 'neoliberal' political philosophy/theory. Even so, different readings do seem to share a common set of understandings about the constitution of state power in that no act of writing constitutions which mark a break from the oppressive past may indulge any reading of it outside the grasp of both the *repressive* and *mediating* role and function of the state.

To be sure, the 'liberal' constitution-makers do not compose any suicide pact for the dominant formations of power; rather, they seek to ensure immortality of their desire for dominance by encrypting some universalistic moral languages of human rights and state welfarism. Thus arise several modes of reading constitutions which I here name inelegantly as 'structural.' Extending here Goran Therborn's notion, one way of structural reading of constitutions invites us to grasp ,in Marx-like ways, the originary promise in a 'threefold-cornered mediation of relationship between among the ruling classes, the state, and the ruled classes, in which the main problem concerns the strength of the ruled classes[13].' Given this 'main problem' the 'mediation' necessarily entails reading constitutions as state formative practices, which constitutionalize the 'foundational' as well as 'reiterative' violence[14] in the name of constitutional legality. Understanding the 'transformative' in the three BISA constitutions even in the discourse of implementation of social and economic rights, remains incomplete, in the preset opinion, outside a full narrative grasp of what Marx insightfully named as the distinction between the 'force of phrases' and 'force without phrases'; put another way, outside identifying the cohabitation/indwelling between the 'rule of law' and the 'reign of terror.'

Another structural reading of the transformative in constitutional orderings demands that we think through constitutional arrangements as normative ways of inventing and replenishing social cooperation as promoting a fair and equal distribution of liberty and equality as primary goods[15]. This offers an enormously

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[13] See, Goran Therborn, *What Does the Ruling Class Do when it Rules?*' at 181 ( London, Verso, 1978r)

14. See Jacques Derrida, *Acts of Religion, 228*-298 (London, Routledge, 2002' Gil Anidjar, Ed.)

[15] John Rawls, *Political Liberalism* (New York, Columbia University Press, 1993); Frank I. Michelman, 'The Constitution as a Legitimation Contract,' *Rev. Const. Studies* 8:101 (2003); '*Constitutional* Legitimation for Political Acts,' *The Modern Law Review,* 66: 1-15 2003.)

complex 'moral' reading of constitutions in which the 'constitutional essentials,' here following John Rawls, suggest at least the following, and summarily

1) May not prescribe any 'comprehensive' conceptions of good life, thus respecting lived life forms outside the constitution
2) Ought to thus respect the distinction between the 'reasonable' and the 'rational' state and citizen conduct; that is, what citizens and political actors may consider as 'rational'(in terms of ends-means directed rationality) may not always count as 'reasonable'
3) Ought thus to regard 'justice' not as any 'metaphysical' virtue but rather as an affair of 'overlapping' deliberative 'consensus' or 'pubic will' formations'
4) Ought further in so doing respect an order of minimal 'pre-commitment,' that is display and fructify respect for some 'thin' versions of human rights minimalism contrasted with the 'thick' versions
5) Ought also to provide space for autonomous adjudication as actualising the exemplarship of 'public reason.'

Amidst these very different practices of reading constitutions, how may the notion of 'transformative' at all survive except as the conceit of constitution makers and interpretive juristic communities? Put differently, what is 'it' that the TC after all 'transforms' autonomously of the wider processes of historical change?' And, if so how?

A second set of concerns entail ways of understanding not so much the first term—'transformative'- but the second- ''constitutionalism.' I have been insistently suggesting (for well over a decade) the importance, for well over a decade, of the distinction in the languages of the three Cs.

If the C1 is the originary and even charismatic constitutional text, C2 comprises the first and second C2. The first C2 signifies official interpretation of C1 by state authorities and agencies, including judicial interpretation or 'constitutional law.' The second C2 presents the practices of citizen interpretation of C1, often in conflict with the first C2. This is a difficult terrain because the second C2 descriptively refers to all interpretive practices of non-'official' citizens. The category of citizens is diverse as including those now known as 'corporate,' 'financial,' market,' and 'consumer' citizens pitted strategically as well as episodically against citizens comprising human rights and social movement actors. The second C2 interpretive practices thus need to be further subdivided (with my apologies for these minutiae) into C2-1 and C2-11. In opposing C2 state practices, often these unite in terms of social action (for example, both these practices for a while joined hands in opposing the Uruguay Round and are said to do so in relation to 'global warming[16].') In what follows, I primarily address some C2 practices.

[16] This is a complex story: see for example John Braithwaite and Peter Drahos, Note 11, *supra*.

C3 stands variously for the underlying normative/ideological thought formations in the service of, and at times against, C1 and C2. Does the notion of TC speak to all the three dimensions? Or should we privilege the C1 as articulating a constitutionally desired social order against which we may access and evaluate C2 and C3? How is this 'moral reading' (to borrow a notion favourite of Ronald Dworkin) of the C1 to be done against the practices of reading that read C1 prosaically in terms of articulation of a nationalist project that would primarily benefit the propertied classes? As concerns C2-1, how may we compare the notions of the 'transformative' contrasting the C2-11 interpretive practices? How far may the forms of adjudicative interpretation, especially concerning the implementation of the social and economic the Bill of Rights, remain primarily advisory, rather than mandatory, in relation to the executive/legislative forms of C2-1? Put another way, how far the practices of judicial activism may justify themselves as having a more authentic access to the originary voice of C1?

Further, how far (and outside the state of exception such martial law and the emergency rule impositions) may the C2-11 popular/insurgent interpretation proceed to present a 'moral reading' of the C1 and even of the first C2? How far may the diverse constituencies of the second C2 effectively claim 'the *right to have rights*?[17]' Put another way, how far the second C2 seek to exercise the *constituent* power of the people against the *constituted* powers of the state? And, further in the domain of the first C2, how far activist justices and courts subserve rather than entirely frustrate 'constitutional insurgencies?'

Perhaps, C3 may then be conceived as constituted by dialectical relationship between the first and second C2. Alternative narrative strategies also remain possible which suggest a normative notion of C3 that must always inform both the making of the C1 and of the varieties of C2. On this reading, the originalism of the C1 remains itself a product of transformative theory which provide us with a rich Thesaurus type menu of what it may mean to say 'human' and 'having rights,' 'the rule of law,' 'people,' 'progress,' and the 'nation.' These menus of meanings/significations are said, in the dominant TC discourse, to constitute the progressive Eurocentric gifts of the 'West' to the 'Rest.' Manifestly, more than mimesis (constitutional borrowings/transplants) remains entailed in some TC narratives of postcolonial and postsocialist constitutions. In what may the other of Europe still engage to re-articulate the transformative beyond the all encompassing claims of the Enlightenment and now the post-Enlightenment universal definitions of the 'transformative?' It is on this register a romantic reading of forms of the postcolonial C1 make a good deal of narrative sense.

### *4. Nostalgia and Amnesia in the Itineraries of Transformative Constitutionalisms*

[17] This is a favorite notion of Hannah Arendt. See, for a recent analysis, Werner Hamacher, 'The Right to Have Rights (Four-and-a-Half Remarks),' South *Atlantic Quarterly*.2004; 103: 343-356. See also, Frank I. Michelman, "Parsing a 'Right to Have Rights'," *Constellations* 3 (2), 200–208 (1996.)

For the constitutional transformative' to remain, as it were, 'true' to itself it needs to re-organize both memory and forgetfulness. The relationship between memory and history as yet does not fully informed COCOS, outside debates concerning originalism (that is how far the first C2- constitutional interpretation by courts-- may be guided by the original intent of the constitution-makers.) I am here less concerned with this forensic recourse and more with the ways in constitutions ordain an amnesia of historic wrongs as well as 'the remembrance of things past' (the invention of politically construed nostalgia) and the relation of all these practices in the Brazilian, South African, and Indian contexts. The COCOS tradition may of course more comprehensively grasp this terms of other comparisons (such as the bicentennial Euroamerican TC forms, the original German Basic Law, the post-national EU constitutionalism, the Israeli and first-ever and world-historic *shari'a* constitution enacted by Ayatollah Khomeini.)

India lacks in comparison with Brail and South Africa forms of constitution-making remembrance. South Africa had its own unique Truth and Reconciliation Commission which accompanied the labours of constitution-making. A recent Brazilian Government's official report concerning 'The Right to Memory and the Truth,' archiving the regime of atrocities during Brazil's two decade dictatorship seems to go beyond the histories of Euroamerican predation[18].

How may we draw some comparisons and contrast within the BISA/CLR in this context? In the Indian context what seemed to matter decidedly were not just the historic wrongs of a colonial past but rather some ancient wrongs such as the practices of untouchability, of the Hindu patriarchy, and of agrestic serfdom. For South Africa what remained decisive were the deeply creative feats of public reason (and as many critical minds still suggest profoundly effete) manifest in the Truth and Reconciliation Commission (TRC). India also lacks any conceptual or pragmatic equivalents of the TRC or the Brazilian recent insistence concerning the 'Right to Memory and Truth.' What difference may this make for the itinerary of the 'transformative' in these three constitutions? Very little, were to proceed on the view that the official archives remains directed to a historic appropriation of memory for the ends of governance. A great deal, on the other hand, were we to regard such recall howsoever ethically flawed as a register of intersection between lived popular memory of 'past wounds' and the ways of state formative practices of managing these.

For me at least the question why the Indian constitutional development has even after six decades so thoroughly continued to organize the oblivion of the Holocaustian histories of the Partition? Neither celebration of the Golden Jubilee of Indian freedom or of the Indian Constitution, nor the celebration of fifty years of India's premier Indian Law Institute, paused by to constitutionally memorialize this event. Indeed, only Indian critical feminist scholarship and 'acts of literature today speak to this historic memory. Thus, Indian constitutionalism as an ensemble of formative state practices fatefully passes by the 'responsibility to memory.' I say

[18] 'Seems' because I do not have access to Direito a Memoria e a Verdade: Comissao Especial Sobre Mortos e Desaparecidos Politicos (2006.)

'fatefully' (and given space-constraints of this essay) because the foundational violence of the Indian constitutionalism continues to reiterate itself in Partition-type reiterative 'communal violence.' Would the Indian TC development have been any the better off by such acts of public remembrance? However severely flawed, the South African and Brazilian engagements with historic memory of past wrongs seem to point the other way at least in the performances of romantic and moral TC readings

To be sure, the IC frontally addresses millennial wrongs such as untouchability; indeed the IC is transformative on this normative register. It is the historically first modern constitution not merely to declare constitutionally unlawful the practice of discrimination on the 'ground of untouchability' Article 17) and of agrestic serfdom described as a human rights against exploitation (Articles 23 and 24.) A unique feature of these provisions consists in the creation of constitutional offences, even too the point of derogation of the design and detail of Indian federalism because Article 35 empowers a Parliamentary override over the legislative powers of the states within the Indian Union. The question, in terms of any comparison, between Brazil and South African narratives is just this: How may we understand in the Indian case the differential reconstitutions of memories of ancient wrongs as providing the very leitmotif of constitutional change compared with the organization of collective amnesia concerning the Partition Holocaust? Does this question at all matter in any understanding of Indian constitution now at work? More generally put, do suchlike interlocutions remain ambivalent concerning the effective histories situating the future histories of the 'nation' and its 'peoples within the governance labours directed to *governmentalization of peoples/popular remembrance of past violations of one's right to be, and to remain, 'human?* The difficulty here is immense. These forms, on the one hand, enlarge public deliberative spheres and at the same time remain fraught with an encyclopaedic variety of enclosures of public memories of injustice, in ways that continue to *re-silence* constitutional insurgencies providing alternate conceptions of rights and justice. True, TC texts and contexts remain the very *last sites* for language of love, gift, belonging and care[19]; instead, as Negri so fully suggests, they proceed to homogenise forms of governmental time both in the construction of *politics* and of the *political*. Thus even the self-styled transformative constitutional languages and symbols present a conflicted terrain on which peoples' right to the orders of historic memory stand appropriated by the state formative practices[20].

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[19] See as to this, Karin van Marle, "Love, Law and South African Community: Critical Reflections on 'Suspect Intimacies' and 'Immanent Subjectivity," in Henk Botha, Andre Van Der Walt, and Johan Van Der Walt (Ed) *Rights and Democracy in a Transformative Constitutionalism*, 231-248 (Stellenbosch, The SUN Press, 2003.) This work will be hereafter cited as *Rights and Democracy*.

[20] In this context, Article V (1) of the Brazil constitution thus remains by far the most explicit: 'All power emanates from the people, who exercise it *by means of elected representatives or directly, according to this Constitution'* (emhasis added.) In the Indian expereince, the Sureme Court proceeded to complicate the personality/identity of *'this Constitution'* via the doctrine of the basic strcuture and essentailfeatures of the Indian constitutuion, which Parliamnet may amend but not witout judicial veto or concurence.

### *5 Writing Human Rights into BISA/CLR Constitutions: The Point of Departure*

The BISA project constitutes a momentary, and even perhaps, momentous, pursuit of the politics of human hope. It postulates the idea that constitutions are necessary[21] and desirable[22] and further that they may, in some contexts of history, carry a transformative burden, character, or potential. By 'transformative' the BISA/CLR project signifies not just an orderly enhancement of governance powers directed to fostering national 'development' but rather a redemptive potential construed in terms of effective implementation of human rights especially the social and economic rights. Accordingly, the question of how rights get written into the constitutions remains worthy of fuller pursuit in the BISA/CLR.

If the assurances of human rights and accompanying freedoms define a constituent element of transformative constitutionalism, understanding whatever it

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[21] COCOS presume that constitutions are *necessary* because they:

a) *Articulate* a political identity of nation-peoples into a state within a community or society of states [*The External Dimension*]
b) *Provide* a blueprint for the articulation of governance apparatuses, powers, and processes [*The Governance Dimension*]
c) *Present* the sacred Will or the Word of God or articulate the separation of the Church and State [*The Theocratic versus Secular Dimensions*]
d) *Enact*, overall for some self-dissipative (*autopoetic)* articulations of communication devices unfolding the doctrine of the 'Reason of the State' [*The Hermeneutic Dimension*]
e) Constitute an encyclopaedic variety of justifications attending to, or providing platforms for, conceptions of monopolization of means and modes of state/law force monopoly [*The Legitimation Dimension*.]
f) Install the modes of enunciation of the orders of production of truths of both *politics* (the combined and uneven exercises of state/law power and prowess) and of the *political* (ways of normative evaluation of this politics. One may name this as *The Political Economy Dimension* which at least implicitly (as also often quite explicitly) carries the full weight of the suggestion that all 'lifeworlds' may best embody forms of life worth deserving that name only as exhausted by constitutions.

Constitutions are said to be *desirable* because these enact across and within-nation discourses concerning forms of restricted/limited governance powers and process/prowess, because these enact some visions and imageries of governance as *somehow also* limited by law. Here we enter some political thickets, constructing both some Anglo-American and civil law' jurisdictions articulating the distinction between 'politics' and 'political.'

[22] Constitutions are said to be *desirable* because these enact across and within-nation discourses concerning forms of restricted/limited governance powers and process/prowess, because these enact some visions and imageries of governance as *somehow also* limited by law. Here we enter some political thickets, constructing both some Anglo-American and civil law' jurisdictions articulating the distinction between 'politics' and 'political.'

may mean to say 'human' and 'having rights' the BISA/CLR constructions do matter. It will take this essay (even when entirely indispensable for understanding the' transformative') far afield to trace the changing notions of being and remaining human and having rights in the three constitutional orderings. Yet, a few general remarks are necessary.

*(a) Different Historicities*

Different 'human rights' historicities inform the writing of the Indian, South African, and Brazilian constitutions. The way rights get written into C1 varies not just according to the state of art (that is normative and institutional developments of international human rights law and jurisprudence) but also on the nature of the struggle for political emancipation. The state of the art stood relatively richly developed when Brazil (1988) and South African constitutions were composed; in contrast the Indian constitution was written almost coevally with the Universal Declaration of Human Rights (UHDR.) The mid- 20th century CE Indian constitution is as much a truly inaugural postcolonial constitution as is South African constitution towards its end. Yet the differences in writing rights into the constitution remain crucial. While India germinally invents the distinction between judicially enforceable civil and political rights and the directive principles of state policy imposing constitutional obligations fundamental to making of state policy and law (an early version of the SCR) South Africa begins a 'long walk into future' by collapsing this divide[23]. In each case, the normative break with liberal constitutionalism is remarkable.

How may we account for the differences between South Africa and India? Is it the case that the Indian nationalist struggle provides a longer and larger history of commitment to social and economic rights than seems to be the case with South Africa? In a recent reflection, Justice Dennis M. Davis suggests that: 'Until the late 1980s, there had been little thinking in South Africa about the need to include social and economic rights within a constitutional instrument for a democratic South Africa[24]. Because the South African struggle was primarily directed against race-based oppression, was it also the case therefore that it was little concerned with what Albi Sachs named as 'non-racial repression'[25]? Both Sachs and Davis seem to read the struggle against apartheid in terms of the future histories of civil and political rights. This may be true if one reads the history, as Davis puts this, in terms of 'conventional thinking about the role of law in social transformation.' However, the question is: Is this the best or the only reading of the struggle for political emancipation in South Africa? Did what we today so felicitously and compendiously name as the SCR play no

[23] So does, on my rudimentary reading of it, the Brazilian constitution.

[24] Dennis M. Davis, in Daphne-Barak-Erez and Aeyal M. Gross (Ed), *Exploring Social Rights: Between Theory and Practice,* 'Socio-Economic Rights: The Promise and Limitation—the South African Experience,' at 193 (Oxford, Hart Publishing, 2007.)

[25] As quoted by Davis, at 193.

role in defining the 'transformative' element? If indeed so, how far does this help us to understand the current judicial approach to SER? Put another way, any understanding the writing of rights into C1 entails some serious engagement of deciphering these struggles, in ways which Antonio Negri archives for us for the histories of constituent power in Europe. Expressed rather strongly, the TC notion does not make much sense outside the development of a tradition of discourse that one may name as 'constitutional history' as going beyond the study of the constituent assemblies debates.

*(b) Writing Postliberal Human Rights*

The three BISA constitutions [hereafter referred to as BC, IC, and SAC] present some important ways of writing of *postliberal* human rights. They enshrine thus the collective right to religious belief and practice (BC, Article V (vi.); IC, Articles 25-26) and SAC (Article 15.) The BC (Article 8) and the SAC (Article 23) explicitly recognize the rights of the working classes, including the right to strike. The IC in contrast meagrely recognises some of these rights via the effete directive principle (Articles 41-43A.) If the IC overall) recognizes SER via the directive principles of state policy (Part IV), the BA (Chapter 2) and the SAC (Articles 27, 29) enshrine this as judicially enforceable basic rights. The SAC remains more explicitly committed to political process rights; Articles 24, 32 and 33 further proceed to guarantee respectively the right to environment, access to information and to 'just administrative action.') Article 8, SAC goes the farthest in the recognition of the human rights of 'juristic persons' (in the main corporations and business entities[26].Each constitution remains specifically articulate concerning the general norm of non-discrimination; the IC as already noted earlier goes the farthest in enacting a human rights notion that suggests that not only the state but civil society, here especially meaning the Hindu religious formations, may remain violative of human rights casting constitututional obligations on the State to reform the dominant religious practices and even thereby the beliefs. The construction of Indian constitutional secularism thus remains a constitutional and political minefield[27]; in contrast, the two other constitutions remain relatively blessed, or at least less stressed.

The three constitutions display their postliberal profile, vividly even when differently, in the negotiation the absolutist libertarian insistence on the sacrosanctity

[26] '(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.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-*(a)* in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and *(b)* may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).'

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

[27] See, Gary Jacobsohn , *The Wheel of Law: Indian Secularism in a Comparative Context* (Delhi, Oxford University Place, 2003); Ronojoy Sen, *Legalizing Religion* (with commentary by Upendra Baxi; *Policy Studies 30* ( Washington DC, East West Centre, 2007.)

of the rights to private property over the means of production. (Incidentally, my computer spell check interestingly renders this into *pirate* property!) It is just as well that Professor Robert Nozick, the author of *Anarchy and Utopia* remains inconversant with the BISA constitutions as otherwise perhaps a premature fatality may have even occurred by a culture shock!) Regardless, Article 4 SAC fully subjects compensation for taking of private property to considerations of 'the public interest' as including 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources' in ways that define ' property' as not 'limited to land.' Likewise, BC Article 5, xii/xiii) guarantee the right to ownership of property when it attends specifically 'to its social function.' Article 184 makes it 'incumbent upon the Republic to expropriate for social interest, for purposes of agrarian reform, rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of real value and redeemable within a period of up to twenty years as from the second year of issue, and the use of which shall be defined in the law.' And Article 186 defines the ingredients of social function[28]. In comparison, Article 31 enunciation of the property right remains normatively inadequate, so much so that the entire burden remains borne by the Supreme Court of India's interpretive oddessy cocnerning the 'social function of property rigths.

(*c) 'Religion' in the Writing of Rights*

Religious traditions and the 'varieties of religious experience' play a crucial role in writing rights and constitutions. One quite explicit concern relates to the construction of state secularity that enables us to distinguish between faith-based

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[28] 'The social function is performed when rural property simultaneously meets, according to the criteria and standards prescribed in the law, the following requirements:
1) Rational and adequate use;
II. adequate use of available natural resources and preservation of the environment;
III. compliance with the provisions which regulate labor relations;
IV. exploitation which favors the well-being of the owners and workers.'

The MST ['*Movement Sem Terra']* offers a radical second C2 interpretation of the social function of property. See for a recent analysis Flávia Santinoni Vera, 'The Social Function of Property Rights in Brazil,' Paper in the field of Law and Development submitted for the appreciation of the Program Committee of the X Latin American and Caribbean Law and Economics Association (ALACDE) Conference, Buenos Aires on May 19-20, 2006, co-organized by Universidad Torcuato Di Tella and Uiversidad de Buenos Aires (available at Berkeley Program in Law & Economics, *Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers,* Paper34. http://repositories.cdlib.org/bple/alacde/34; visited April 17, 2008.) Although Vera is primarily concerned with possible extension of the law and economic approaches, the landless labor movement complicates any such understanding and the further legislative responses. See as to this the important contribution by George Meszaros, 'MST and the Rule of Law in Brazil' in Miguel Carter(Ed) Challenging *Inequality: the Landless Rural Workers' Movement (MST) and Agrarian Reform in Brazil* Durham, NC, Duke University Press… (2007); 'Taking the Land into their Hands: The Landless Workers' Movement and the Brazilian State' *Journal Of Law And Society* 27 (4), 517 – 541, (2000); and 'No Ordinary Revolution: Brazil's Landless Workers' Movement' *Race And Class* 42 (2), 1 - 18 (2000.)

constitutions and the 'secular' ones. However, if the very notion of secularity may be thought of as an off-shoot of the Protestant theological worldview[29], very little orginary spaces remain, outside the Chrsitendom, whether old or new, for any articulation of postcolonial constituional secularity. If so, how may then we procced tonegotiate uderstanding of the elements of *mimesis* and originality in the framing of the BISA constitutionalisms?

Conventionally, the liberal secular constitutions are said to proceed on the view that matters of faith belong to the private realm; the state has duties to accord as much it can equal respect for all religions but should itself not be faith –based. I say 'said to' because empricially speaking quite many a liberal constitution not merely institute forms of civic religion[30] but actually remain permeated by the God-talk[31]. Indeeed, even as cocnerns the United Sattes S C2, one hears about the distinction between the 'Catholic' and 'Protestant' forms of judicial interpretation[32]. The right to life and digniity thus for exmaple in the United States and Brazil raise some severe questions for apex adjudiciation; currently, the Bralian apex court is currently seized with the issue of constitutionality of the legitimacy or otherwise of governmental regulatory reach, for example, over stem cell based research and commercial application[33].

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[29] Professor Balgandhara, an Indian philosopher now residing in Belgium, tiressely advocates this thesis. See, 'Balganadhara on the Bibilical Underpiinings of 'Secular' Social Sciences.' In Krishnan Ramswamy, Anotonio de Nicholas, Aditi Banerjee (Ed) *Invading the Sacred: An Analysis of Hinduism Studies in America* 123-131 (New Delhi, Rupa Publishers, 2007.)

[30] An important question in the making of the European Constitution raised concerns about how explicitly its preamble should recognize that the EU derived its major value-impetus from the shared values of Christianity.

[31] Thus, the Preamble of the Brazilian Constitution speaks to us thus:

> 'We, the representatives of the Brazilian People, assembled in the National Constituent Assembly to institute a Democratic State for the purpose of ensuring the exercise of social and individual rights, liberty, security, well being, development, equality and justice as supreme values of a fraternal. pluralist and unprejudiced society, based on social harmony and committed,in the internal and international spheres, to the peaceful solution of disputes, promulgate *under the protection of God*, this Constitution of the Federative Republic ofBrazil ( emphasis added.)'

Thus, also, the majestic SAC Preamble concludes: 'May God protect our people.'

[32] See, Sanford Levinson, *Constitutional Faith* 9-53 (Princeton, Princeton University Press, 1988.)

[33] See, the Brazilian Case ADI 3510, The spokesperson for Connectas Human Rights and the Human Rights Centre (CDH), Oscar Vilhena Vieira, justified the constitutionality of this research, arguing that 'an embryo cannot be legally equated with a person, further positing that the law is very clear in only permitting research with non-viable embryos that have no chance of ever coming to term, noting that their use in medical research will help find cures to preserve the life and human dignity of people suffering from diseases.' Further, he maintained

While each BISA constitutionalism remains 'multi-religious' in important ways, South Africa and Brazil remain pre-eminently Christian societies shaping some faith-imbued notions of governance, development, and rights. In contrast, the Indian case presents the writing of rights in several distinctive ways. It significantly restricts religious freedom of the majority 'Hindu' faith communities by assailing some age-old practices of 'untouchability' in the constitutional idiom of outlawry; the Indian constitution remains normatively notable for its ways of constitutional criminalization of these practices( Article 17, 23, and 35.) Further, its way of writing human rights remain overwhelmingly and understandably concerned (given the Partition Holocaust) with a full recognition of collective rights of religious minorities ,even when these manifestly conflict with the logics, paralogics, and rehtorics of constitutionally enshrined human rights. Yet, the three BISA constitutions, more or less co-equally militate against the emergent human rights of sexual orientation and conduct, articulated by insurgent sexual minorities. Constitutionally-ordained/crafted multi-religious or secular transformative theory and practice here reaches a limit situation, indeed! The transformative element in the three constitutions registers a form of homophobic constitutionalism. How may we ever fully grasp this arrested 'transformative' in the ways of writing human rights via C1, C2, and C3?

This rudimentary presentation of contrasts in three constitutions should suffice to illustrate postliberal constitutional imagination at work. The three texts further suggest a way of reading in which the 'civil and political' rights are constructed in the imagery of the 'social rights.'

## *6. Questions Concerning Implementation of SCR*

### *(a) Implementation: A Prefatory Remark*

Implementation (efficient and outcome-oriented pursuit of the SER goals and rights) is conventionally thought of in terms of structuring of governance institutions and processes. It also entails judicial governance at least in so far apex justices strive to remain true the spirit of the constitution which they swear/affirm to uphold and the declaration of rights. Human rights and social movement actors also at times play a significant role in implementation. Direct self-help popular movements such as occupation of urban and rural land by indigenous and landless peoples disturb the notions of constitutional legality but remain sociologically important in understanding the itineraries of human rights, including the SER. So do mass movements of political protest directed against special economic zones, which now often encrypt solidarity of global resistance. Perhaps, on conventional analysis, a limit situation is reached in terms of understanding implementation when people's group enact violent

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that 'at no point does the Brazilian Constitution address the right to life before birth but rather what it 'does protect is the right to life of Brazilians "by birth", i.e. those already born.' Thus, Oscar Vilhena claimed, the Brazilian constitution 'invalidates the argument for the unconstitutionality of embryonic stem cell research' See for the diversity of judicial opinions, still put on hold, the recent posting on www.conectas.org

constitutional insurgencies and even make a claim to the legitimate use of organized collective political violence in the face of state failure or repression. I suggest here rather summarily that that the BISA/CLR project needs to take a fuller account of varieties of implementation. To achieve this, we need to move beyond the juridical discourse legalizing human rights[34] and move towards fashioning *ethnographies of constitutionalism* as this may be put to *work* or to *sleep*.

*(b) Declared and Undeclared 'States of Exception'*

The BISA/CLR even as they celebrate postliberal writing of human rights also celebrates the 'reason of the state' doctrine. This in the main means that constitutional affirmations of civil and political as well as social, economic, and cultural rights at best remain 'contingent necessities' for 'constitutional' governance. Typically, and with and since Carl Schmitt, the 'state of exception' primarily refer to the enshrinement and use of the 'emergency' powers, or the powers to declare martial law regimes which adversely affect the futures of civil and political rights and thus also the progressive realization of the SCR. On this register remain profoundly intertwined the futures both of civil and political rights on the one hand and of the social, economic, and cultural rights on the other.

Without at all wishing to diminish the 'classical' notion of the state of exception, our comparative BISA/CLR deliberation, I suggest, needs to explore the genre of states exception which consist in a series of *undeclared emergencies* on SER, and human rights generally. These undermine implementation in an encyclopaedic variety of state action and inaction and accordingly remain the more insidious for the 'transformative' element.

*(c) The External Dimension*

Let me exemplify what I mean, rather than provide any conceptual narrative of undeclared emergencies or the more exceptional 'states of exception.' The 'external dimension' of constitution consists in the sovereign treaty-making power of the state. It remains constitutionally immune from adjudicative scrutiny and the wider participative public sphere. This means three things. One, there exist no constitutional limitations on the executive power of lodging reservations or derogations to human rights treaties; for example, the most universally subscribed CEDAW is thus rife with reservations. And two no constitutional limitations or no internationally binding human rights norms and standards (outside of *jus cogens*) may extend to the making of bilateral, regional, and multilateral trade and investment treaties. Human rights, both constitutional and international, can thus simply be traded away in acts of global economic diplomacy. Three, the same remains true concerning other agreements with international financial institutions, and bilateral economic aid agreements; as is well-known structural adjustment programmes, debt conditionalities be described as undeclared emergencies or hostilities on the SCR. This

[34] See, 'Politics of reading Human Rights: Inclusion and Exclusion within the Production of Human Rights,' in Saladin Meckled –Garcia and Basak Çali (Ed.) *The Legalization of Human Rights* 182-200 (London, Routledge, 2006.)

is now fully in evidence and at work in the 'new economic global constitutionalism,[35]' which' 'makes room for the regulatory capacity that developed states prefer while disabling measures that the less developed and developing states may require[36].'

I commend in this context the magisterial study of David Schneiderman, who overall offers richly detailed analyses of the ways in which postliberal writing of human rights stands shattered by the actually existing regimes/forms of BITS and MITS (bilateral investment treaties and multilateral investment treaties.) Schneiderman fully demonstrates 'the potential for conflict between constitutional aspirations in the post-apartheid era and the exigencies of economic globalization[37].' To further generalize this insight, how may we begin to understand the fact that the BISA/CLR apex courts remain either constitutionally powerless or unfavourably disposed, as a matter of adjudicatory policy, to subject the treaty-making powers to any strict regime of human rights based impact scrutiny? What readings of histories or theories justify forms of adjudicative restraint or outright acts of judicial abdication? In this context, further, how may the so-called 'civil society' endeavours remain directed, and carry any prospect of success, to render this power constitutionally responsible[38]?

*(d) The Allocation Dimension*

Much the same remains true of the sovereign discretion concerning the ways the allocation of national incomes and resources. How these if may at all, or fully, subjected to human rights considerations? People's participation in allocative processes (outside the important but limited but important local example in Brazil) is almost everywhere unknown. How far Justices and courts even when constitutionally obligated to enforce SER to follow the policy of judicial self-restraint? This important question has been more vigorously addressed in South Africa than in India.

Before I turn to this, I need to mention with all growing sophistication of human rights scholarship, there does not exist as yet a formats for national budgeting practices, with the result that the discourse becomes a sort of blame game between national legislatures indicted by activist justicing and the latter indicted by 'radical' constitutional scholarship. The blame game performs some important rhetorical political functions, without at least in a *very long short run* ameliorating the constitutionally worst-off. The question here is not just about high comparative human

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[35] Concerning this, see now the valuable study by David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, Cambridge University Press 2008, hereinafter referred to by the author.)

[36] Schneiderman, at p. 111.

[37] Schneiderman, at p. 152.

[38] See, Schneiderman, at 185-222. The Columbian situation is worth a moment of contemplation. Following the 'emancipatory' constitution of 1991,' the Columbian Supreme Court flexing its constitutional muscle' by a 1996 6:3 majority opinion actually invalidated the Colombian –UK BIT, only to be speedily reversed by a constitutional amendment. See, Schneiderman at 177-79.

rights social theory which we seem to have in our hands in an abundant measure and the judicial and juridical toolkits/technologies endlessly debated (such as 'reasonableness,' 'balancing,' 'proportionality,' and constitutional cost-benefit analyses.) The question rather concerns the development of constitutional economics from a subaltern perspective. This smooth term masks many a diversity because more human rights action groups/movements exist per square inch compared with the Cardinals in the Holy See! Each one of activist group remains constituency-specific, even to a point of making the very notion of human rights based national allocative budgeting incoherent and fully to the advantage of the dominant (ruling) classes. A close study of the 'movement of movements'—the World Social Forum- also reveals that it address primarily the 'demand side' rather than the 'supply side.' This brief remark runs many a narrative hazard; so let me turn to some TC specifics in the SA and Indian contexts.

The paradigmatic (or if you will, the sub-paradigmatic) SAC performance in *Government of the Republic of South Africa and Others v Grootboom*[39], held that while it 'is essential that a reasonable part of the national housing budget be devoted to [giving effect to this Court order],' the 'precise allocation is for national government to decide in the first place. Justice Yacoob stipulated that the state had a number of options towards compliance with the Court order, "[t]he precise contours and content of the measures to be adopted" are, he argued, "primarily a matter for the legislature and the executive" [Para 49; para 66.] The small number of South African academics who defend the decision and a large number of its critics seem to remain agreed one point: the resource allocation or housing has not, to put it mildly, improved. This demonstrates that a variety of power games are being here enacted. Constitutional justices 'defer' to the executive; constitutional scholars indict justices at east with the sovereign power of their scholarly pen; the politics of protest stands riven with specific strategic constituency interests; the executive of the day has the last unconstitutional laugh, as it were, and the constitutionally worst off experience the misfortune of the French adage 'the more things change, the more they remain the same!' What amidst these power games may survive by the talk of transformative constitutionalism?

One may dare hope that the Indian situation, at first sight, remains a bit different. Social action litigation has led to judicial enunciation of new constitutional and human rights and the Supreme Court has devised various ways and arrangements to monitor implementation, especially via continuing mandamus power and process. I may here very briefly refer to the right to education. The IC guaranteed via Directive Principle (Article 45) free and compulsory education for the young in the age group of 8-14. That was in 1950. The SC1 in 1993 held that the '… right to education is implicit and flows from the right to life guaranteed by Article 21 of the Constitution[40].' This reinforced human rights and social movement folks to urge an amendment to the constitution and in 2002, Article 21-A is inserted by the Constitution Eighty-sixth Amendment.) All constitutionally sincere citizens felt let down by the amendment

[39] 2000 (1) SA 46

[40] Unni Kishnan, J.P.& Others v State of Andhra Pradesh & others (1993) 1 SCC 645 at para 166.

because while appearing to enshrine a right to education, all it does is to provide for a right to have an appropriate state law being made providing for education[41]. On my understanding, neither the allocation of the federal or state budgets has significantly improved. This at least led Justice Dalveer Bhandari, in his solo dissent in the *Thakur Case,* to insist that 'Parliament should fix a deadline' for the implementation of the right to education 'within six months[42].' It is puzzling that his Bretheren did not feel any impelling need to share this time-limit.

But activist judicial dissent rather than signifying judicial conversation has always in India conveyed human rights signals for the constitutionally sincere citizens; thus, it is only a matter of time when the Court will be pressed to follow this direction. By way of an important comparative remark, it seems to come to pass that whereas the SAC seems to apply doctrinal constitutional closure to SCR implementation, the ISC continues to follow a style of ongoing civic conversation on the nature and future of the SCR in India[43]. I do not know, on this register, the state of play for BSC.

The Indian judicial experiment [the first C2] has thus some impact on the nurturance of the second C2 [citizen -interpretation.] This does not of course resolve arguments justifying the sovereign discretion on various grounds: for example, that the representative institutions rather than courts are legitimately entrusted with tasks of monitoring human rights indifferent policy in the allocation of the federal and state national resources, that courts and justices may not have the requisite skills and competence to 'balance' budgets, and that their role and influence in such matters is best perceived as symbolic, as aiming long term governance dispositional change rather than instrumental aiming at here –and now- compliance.

Space constraints forbid further development of these arguments and their refutation. However, for any worthwhile BISA/CLR exploration, it remains important to further elaborate the horizons of doctrinal closure and relatively undisciplined craft that leaves open further spaces of contentious constitutional politics. Further, this howsoever indeterminate, fuzzy, and often ISC type openness helps conscientious justices do *something* in the face of evidence that conclusively suggests the lack of constitutional good faith in implementing SER. That 'something' is never enough from the worm's eye perspective on the unreality of human rights but for them at the same moment that 'something' seems better than nothing!'

Further, the Olympian Judicial Gods that preside over the fate of human rights remain deeply problematic angelic communities! They may pursue the politics of

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[41] Article 21-A says this: 'The State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may by law determine.'

[42] 2008(5) SCALE at 271.

[43] See for the notion of judicial activism as civic conversation, Upendra Baxi, 'The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice', in S.K. Verma and Kusum (eds.), Fifty Years of the Supreme Court of India: Its grasp and Reach, 156–209 (Delhi: Oxford University Press and Indian Law Institute.)

constitutional hope via the development of a pedagogic role, which consists of the symbolic judicial conduct directed to change governance mindsets. When this may demonstrably fail, how may these forms of new secular divinity proceed? Should justices stand haplessly by or should they move to instrumental judicial action? Should not the courts deploy wisely and well their sovereign contempt powers? Or should they somehow justify judicial bystanderism as the best course of policy?

All I can say here that when justification of human rights indifferent, and even hostile, political practices for the allocation of national resources reigns, undeclared states of exception or emergencies stand declared against the constitutionally worst-off. If constitutional scholarship may valiantly rise against constitutional dictatorship that abrogates civil and political rights, should it not respond in an equal measure to the long –term suspension of the SER? If not, how may we understand the linkages between the communities of justices and of their critics, both in turn severally justifying judicial bystanderism and quite frankly the abdication of constitutional judicial role, power, and function? Danie Brand is right to insist (invoking the phrase-regime of the Law and Transformation Program of Centre for Applied Legal Studies at the University of Witwatersrand) that the 'Constitution of South Africa does not say that 'South Africa macroeconomic policy is the supreme law of the Republic, and everything the government does must necessarily fall in line with this strategy[44].' I fully agree in terms of the second C-11 reading of the Constitution in the Indian context. However, what remains here manifest is the state of play and of war between the written and the unwritten C1[45]. The latter entails what I have elsewhere named as the 'structural adjustment of judicial activism.'

*(e) The Militarized Forms of 'Constitutional Governance'*

It is clear that available national resource flows have to be harnessed to some equally insistent needs for military preparedness for territorial self-defense; when close to half the national budget stands dedicated to the armed forces and defense production, further undeclared emergencies against the SCR implementation arise. All that judicial power and forms of adjudication may do here is to ensure corruption – free wise use of such allocation. As far as I know, there exists no normative declared human right to immunity from corruption in high places. Continuing impoverishment thrives precisely on this immunity and impunity. The ISC has had a more than its fair share of adjudicative burden in perforating this immunity/impunity; the SAC will soon have a major opportunity to so act; and although I do not know whether the Brazilian Court was thus engaged, it is the case that a popularly elected civilian President was successfully indicted and removed for corruption. How far corruption trials further assist the implementation of the SER remains an open question, and not only in the BISA/CLR[46].

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[44] *Rights & Democracy*, at 54.

[45] For this distinction, see Upendra Baxi, 'Constitutionalism as a Site for State Formative Practices,' *Cardozo Law Review*, 21, 1183-1210 (2000.)

[46] I do not here address wider regional human rights type peacekeeping engagements. Each and every act of constitutionally-based and human rights-friendly regional intervention

*(f) Unconstitutional Economic 'Good Governance'*

Despite the brilliance of erudite TC discourse[47], there has not yet come into existence SER, or human rights, type enunciation or language that speaks to *economic good governance* in terms of obligations not to aggravate the immiseration of the constitutional have-nots or the worst off peoples. With all the profusion of General Comment of the UN Human Rights Treaty Bodies, and of the MDG, and the right to development talk, there exists no human right against fiscal and monetary policy regimes. Thus, there is no human right directed against price-rise (inflation) which mocks the smooth languages of the right to affirm, protect, and promote the SER! There is no human right whatsoever against policies and programmes of 'structural adjustment' or 'devaluation' of national currency which ruin the everyday lives of millions of peoples in the Global South.

SER depend a good deal on executive policy determinations concerning fiscal and monetary policies and bilateral/multilateral trade agreements. They also depend on the agencies that shape global social policy such as the World Bank's poverty alleviation programs[48], the MDG plans for action, and the various UN development instrumentalities. The relationship between some admirable General Comments offered periodically by the United Nations Human Rights Treaty Bodies and global social policy discourse is far from clear. In many respects global social policy tends to

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necessarily, and to some degree at least, diverts finite Global South economic resources for the protection and promotion of the SECR of co-nationals. India's claim to a permanent membership of the UNSC remains partly based on her huge contributions to the UN peacekeeping forces. The case of South Africa, acting independently or in association with the African Union (as recently in Somalia but also elsewhere) provides another instance. I do not know much about Brazil on this register. The general point, however, remains. Whatever we may privilege in TC terms remains impaled on some forms of authentic postcolonial geopolitical solidarities, which in turn diminish the available flow of resources for here-and-now pursuits of the within-nation endeavours to promote and protect the regimes of SECR. Nor one may overlook the defence production and operational costs thus entailed; when these reach any significant proportion of national budgets, the available internal resources of the implementation of SECR remain severely constrained.

[47] See for a recent instance, David Bilchitz, *Poverty and Fundamental Rights, The Justification and Enforcement of Socio-Economic* Rights (Oxford: Oxford University Press, 2007) and the critical forthcoming review of this work by Octavio Ferraz,' Poverty and Human Rights,' (2008.) will not here engage his central concluding remark that suggests that some historic developmental differences in the West and the non-West may have a differential pertinence/ purchase for the analytic of the 'transformative.'

[48] See, Celine Tan, doctoral thesis concerning Poverty Reduction Strategy Programs (PRSPs) as forming the contexts of postcolonial international law and global governance (University of Warwick, 2007.)

weaken the logic of SR in particular and human rights generally[49]; yet it seems that apex courts in the three countries often conflate this difficult relationship.

### *7. The Role of Apex Courts*

#### *(a) General Questions*

While there is general agreement in the BISA/CLR (as in most postcolonial and postsocialist constitutionalisms) that apex or constitututional courts have an important role to play in fostering constitutional cultures aimed at strengthening the protection and promotion of human rights, opinions continue to differ concerning how best judicial actors proceed to accomplish this. I here identify at least six types of related but distinct questions:

1) *The Question of Context:* When may Justices articulate their role as imposing on them a higher threshold of constitutional responsiveness than the executive or the legislature?
2) *The Question of Judicial Method or Discipline*: *How* best and within what limits or discipline may the Justices articulate such superogratory or pedagogic role in relation to the co-equal institutions of national governance?
3) *The question of Interpretive Limits: How far* should Justices deploy their exceptional power of judicial review over executive, administrative, and legislative action? Or, with justifications they may retreat to a closet, as it were?
4) *The Question of Effect:* Especially in the field of protection of human rights, how far the Justices may be guided by any consideration of the intended and *unintended governance and rights results/impacts?*
5) *The Question of Legitimacy:* In what ways judicial actors may pursue self-legitmation of the institutional judicial power, even when the immediate impact may entail some here-and –now denial of the claims of basic human rights? How far judicial restraint (or what emerges in the South African discourse as 'weak' versus 'strong' form of judicial review[50])? How may any institutional accommodation thus involve in

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[49] See Upendra Baxi, " 'A Report for all Seasons?: Small Notes on Reading *In Larger Freedom,*" C. Raj Kumar and D.K. Srivastava (ed.), *Human Rights and Development: Law, Policy, and Governance,* 495- 514 (Hong Kong, Lexis/Nexis, 2006) Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals,' *Human Rights Quarterly* 27:3 755-829 (2005.)

[50] See. For example, Danielle E. Hirsch, 'A Defense of Structural Injunctive Remedies in South African Law,' The Berkeley Electronic Press (bepress): http://law.bepress.com/expresso/eps/1690 (visited July 2007.) See also, Mia Swart 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor," 21 *SAJHR* 215, 215-19 (2005); Dennis Davis, "Socio-economic rights in South Africa: The Record of the Constitutional Court after ten years," 5:*55 ESR Review* (Dec. 2004); Kameshni Pillay, Implementing *Grootboom*: Supervision needed," 3:1 1 *ESR Review* (July 2002); David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-Economic Rights Jurisprudence,. *SAJHR* 19:1, 25-26 (2003); Rosalind Dixon, 'C*reating Dialogue about*

the short and long runs, contrary to the apperceived end of promoting the legitimacy of the highest adjudicative power?

6) *The Question Concerning Governance Effect:* How may feats of shared adjudicatory policy enhance or weaken the governance capabilities, at least in part directed to accomplishing a better, or more secure, future for human rights, including SER? Put another way, how far may, or ought to, either aggravate or repair the legitimation deficit of governance? In this context, how far courts and justices foster or frustrate the rather imaginative reworking of the notion of the state as 'the newest social movement[51]?'

J*udicial actors in particular* themselves differ *inter se* on these matters; so also do *those public actors affected by judicial action* and the relatively 'disinterested' communities of academic critics. In part, this also presents an allied question of socially responsible form of evaluation of justice at work: How may we *judge the judges*? Neither Justices at work nor their critics may escape the burdens of political judgement thus imposed, even when working with conceptions of constitutionalism that resist reduction of the 'law' to 'politics.'

I must add a few caveats to this even summary enunciation of questions/concerns. *First*, the structuring of the apex courts and judicial hierarchy matters decisively because this determines who among the vast masses of citizens may after all be invested with high judicial power. It is unlikely that members of vulnerable social groups will ever be invested with high judicial power. The Indian Supreme Court (ISC) has rewritten the IC in terms that transfer the executive power into the hands of the Chief Justice of India acting within a collegium of a few senior justices. The SAC (Article 174) not merely provides for a wider political consultation but also the device of a national Judicial Service Commission and further remains sensitive to the need to 'reflect broadly the racial and gender composition of South Africa.' Articles 93-94 of the BC proceed very differently indeed in vesting the executive with nominative powers, but in relation to federal judges with a rather piquant requirement in Article 94 that mandates that 'one -fifth of the seats on the Federal Regional Courts, of the Courts of Appeals of the States and of the Federal District and Territories are formed by members of the Attorney General's Office with over ten years of service,' and 'by lawyers of notorious legal knowledge and unblemished reputation, with over ten years of actual professional activity…'"Notorious' legal knowledge may be a quirk of translation but it sits oddly with the possibility of an '*unblemished* reputation!'

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*Socio-economic Rights: Strong v. Weak-form Judicial Review Revisited*, Center for Human Rights and Global Justice Working Paper Economic, Social and Cultural Rights Series, Number 3, 2006; and some further remarkable offerings in *Rights & Democracy*.

[51] B Bouaventura de Sousa Santos, *Toward a New Legal Commonsense: Law, Globalization, and Emancipation* at 489, 492 (London: Butterworths Lexis/Nexis).

*Second,* no matter how the judiciary is composed it remains important to engage the composition of the Bar; as Jeremy Bentham long ago memorably judicial power is always exercised by the 'judge and the company.' Ways of judicial disposition overall depend on how that 'company' stands constituted. The ways in which markets for legal services stand constituted matters a good deal in terms of the availability of necessary forensic competence for the construction and enforcement of SER; nor, further, may we underestimate in this context the ways of state lawyering. I think that the BISA project needs some serious engagement in terms of comparative understanding of the production/reproduction of legal professions. Further in this context, the disruption of professional hegemonies caused by the emergence of the citizen- petitioner (certainly in the itineraries of the distinctive forms of the Indian social action litigation) needs a fuller acknowledgement.

*(b)Adjudicatory Policy and Rights Implementation*

*Third,* references in the above questions to 'adjudicatory policy' may surely puzzle on a view that insists that appellate justices ought to decide cases and controversies on the facts and arguments placed before them without predispositions. These are often summated as obligation to justice according the law without 'fear' or 'favour.' This is surely an attractive view of constitutional justicing. However, it remains true that the exercise of judicial power and function entails the development of judicial policy dispositions that evolve over time. The most famous (or infamous) are the versions of judicial restraint or activism which actually mediate the hearing of arguments, the writing of judicial opinions, and votes on the final result; the Indian Supreme Court (ISC) has innovated these categories in terms (my description) of judicial and justice restraint and activism as well as forms of eclecticism. Often adjudicatory polices crystallize into legal doctrine: *res judicata*, *laches, stare decisis, standing, and justiciablity,* for example, which adversely affect SCR implementation.

The Constitutional Court of South Africa (CCSA) has perhaps gone the farthest in evolving an explicit policy agreement with the country's media, referred to it as the 'Goldstone Concordat,1993, (the naming derives from Justice Goldstone who on behalf of the judiciary entered into a general agreement with the representatives of the media.) Under this sound and film recording could be made but sound would not be broadcast save for the delivery of judgment and further that the recording should be done in a non-intrusive manner. In a recent case the CCSA[52] more or less affirmed this agreement[53]. It declined to fully pronounce on the media right of live broadcasting of judicial proceedings generally and the right of the public to know in situations of

[52] *South African Broadcasting Corporation Case: Case CCT 58/06*)

[53] The Court observed (at para 71) : 'It would seem that the advent of a democratic constitution, technological advances and growing acceptance throughout the world of the power and impact of the electronic media may require this agreement to be reconsidered. The answer, however, is not to treat it as non-existent but rather to renovate and update it. It would be inappropriate for this Court at this stage to prejudge such a process. '

political corruption in high places. Avoiding a substantive decision, it upheld the power of the Supreme Court of Appeal to determine whatever 'fair trial' constraints may mean[54]' However, as the Brazilian instance shows adjudicatory policy' varies with the hierarchy of courts; in relation to the movement of the landless who in a remarkable act of citizen interpretation of the 'social function of property') 'Some judges agree to most injunction of repossession, but others, in name of "social justice", decide in favor of the squatters[55].' Yet the Brazilian Supreme Court (BSC) 'ordered the state government of Paraná to use public force and have the judicial decision of repossession of a land enforced. 'With extreme eloquence' the Court rules against the ending of the 'underlying uncertainty' resulting from 'the non enforcement of the judicial decision by the state government (and police)' and 'the necessity to guarantee social peace and order, despite the difficulties that the State claimed in enforcing judicial orders against the 'invaders' and the tasks of their resettlement[56].' The issue, it seems to me (seems because I do not have access to the full text of the judgment), here gets transferred to the realm of the institutional integrity of the Court from the mosaic of considerations of human rights and justice otherwise so fully articulated in the BC.

At first sight, judicial insistence on executive compliance with court orders and directions seems justified in the context of civil and political rights. As a matter of first principle, it is clear that the executive (or even the legislature) of the day may not plead political or resource (financial) helplessness in providing for civil and political rights. To authorize such pleading would entail state helplessness to prevent torture, disappearances, and barbaric prison conditions. However, the same approach does not quite clearly hold in relation the implementation of the SER, as specially revealed in the SACC discourse. Despite the fact that some SCR are declared enforceable against the state, the constitutional court has shown considerable reluctance in constraining appropriate state action. Indeed, it has overruled state High Courts when they provided for implementation by way of 'structural injunction, notably in the context of right to health and housing and shelter. On this register, as already noted, the adjudicatory policy showing a *high* order of deference to the executive has indeed resulted in a *low* order of judicial respect for the constitutionally guaranteed SER. It is clear both from the SACC and ISC experience that policies of judicial restraint, or more dramatically put the judicial politics of consensual institutional accommodation of the executive caprice in implementing SCR leaves the constitutionally- worst off in the same 'original position.'

How may then understand the dissipation or reconstituting of the transformative character or potential of the TC? Confidentiality obligations prevent

[54] See the further analysis by Daniel H. Erskine, 'Judgments of the United States Supreme Court and the South African Constitutional Court as a basis for a Universal Method to Resolve Conflicts between Fundamental Rights,' *St. John's Journal of Legal Commentary*,. 22:3,594 (2008.)

[55] See Meszaros cited *op. cit*.

[56] Ibid.

me from naming names, but I may say that I have heard from at least two incumbent justices of the SACC that the current historic moment is not 'ripe' for structural injunctive relief (or continuing mandamus type judicial oversight.) The constitutional moment for this happening, it always remains suggested, must await a better future. Like the SACC, the ISC remained bound to notions of constitutional political correctness for a long while. I understand this in terms of my conversation with many illustrious ISC justices of yesteryear; they too felt that the time was not ripe for judicial implementation of Directive Principles. For India, however, this time arrived in a radical outburst of judicial populism in the wake of a declared emergency of 1975-76, and in a later moment of the efflorescence of social action litigation (which in part I was privileged to initiate) during which apex Justices not merely transferred Part IV SER enunciations into Part 111 judicially enforceable rights but further proceeded to proclaim new basic rights and freedom not contemplated by the constitution-makers and often against the grain of their expressed determination. It is not clear in rapidly accelerating hyperglobalizing contexts that the SACC has the same stretches of luxurious time as had the SCI. Perhaps, the same may remain true for the Brazilian constitutional experience. All this invites attention to Antonio Negri once again: How may apex justices develop *love of* and *for* time?

*(c) Rights as' No More' than Policy Statements*

This is 'big' jurisprudential and political theory business, indeed! Many careers have been made, for weal or woe, reducing declarations of rights into languages of policy or in asserting their 'trumping' character, It remains conventionally accepted that civil and political rights signify an order of precommitment, in the sense that these constitute prior restraint on the rues of the political game. As Justice Hidyatuallah put this (in the *Sajjan Singh Case*) Justices ought to worry about converting human rights into' playthings' of majority; by this he meant the tyranny of political majority; as however happens in the Indian context rights also became playthings of wafer-thin judicial majorities in the voluminous *Golak Nath* and *Kesavananda Bharati* discourse. For an Indian reader of the first C2, the noble rhetoric Justice Madala [57] carries a profoundly poignant ring: His Lordship explicitly states: 'Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for the future South Africa.'

The slight problem with all this: the 'striving'/'salvaging/ etc marks is 11twofold. If human rights are no more than policy statements, these remain poor guides to state action. Polices may be made with scant or little regard to human rights. These remain contingent against some articulation of the ontological robustness of the basic human rights. Judicial governance, no matter how differently human rights oriented/imbued thus seems to cohabit the same space as demarcated by human rights neutral, and even unfriendly, ways of governance. Perhaps, the second C2 is all we have by way of a platform of résistance to forms of judicial collapse in

[57] *Soobramoney v the Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 42.

which the pursuit of the CPR remains entirely distanced from that of the SER. Via the reduction of the languages of human rights into those of mere policy – statements what stands achieved is the structural adjustment of the forms and lineages of judicial activism at the cost of neoliberal caused recession of the futures of the SCR in particular and human rights in general. Nothing will gladden my aging heart and soul more than a refutation of this funerary conclusion in our BISA deliberations!