www.vrue.nomos.de

VRÜ | WCL

Verfassung und Recht in Übersee
World Comparative Law

2 2025
58. Jahrgang
Seite 141–260
ISSN 0506-7286

Nomos

Symposium: Grand Narratives of Constitutional Journeys and the Crisis of Democracy

VRÜ | WCL 2 2025
58. Jahrgang
Seite 141–260

Inhalt / Table of Contents

SYMPOSIUM

ABHANDLUNGEN / ARTICLES

BUCHBESPRECHUNGEN / BOOK REVIEWS

SYMPOSIUM

Grand Narratives of Constitutional Journeys and the Crisis of Democracy: Introduction to the Symposium

By *Anmol Jain*[*]

A. Introduction

In his thought-provoking article of high contemporary global relevance, published in 2024 in the pages of this very journal,[1] Theunis Roux makes an important intervention in the debates around the design, character, and effects of the Indian and South African constitutions, with the primary aim of nudging our politics towards securing, albeit incrementally, an inclusive and democratic vision of constitutionalism. In this exercise, Roux attempts to manage a herculean task within the confines of an academic article, which has its shortcomings and misses. Yet, he achieves something remarkable and thus acts as the locus of this symposium.

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

Titled "*Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa*", Roux's article argues that one could broadly trace two discursive narratives about the Indian and South African constitutional journeys in scholarship and politics. The first narrative holds that while the two constitutions may seem to have borrowed their structure and institutional design choices from the Western liberal constitutionalism model, the framers consciously made a few notable and defining changes to suit the local needs and demands of the two nations. The constitutions, therefore, cannot be called a replica of Western ideas. Roux terms this the liberal progressive narrative ("LPN"). LPN does not deny that the two constitutions have been successful in their purposes. While acknowledging the shortfalls in the desired performance, LPN disagrees that such shortfalls are on account of designing the state with inspirations from the liberal constitutionalism model. Several extra-constitutional factors and governance decisions could be the reasons, something that Roux acknowledges requires further work to ascertain.

* Assistant Professor, Jindal Global Law School, OP Jindal Global University, Sonipat, India. Email: anmol.jain@jgu.edu.in.

1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 5.

Contradicting this narrative and challenging the extent, if not existence, of such local adjustments, the believers of the culturalist grand narrative ("CGN") argue that the two constitutions are symbols of colonial hangover. They perpetuate the colonial matrix of power in the economic, social, and political domains, largely on account of the framers' rejection of designing the constitutions with indigenous inspirations. In developing this account, Roux limits the boundaries of CGN to only those critiques of LPN that still believe in the inclusionary and democratic vision of constitutionalism. Those interests that use the language of culture, indigeneity, and the decolonization movement to establish an exclusionary ethno-nationalist state are termed the "dark side of CGN,"[2] and kept beyond the arguments made in the paper.

Having outlined these two broad narratives, Roux presents an imaginary dialogue between these two camps to highlight that they have much in common. Both intend to establish a constitutional system that not merely establishes state institutions and distributes power among them but empowers such institutions in ways that enable them to bring about ground-level socio-economic and political transformations.[3] In other terms, the idea of transformational constitutionalism binds the politics of LPN and CGN, though Roux labels this as "southern democratic constitutionalism."[4] In his words,

> *"[…] it is fair to say that the LPN and the CGN, despite their many differences, are animated by the same ideal—call it southern democratic constitutionalism. According to this shared ideal, the role of constitutions in the Global South is different from the classic liberal idea of constitutions as limits on government. Rather, constitutions in the Global South should be designed to empower a democratic state to undo the colonial legacy of social, economic, and cultural inequality. Constitutions, in this view, are not purely procedural frameworks for managing competition between groups with different conceptions of the common group. They are instruments for transforming society in line with a clearly articulated vision of post-colonial justice."*[5]

At this point, Roux pivots to the current political realities of India and South Africa and argues that, as anti-democratic populist forces are on the rise, it is imminent for the LPN and CGN camps to come together in their fight for the shared ideal. Now is not the time to champion the differences; the exigencies of current politics and the dangers they pose to the survival of democracy call for a strategic coalition between the proponents of LPN and CGN. They must synergize their energies and fight together for a future where they may find adequate political opportunities to bring about suitable changes to the Constitution.

2 Ibid., p. 27.

3 See also *Sandipto Dasgupta*, Legalizing the Revolution: India and the Constitution of the Postcolony, Cambridge 2024.

4 *Roux*, note 1, p. 51.

5 Ibid.

Any call for revisions or an overhaul at this stage would be dangerous and could give way to the dark side to seize the moment.

C. Expanding on the Understanding of the Indian Constitution

There are many entry points for engaging in a conversation with Roux and his ideas. The already published four responses to Roux make tremendous efforts in this regard,[6] but much scope for engagement remains. Given the contemporary salience of Roux's arguments—not just in the academic corridors but even among those active in national and regional politics—this symposium is an attempt to deepen this engagement. But before I introduce the authors who have graciously agreed to be a part of this symposium, I will briefly offer my comments on Roux's article, drawn mainly from my understanding of the Indian Constitution, as that is the country I know the best.

First, the Indian constitution is much more complex in its framing and institutional suggestions than is portrayed by Roux and perceived by the two narratives. LPN does not fully capture the identity of the Indian constitution, and its certain sections portray how indigenous ideas were given due space by the framers. For instance, consider Part X of the Constitution, which provides for specialized governance regimes for the scheduled and tribal areas and allows for the creation of autonomous councils. This idea was carried further in the post-independence period by constitutionally supporting similar exceptional institutional structures in select states.[7] Calling the Indian Constitution inspired by Western ideas, though with local adjustments, overlooks such examples of indigenous inspiration and tapers over their significance while presenting the constitution-making process in an oversimplified manner and discounting the labour and agency of the framers.[8] As BR Ambedkar countered in his November 1948 speech in the Constituent Assembly, which deserves quotation in full:

6 *Catherine O'Regan*, Some Reflections on Theunis Roux's Grand Narratives of Transition and the Question for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 72; *Joel Modiri*, Narrating Constitutional Dis/Order in Post-1994 South Africa: A Critical Response to Theunis, World Comparative Law 57 (2024), p. 82; *Anuj Bhuwania*, Spectres of Decoloniality: Comparing Constitutional Histories of India and South Africa, World Comparative Law 57 (2024), p. 98; *Aparna Chandra*, Detangling Knots in the Narratives: A Response to Theunis Roux, World Comparative Law 57 (2024), p. 114.

7 Constitution of India 1950, Part XXI.

8 See *Dasgupta*, note 3, p. 9 ("The nascent postcolonial regime in India did not seek legitimacy by adopting certain 'impedimenta of statement.' It drew its legitimacy from the popular anticolonial struggle that preceded the Constituent Assembly. The Assembly, in turn, spent more than three years reflecting and deliberating on their particular historical conjecture, rethinking what a constitution can and should do. Their undertaking demanded not the wherewithal of adaptation, but the anxious labour of creation. A full account of that undertaking therefore must depart from the idea of a constitution as an established normative template.")

> *"It is said that there is nothing new in the Draft Constitution, that about half of it has been copied from the Government of India Act 1935, and that the rest of it has been borrowed from the Constitutions of other countries. Very little of it can claim originality. One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world. More than a hundred years have rolled over when the first Constitution was drafted. It has been followed by many countries reducing their Constitutions in writing. What the scope of a constitution should be has long been settled. Similarly, what are the fundamentals of a constitution are recognized all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in a constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country. The charge of producing a blind copy of the Constitutions of other countries is based, I am sure, on an inadequate study of the Constitution. I have shown what is new in the Draft Constitution, and I am sure that those who have studied other Constitutions and who are prepared to consider the matter dispassionately will agree that the Drafting Committee in performing its duty has not been guilty of such blind and slavish imitation as it is represented to be."*[9]

Moreover, recent scholarship on the Indian constitution-making process has unveiled evidence of public participation and how such interventions influenced the thinking of the Constituent Assembly and design of the constitutional provisions,[10] though it is undeniable that the extent of such participation was limited. These works further challenge Roux's classification of existing constitutional narratives into two camps—LPN and CGN, and compel us to reconsider the Indian constitution-making exercise as a mere adoption of Western ideas with minor changes to suit local requirements. Unfortunately, this scholarship remains absent from Roux's analysis.

Second, clubbing the decolonial critique with the CGN essentializes the former. Particularly from the Indian experience, the aspect of the absence of culture and Hindu religious values from the Indian constitutional thinking is only one strand of the decolonial critique. There are so many other ways of thinking, which Roux himself acknowledges, that critique the Indian constitution without adopting the vocabulary of indigeneity (or the absence of it). Roux's choice to club all such critiques within the camp of CGN could perhaps be on account of studying India along with South Africa, where, in my understanding, the aspect of religion is absent in the language of cultural critique. In such a scenario, a forceful marriage of such diverse critiques within a single camp may not be appropriate.

9 Constituent Assembly of India Debates, vol 7, 4 November 1945, speech by BR Ambedkar.

10 *Rohit De / Ornit Shani*, Assembling India's Constitution: Towards a New History, Past & Present 263 (2024), p. 205; *Ornit Shani*, The People and the Making of India's Constitution, The Historical Journal 65 (2022), p. 1102.

Third, it is wrong to presume that the alternative institutional design ideas from the CGN camp would be democratic in their outlook. I agree with Roux that the present times call for coalition building between the believers of LPN and CGN; however, it cannot be denied that the coalition must be based on the shared ideal of Southern *democratic* constitutionalism. There is a possibility that institutional alternatives based on indigenous thinking further an anti-democratic outlook, which may not resemble what Roux calls the 'dark side of CGN' but remain miles away from the understanding and depth of democracy as believed by the LPN. Indigenous suggestions bring with them the possibility of supporting a different set of hierarchies, which we can term a pre-colonial matrix of power. Therefore, the strength of the coalition would hinge on the normative assessment of the reform proposals by the CGN camp. We are yet to see any elaborate exposition of that, as Arghya also notes in his contribution to this symposium.

Fourth, the approach to reforms must not only be inward-looking. Believers of LPN, as well as of CGN, must make active efforts to expand their vision beyond the West and their respective cultures and study other similarly situated societies and systems. The borrowing of ideas is a historical truth, and no modern society has remained uninfluenced in the design of its constitutional system. The dangers of the present and the failure of the 1950 and 1996 constitutions in materializing their transformational potential must not only make us conscious of the need to brainstorm reform but also nudge us toward the possibility of South-South borrowing. In developing such reform proposals, I agree with Roux that the aspect of Southern democratic constitutionalism must remain the focal point, with the ideas of substantive democracy (in its thick understanding) and transformation at its core.

D. Taking the Conversation Further and Beyond

There is so much more that could be said about this wonderful contribution by Roux. It is a genuine effort to inform our politics and is written in the service of democracy. Given the contemporary and global relevance of the arguments Roux develops, this symposium attempts to take the conversation further and beyond. It brings together a remarkable set of reflections, and each contribution situates Roux's conceptual framework of the LPN and CGN in different national and regional contexts, testing its analytical force, exposing its limitations, and extending its reach. Together, these responses demonstrate the vitality of comparative constitutional thought across the Global South, as well as the continuing urgency of engaging with questions of decolonization, legitimacy, and democratic constitutionalism. What follows is a set of eight responses culminating in Roux's own reply to his interlocutors, including the four responses that were published earlier in this journal.

Arghya Sengupta reads Roux's intervention as a "balm" for fractious Indian debates over constitutional meaning.[11] He highlights Roux's careful attempt to place the two narratives into conversation, while cautioning that their divergent means may render any shared

11 *Arghya Sengupta*, The Roux Balm, World Comparative Law 58 (2025), in this issue.

ends less significant. Sengupta stresses the enduring paradoxes of India's constitutional experience—Ambedkar's deified status, the BJP's strategic ambivalence, and the persistence of colonial institutions. Roux's framework is valuable, he argues, but perhaps he underestimates how deeply political legitimacy in India is shaped not only by textual design, but also by historical figures and institutional continuities that neither grand narrative fully confronts.

Mathew John engages Roux's presumptions that CGN offers the most authentic decolonial stance.[12] He argues instead that both LPN and CGN are shaped by the colonial experience, and that their real distinction lies in competing accounts of who constitutes "the people" in democratic constitutionalism. Reconstructing Indian nationalism through Partha Chatterjee and others, John shows that neither narrative can straightforwardly claim the mantle of decolonization. Instead, he turns to Gandhi as a thinker who uniquely sought to reject Anglo-European categories and imagine a different constitutional modernity. This Gandhian lens, John suggests, provides a richer way to think about democratic constitutionalism today.

Tom Daly situates Roux's grand narratives within a wider landscape of "phantom constitutions"—constitutional imaginaries that remain unrealized.[13] Drawing on comparative examples from Ireland to Venezuela, Daly asks whether culturalists' claims for constitutional overhaul suffer from insufficient attention to detail and political feasibility. He warns that the allure of constitutional revolutions often obscures risks of authoritarian appropriation, as seen in Venezuela and Brazil. Roux's LPN-CGN distinction is a helpful heuristic, Daly argues, but it must be supplemented by attentiveness to democratic commitments, institutional detail, and contextual constraints that determine whether constitutional alternatives are emancipatory or dangerously illusory.

Heinz Klug welcomes Roux's provocation but resists his framing of southern democratic constitutionalism as a dialogue between only two poles.[14] Instead, Klug calls for recognition of a spectrum of experiences across Africa and beyond, highlighting Ghana, Kenya, Zambia, and others as exemplars. He emphasizes issues Roux sidelines: the persistence of legal continuities, the rural-urban divide, and the entrenched power of bureaucratic structures. For Klug, southern democratic constitutionalism must embrace social-democratic alternatives already latent in existing texts and practice, while acknowledging the risks of both continuity and rupture. A broadened debate, he concludes, requires more syncretic, aspirational, and materially grounded paradigms.

12 *Mathew John,* Democratic Constitutionalism and the Blandishments of Grand Narratives, World Comparative Law 58 (2025), in this issue.

13 *Tom Daly,* Decolonisation and Democracy: Constitutional Dreaming, Revolution, or Threat?, World Comparative Law 58 (2025), in this issue.

14 *Heinz Klug,* Beyond a Bimodal Southern Democratic Constitutionalism, World Comparative Law 58 (2025), in this issue.

Turning to Ethiopia, *Alemayehu Weldemariam* asks what happens when constitutional legitimacy lacks any unifying narrative.[15] Unlike India or South Africa, Ethiopia's constitutions were products of revolutionary impositions rather than inclusive struggle. The 1995 federal constitution, hailed by its authors as emancipatory, is viewed by others as an act of dismemberment. Ethiopia's constitutional history, he argues, is one of proliferating texts without shared meaning, leaving the polity suspended between centrifugal secessionism and authoritarian majoritarianism. Roux's insights into the narrative function of constitutions resonate here, but Ethiopia illustrates the tragic consequences when no grand narrative—emphasizing judicial independence, international human rights, and institutional checks—with the "Fourth Transformation" narrative of López Obrador, which seeks to revive the popular, nationalist spirit of the 1917 Constitution.

These clashing accounts mirror Roux's LPN and CGN, yet *Roberto Niembro* stresses their instrumental role in legitimating political projects. Mexico, he argues, now oscillates between liberal constitutionalism tied to global norms and a populist nationalism claiming decolonial authenticities. Roux's typology helps decode this confrontation, but the Mexican experience also demonstrates the performative power of grand narratives themselves.[16]

Anna Dziedzic extends Roux's conversation to the Pacific, where constitutions are marked both by colonial inheritance and indigenous adaptation.[17] She highlights how Pacific constitutions enshrine customary land rights, recognise legal pluralism, and experiment with the imprint of foreign advisors and colonial order. Recent reforms in Samoa and Tuvalu reveal how constitutional change is framed as decolonial "weaving," blending indigenous values with liberal constitutions. This interweaving challenges the stark opposition between LPN and CGN, suggesting instead that southern constitutionalism often operates through syncretism and hybridity, producing plural forms of legitimacy beyond Roux's binary schema.

Abrak Saati shifts attention from constitutional content to process, analyzing Fiji's participatory constitution-making efforts in 1997 and 2013.[18] While formally inclusive, both processes failed to translate participation into real influence, rendering participation largely symbolic. Saati argues that this tension reveals how participatory constitution-making, often promoted by international actors as part of a liberal-progressive agenda, may conflict with indigenous decision-making traditions that prize respect, silence, and deference. Roux's dichotomy, she suggests, obscures this procedural dimension: participatory ideals

15 *Alemayehu Weldemariam,* Between Myth and Meaning: Ethiopia's Fractured Constitutional Narratives and the Crisis of Legitimacy, World Comparative Law 58 (2025), in this issue.

16 *Roberto Niembro Ortega,* The Grand Narrative of the Current Transition of Mexican Constitutionalism, World Comparative Law 58 (2025), in this issue.

17 *Anna Dziedzic,* Grand Narratives Interwoven: Pacific Constitutions and Constitutionalism of the Global South, World Comparative Law 58 (2025), in this issue.

18 *Abrak Saati,* Public Participation and Grand Narratives of Constitutional Transitions: The Case of Fiji, World Comparative Law 58 (2025), in this issue.

may themselves be a form of imposition. Fiji demonstrates that legitimacy depends not only on narratives of content but also on culturally resonant processes.

Taken together, these contributions offer a wide-ranging meditation on the power and limits of grand narratives in shaping constitutional legitimacy across diverse contexts. From India to Mexico, Ethiopia to the Pacific, each response shows how Roux's heuristic illuminates national trajectories while also inviting revision, expansion, or reimagining. What emerges is a dialogue that both honors the ambition of Southern democratic constitutionalism and insists on its complexity. It is, therefore, fitting that the symposium closes with a response from Roux himself, where he takes up these challenges and reflects on the future of comparative constitutional thought. I sincerely hope this symposium will make positive contributions and further the cause of Southern democratic constitutionalism.

Before I close, I would like to extend my warm regards and sincere thanks to the entire editorial team of the IACL Blog, who extended the space and editorial assistance to a few of our authors to have these conversations by way of an online blog symposium, which undoubtedly played a formative role in the imagination and possibility of this longer interaction.[19] This WCL symposium would not have been a reality but for their gracious acceptance of my proposal and the positive response of the blog's audience. I will ever be grateful to them, and hope that the blog will host many such conversations in the future.

19 IACL-AIDC Blog, Workshop my Paper Series – Grand Narratives of Transition and the Quest for Democratic Constitutionalism, 2025, https://blog-iacl-aidc.org/2025-posts/2025/6/3/workshop-my-paper-series-grand-narratives-of-transition-and-the-quest-for-democratic-constitutionalism-response-to-commentators (last accessed on 28 August 2025).

The Roux Balm

By *Arghya Sengupta**

A. Introduction

If Lindiwe Sisulu, Transport Minister of South Africa, thought that the Constitution of South Africa was like a "Panadol" providing momentary relief, Theunis Roux's article bringing that Constitution into conversation with the much older Indian Constitution is like a balm.[1] It burns at first blush, but when it settles, has a soothing feel.

In India, debates about the nature of the Constitution, and its ability to truly serve "we the people" in whose name it is written, are unusually fractious. In this context Roux's intervention that brings two seemingly opposing viewpoints into conversation with each other prods each of us who are participants in this debate to be the best versions of ourselves.

Roux argues that the liberal-progressivist narrative ('LPN') of the Constitution—which argues that both the Indian and South African Constitutions are essentially masterful adaptations of a liberal Constitution to a Global South setting—and the culturalist grand narrative ('CGN')—that argues that the Constitution is largely a perpetuation of the colonial matrix of power and ignores indigenous constitutional ideals—are both united in a common goal of what he calls *Southern Democratic Constitutionalism,* a new kind of post-colonial state that can transform society and materially improve the lives of people.

As a caveat, it is worth examining whether the unifying rationale that Roux has identified for the two projects does much normative work. In this context, there is a distinction that needs to be drawn between means and ends. The ends sought to be achieved by the proponents of these two viewpoints may well be to articulate a form of constitutionalism that is best suited to their respective countries. At the level of intention, Roux is surely right. However, the key point is this—even if the intention is such, the means adopted are so widely different that the common intended end pales into insignificance. Roger Federer and Rafael Nadal both want to win tennis matches—one does it through silken grace, a single-handed backhand and a serve-and-volley game while the other uses sheer power, heavy top spin and baseline hitting. Merely because they have the same intended end does not whittle down their differences in how to get there. It does, as Roux points out, call for healthy respect and engagement.

To reach his conclusion, Roux adopts the best possible interpretation of each of these two streams of thought and urges them to be better. Since I am much more familiar with the

* Research Director at the Vidhi Centre for Legal Policy, India. Email: arghya.sengupta@vidhilegalpolicy.in. The views expressed in this article are personal.

1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), pp. 5-71.

Indian literature on the subject, I will use examples from the Indian works he has cited to make this point. Take the modern expression of the LPN view found in Madhav Khosla's work. Khosla's main point is that the Constitution was a founding moment for the modern liberal Indian state because of its emphasis on universal suffrage, fundamental rights and codification of law. Roux understands this as taking certain ideas central to constitutionalism in the Western world and adapting it successfully to a non-Western context.

But even though the Constitution of India makes a reference to universal suffrage, the right to vote was not made a fundamental right. The fundamental rights themselves are an incorporation worth celebrating, but came riddled with wide exceptions. Codification itself was a colonial process that began with creating consolidated bodies of Hindu and Islamic law. Besides, Khosla's account does not seriously look at how colonial institutions—the police, the judiciary, the Indian Civil Service (a centralized bureaucracy)—were perpetuated without undergoing any fundamental transformation. Ambedkar admitted as much, when he clarified that "the provisions [in the Indian Constitution] taken from the Government of India Act, 1935, relate mostly to the details of administration." His implication was clear: merely that the institutions were colonial would not matter; since they would now be run by Indians, they would also be run *for* Indians. Roux is right to point to the fact that if LPN adherents are serious about their goals, they need to be serious about reforming the institutions that will get us there. Maybe the Indian Constitution is simply not as liberal as they would like to believe.

Equally, for the CGN, Roux rightly captures the difficulties of having this conversation at a time when the winds of authoritarianism blow globally. Putting this conversation in a longer historical frame is also apt given the recent tendency to consider any criticism of the Constitution as motivated by support of the Bharatiya Janata Party. Roux perceptively grasps this dilemma that a critic of the Constitution like me faces, when he writes that the nature of the time we live in is a reason why those with critical views of the Constitution pull back from asking for a complete overhaul.

However, upon interrogating this dilemma more deeply, we will find it is not because, as Roux apprehends, that any Constitution that comes out of a time such as this will be authoritarian, but rather that any such constitution, no matter what its contents, will not enjoy the wide, cross-party support that is needed for constitutional ideas to germinate and take root. No Constitution that comes out of this time is likely to be long-lasting and authoritarian. On the contrary, at least in the Indian context, I believe, it would be a waste of time.

In India today, much of this is academic. This is because of the elephant in the room when it comes to discussing the Constitution is BR Ambedkar, widely recognised as its moving force. Roux appreciates this but perhaps does not dwell on it as much. He recognises the paradox that the BJP, whose ideological opposition to all things colonial is well-known, has remained ambivalent on the Constitution.

At the risk of over-simplification, a key reason behind this paradox is that over the decades, Ambedkar has not only been seen as the greatest Dalit leader in India, but also

attained a deity-like status, whose shrine in Chaityabhoomi in Mumbai sees scores of devotees come to pay their respects much like in any other temple. Dalits form 16.6% of the population and are an important voting bloc for any political force that wants to win general elections in India. The BJP has shown its keenness to cast its ideological viewpoint on the colonial nature of the constitution aside and remain pragmatic in this regard.

Sometimes the mask slips, as it did recently in Parliament when Amit Shah, the Home Minister, rather derisively said that if people recited God's name as many times as they did Ambedkar's, they would attain salvation. But he was quick to retract it saying that he wholly respects Babasaheb and can "never insult him". Simply put, had it not been for Ambedkar's position as Chairman of the Drafting Committee of the Constitution (a job that Mahatma Gandhi had put him to), and his role in ensuring widespread consensus regarding its provisions (and, in hindsight, its longevity), the narrative around the Constitution today may have been markedly different. Proponents of the CGN have to recognise this and be careful about what they wish for.

But this fact should not detract all of us, interested in the constitutional futures of South Africa and India, to lay out what the contours of a decolonial Constitution looks like. Many critics of my book *The Colonial Constitution* have claimed that I do not put forward an alternative idea of what the Constitution should contain. This is neither an easy task, nor one that can be done quickly. Yet Roux is right in saying that the important task for interested scholars of constitutional law lies in outlining such a vision. I remain in the hope, as he does, that this will narrow down existing differences between constitutional law scholars further. I am grateful to him for making a start.

Democratic Constitutionalism and the Blandishments of Grand Narratives

By *Mathew John**

A. Introduction

This timely and engaging essay by Theunis Roux sweeps across the democratic constitutionalist project as it is under threat of running aground in India and South Africa with echoes for other countries across the world.[1] His axis of analysis is held together two grand narratives articulating national constitutional self-identity in these countries—the liberal progressivist narrative (LPN), and the cultural grand narrative (CGN). Consequently, these grand narratives define the poles along which Roux contours the challenge of forging the political and institutional conditions for democratic constitutionalism in India and South Africa respectively.

Framed in this manner, the essay suggests that the institutional success of the hitherto dominant liberal constitutional project (broadly the LPN) hinges on its ability to draw on and bring itself into dialogue with its principal antagonists—cultural nationalists (CGN), in Roux's telling. Accordingly, the essay details both the LPN and CGN narratives, brings them into an imagined dialogue, and pulls them together to further a democratic vision for constitutionalism in the global South. As these two narratives are brought into conversation, a key challenge that is evaluated in some depth is the colonially inflected political imagination inherited in India and South Africa and its suitability for forging constitutionalism in the global South. As the essay is organised, CGN prosecutes the charge of colonially inflected (and unsuitable) choices in the making of these Constitutions; and LPN, which was broadly adopted as part of the dominant institutional firmament, finds itself fending off the charge of being complicit in carrying on colonial government in a new garb through the independence constitutions of India and South Africa.

Negotiating what Roux presents as GGN's demand for de-colonising constitutional imagination and practice is therefore a key concern of my response, especially his presumption that CGN embodies the best case for de-colonisation. To outline the contours of my response, the ideological and institutional reality of colonialism, as well appreciated by the essay, was a framing condition for law and politics for all parties across India and South Africa. Therefore, all political and constitutional positions that took shape in opposition to colonialism were perforce shaped by the institutional and intellectual currents of colonial

* Professor of Law, School of Law, BML Munjal University, NCR Delhi, India , Email:john.mathew@bmu.edu.in.

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

society. If that be the case, I would like to show it is no easy task to attribute and argue, as Roux seems to do, that the sets of political actors associated with the CGN position could be taken to best embody the case for decolonisation.

On the contrary, I argue that both LPN and CGN are responses to the same challenge that colonisation posed—that is, how is it possible to forge modern political solidarities in societies that emerge from the throes of colonial domination. Problems associated with the afterlives of a "colonised" imagination and its impact on modern political and constitutional institutions are a problem that India and possibly South Africa also confront. However, this is not the central burden that either CGN or LPN seek to resolve in forging political solidarity and working towards state formation. Thus, even as CGN and LPN are political antagonists, it is not their stance on decolonisation that sets them apart but their different accounts of who must count as the people who constitute democratic constitutionalism. This has implications for Roux's considerations for democratic constitutionalism as it dissolves the problem, he generates from the aspiration to decolonise that is rife in different ways in most post-colonial societies. This way of recharacterizing Roux's essay takes me to a more full-throated engagement with decolonisation than he has explored in his essay, the prospects of which I explore with reflections on Gandhi as a thinker of decolonisation. Finally, I suggest what my response might mean for democratic constitutionalism in societies like India and South Africa, the heart of Roux's essay.

B. Characterising the Colonial Problem

Cutting through the nuances of Roux's account of constitutionalism in India and South Africa, I argue that he misidentifies, at least in the case of India, the problem posed by colonialism. That is, he accepts all too easily the assertions advanced by the advocates of Hindutva[2] (the Indian votaries of CGN) that they embody the case for decolonising modern Indian constitutionalism. But why must one look beyond and second guess the arguments advanced by a set of political actors who explicitly come down on the colonial character of Indian constitutional imagination and argue for fashioning constitutional identity that draws on native India political idioms? The answer I offer lies in the history of colonial government in India within whose folds Hindutva began to be asserted as rightfully representing Indian identity.

To historically locate Hindutva, it is important and perhaps even inescapable to begin our enquiry in the debates on nationalism and national self-identity in colonial India. Drawing on Partha Chatterjee's definitive work, it is possible to take nationalism to be a form of political consciousness that rent the political experience of pre-colonial South Asia.[3] Roux presents CGN as the claimants of this pre-colonial world and as those trying to

2 I use the term Hindutva loosely to encompass all shades of political opinion in India that argue for a nationalism rooted in Hindu identity

3 See *Partha Chatterjee*, The Nation and Its Fragments, Oxford 1995, esp. chapters 4 and 5.

align contemporary India to the largely "Hindu" values that made up this world. It therefore is useful to touch on the contours of this pre-colonial world and the forms in which it has been drawn on as a resource for modern India which I will try to address a little more systematically at the end of the essay through a discussion on Gandhi.

Chatterjee makes the historical imagination of pre-colonial India salient through the voice of Mrityunjay Vidyalankar, a Brahmin scholar in the employment of the British East India Company at Fort William in Calcutta. In his 19th century text *Rajabali,* Vidyalankar, pulled together the world of political power that he inhabited in which time, geography, and political lineage were all seamlessly woven with a mythic or *puranic* understanding of the Indian sub-continent.[4]

In this *puranic* world where mythic time could co-exist with liner time, and where mythic heroes could be viewed as predecessors of historically recorded figures, the motor force animating the past/history and time were providence and the divinely ordained authority of kings. Ordinary human agency as a presence in history and as an aspect of sovereign power, Chatterjee argues, did not make its presence felt for another half century. That is, Indians who largely did not engage the problem of the authorship of a political order felt the compulsion, through interactions and provocations arising from colonial state, to identify themselves as political and historical agents.[5] Consequently, and very significantly for my response, it was by breaking some of their *puranic* commitments and by attempting to cast themselves as sovereign political agents that Indians began to identify themselves as a nation or a *people*.

Drawing on the contours of this nationalist history through Chatterjee as also other historians, it is possible to draw out some salient features that defined the efforts of early Indian nationalists to demarcate their identity as sovereign agents of their own history. These include a recognition that national identity was by and large absent as Indians found themselves in the middle of 19th century, that Indians had to accept and learn from the superiority of European forms of knowledge and self-fashioning in this regard, that this learning from Europe entailed a thorough going reform of Indian society, and as Chatterjee points out, this transformation of India was to be carried in a manner that did not wholly concede the question of national identity to their European mentors.[6]

Drawing on this reconstruction of Chatterjee, my response makes the, arguably uncontroversial, assertion that decolonisation must be understood as an offshoot of the process through which Indians devised and debated, across the 19th and 20th centuries, responses to questions regarding the appropriate reform and remaking of their national and sovereign self-identity. However, even as British government framed the conditions and the challenge

4 Ibid., pp. 77–87.

5 Ibid.

6 For a flavour of this debate see Ibid; see also *Dipesh Chakrabarty*, Provincializing Europe: Postcolonial Thought and Historical Difference, Princeton 2000; *Sudipta Kaviraj,* Imaginary Institution Of India, New York 2010; *Tanika Sarkar*, Hindu Wife, Hindu Nation: Community, Religion and Cultural Nationalism, Bloomington 2001.

of decolonisation, it soon became clear to Indians that the realisation of national identity required national self-government, a demand that British would not concede until they were forced to leave by a movement for political independence.

National self-determination was indeed realised after Indians were able to forge a national solidarity that bridged differences across caste tribe region language and so on which the colonial state had supercilious declared would never allow Indian national unity. [7] It was the ferment and debate across these differences that positions recognisable from a contemporary vantage point about national unity began to take shape. Thus, LPN could be said to be the constellation of actors and positions that defended the that defended and viewed the Indian people to be a collection of individual citizens. Similarly, CGN could be said to the perspective that viewed the people in terms of exclusionary national identity, a perspective that played a big role in the creation of Pakistan but had limited success in independent India. Similarly, another important perspective foregrounded the federal character of the Indian people, and yet others like Gandhi argued that the project of national unity would have first have to reinvigorate the plurality of everyday practices that gave the Indian subcontinent its civilisational strength and cohesion.

Against this backdrop it is important to note that all these positions and perspectives are responses to the appropriate form in which national identity must be articulated and, that almost all these positions save that of the Gandhian strands are also straight-forward responses to the colonial/European problem—who must be the bearer of sovereign power? To narrow onto just LPN and CGN for our present discussion, it is true that they offer very different answers to the challenge of organising sovereign power which is a point that Roux makes more than apparent in detailing of their very different perspectives on how sovereign power is or must be organised for modern India. However, to what extent could it be said that these positions embody a decolonising sentiment that significantly and materially goes beyond the transfer of political power to a sovereign government that represents the Indian people?

Roux casts decolonisation as a process that goes beyond the merely acquisition and wielding of sovereign power but emphasises instead the argument that decolonisation must be the process of fashioning a constitutionalism that is culturally appropriate for India. Further he also identifies CGN as an embodiment of decolonisation in this latter sense. However, in the light of the discussion up to this point I would argue neither LPN or CGN are substantially invested in decolonisation understood as a project that seeks to fundamentally shed the Anglo-European character of constitutional and governmental organisation for an independent India. Of course, both these perspectives on national unity have been invested in mobilising symbols and resources from India's past to shape what they believe to be a uniquely Indian foray towards sovereign nation building. Thus, symbols like that

7 The British consistently claimed that the social divisions of India did not permit the possibility of national unity and justified their rule—Pax Britanica—as upholders of the peace in India See for example *Reginald Coupland*, Report on the Constitutional Problem in India: The Indian Problem, 1833-1935, Oxford 1943.

of "mother India", the Indic iconography of the India Constitution, the unique place given to the cow via provisions in of the directive principles in the Constitution and so on could be deployed by either LPN or CGN in their respective visions of national identity and by extension of constitutional government. That is, both LPN and CGN are principally efforts to build sovereign nation states as inspired by the brush with the Anglo-European forms of political imagination that colonialism brought to India.

Thus, against the backdrop of my re-characterisation of the terrain that Roux maps, at least in the case of India I would hesitate to label either LPN or CGN as perspectives as elaborating a decolonisation committed to undoing the cultural impacts of colonial rule. On the contrary they are merely different hues that constitutional democracy has assumed in India over the last 70 odd years coming out from the struggle for independence and self-determination.

Entering the debate on decolonisation and Indian self-identity, Gandhi was an exceptional political and intellectual figure who made a serious attempt to think with Indian ideas. Gandhi of course also drew intellectual inspiration from romantics and the traditions of dissent from across the world that he wove into the Indian intellectual traditions in pitching for a vision of "Hind Swaraj" or a free India. As a subject of the British empire Gandhi could not but be influenced by ideas that came to him from every part of the world.[8] However, unlike many of his fellow countrymen who drew on the Anglo-European political traditions to fashion their distinct conceptions of Indian national identity, Gandhi charted a path that was more deeply committed to the decolonisation or rejection of Anglo-European ideas than any of his contemporaries. Consequently, I suggest that it is intellectual imprint of figures like Gandhi and not the cultural nationalists associated with CGN who brings to view a much better case for decolonisation as it goes beyond self-determination, transfer of power, and the establishment of representative government. However, before we assess what this claim means for the manner in which Roux ties his essay to decolonisation it is useful to outline Gandhi as a decolonial thinker.

C. The Ghandhian Challenge

Gandhi refused to participate in the debate on national identity as it was framed by the colonial state. Going back to our discussion on the emergence of the history of modern India, I had pointed out via Chatterjee that sovereign national identity as a people, a historical account of that nation, and a thorough going reform of Indian society were viewed by both Indians as well as their colonial government as the conditions precedent for Indians to take their place in the world that colonialism had wrought. However, Gandhi turned his back on much of these ways of thinking about and fostering national identity by refuting the colonial assertion that Indians lacked identity as a nation or a people and by refusing the demand that Indians develop a sense of political unity understood through

8 *MK Gandhi*, Hind Swaraj and Other Writings, Cambridge 1997, pp. xiii–lxii.

frames such as liberal individualism, cultural nationalism, federalism and so on. He was committed to the reform of Indian society like for instance his opposition to the practice of untouchability. However, in his exhortation to India, the inhabitants of the subcontinent only needed to double down, rediscover, and refine their everyday and plural (perhaps even *puranic)* practices that had defined them over millennia.[9]

Gandhi was unimpressed by the developmental of the political, legal, and eventually the constitutional imagination that colonialism introduced to India. Responding to the political and constitutional change that the colonial state unfolded in India over the 19th and 20th century as the leader of the struggle for Indian independence, he spurred the most thoroughgoing attempt to revitalise Indian traditions that emphasised individual self-making, sustainable forms of engagement with the natural world, as also forms of engaging with each other as individuals and plural communities. Pulled together in his manifesto the *Hind Swaraj*, these ideas elaborate individual and moral self-making he envisioned at the heart of the project of *swaraj (*literally translated as self-rule). This approach to freedom was tied to the idea that mere transfer of power from the British to Indians would be insufficient to secure true swaraj. Thus, swaraj would only arrive "when we learn to rule ourselves".[10] The problem, however, were the structures of colonial rule that interrupted and came in the way of the freedom and self-making that he envisaged.

Roux makes many references to Gandhi in his essay and for the most part he does not take any position on Gandhi one way or the other. However, most of the interlocutors Roux draws upon, portray Gandhi as a woolly-headed romantic who did not have an eye on practical realities. In turn this impractical Gandhi is cast as having turned his back on modernity and on securing political power for the people who were understood to be the agents of modernity. However, far from being a form of naiveté, Gandhi's dismissal of railways, doctors, lawyers, as also the conflicts between Hindus and Muslims could be alternatively viewed as part of an attempt to foreground these typical forms modern life as they thwarted the ability of Indians to think with their intellectual traditions.

To take one of these emblems of modern life—the need for a sovereign people and its allegedly absence of in India owing conflict between Hindus and Muslims as principal elements of the body politic—it is useful to highlight Gandhi's deep suspicion of identities as the exclusionary axis of national solidarity. Thus, Gandhi objected to the colonial belief that unified political agency in South Asia was not possible because Hindus and Muslims were condemned to irreconcilable conflict.[11] On the contrary, unlike the colonial state which cast them as monolithic and exclusionary identities of potential national solidarity, he viewed these groups as civilisational spaces for experimenting with truth seeking. To the extent that they could be basis for solidarity, it was the through the diversity and the

9 This the core of his message in *Gandhi*, note 8.

10 Ibid., p. 73.

11 Ibid., pp. 51–57.

pluralism of experimentation that these traditions fostered. Consequently, founding politics and nations through exclusionary identities was to him sheer foolishness.

Hence, he was not merely unimpressed with colonial forms of pushing the subcontinent towards claiming political agency through exclusionary political identities but was one of its fiercest critics. For him, sovereign political agency was displaced by the urgency he placed on strengthening everyday forms of plural social practice held together under the umbrella of different traditions of truth seeking that were termed Hindu, Muslim, Christian and so on.

For the present purpose I will winding down this indicative account of Gandhi that is understandably short on detail and nuance but is hopefully sufficient to point to an approach to decolonisation that is not founded in acquiring and wielding sovereign power but in revitalising the ability to think with the social and intellectual traditions of the Indian sub-continent. In turn this could be characterised as the form of decolonisation that Roux was foregrounding all through his essay but was in my opinion unable to find across the spectrum of mainstream of Indian politics that he chose to examine.

Thus, if Roux was to examine a full-throated effort at decolonising Indian political and constitutional imagination, I would imagine that he could not evade engagement with the legacy of the likes of Gandhi in contemporary India. Consequently, it is on this note that I would like to draw this response to a conclusion with some cursory reflections on the absence of decolonisation in Roux's essay in the sense that I have outlined in my response.

D. Conclusion

To conclude, my response was framed as a search for decolonisation in Roux's essay. As I have presented it, the problem that Roux terms the colonial power matrix and a broad commitment to decolonisation is recognised by all parties across the Indian political spectrum. However, I have tried to argue that the deeper call for decolonisation that is associated with the CGN is a red herring in Roux's presentation and that CGN is as much part of the political mainstream of Indian constitutional imagination as is LPN. I have not been able to elaborate at great depth on the contours of a decolonial constitutional imagination, but through my cursory account of the Gandhian political thought I have suggested a more appropriate location to search for such for a decolonial imagination. Thus, in my understanding this leaves Roux where he signs off in this essay—elaborating the important avatars of democratic constitutionalism in both India and South Africa who are both committed to the same ideal even as they debate key constitutional concerns such as the scope of judicial review, secularism, federalism and so on. In my understanding these are problems best considered outside the purview of decolonisation, but I hope to hear

from Roux on how best to carry forward our common concerns, how best to confront the uncertainties facing constitutional democracy in almost all parts of the contemporary world.

Decolonisation and Democracy: Constitutional Dreaming, Revolution, or Threat?

By *Tom Gerald Daly**

A. The Allure of Phantom Constitutions

In his book *Phantom Architecture*, Philip Wilkinson offers that "some of the most exciting buildings in the history of architecture are the ones that never got built"[1]: a mile-high skyscraper; a dome to cover most of downtown Manhattan; an enormous elephant-shaped triumphal arch (on the site where the Arc de Triomphe in Paris now stands). Although these dreams and follies were never realised, they allow those dissatisfied with contemporary constructions to ponder what might have been. Some projects, such as the 1830s plan to build a palace on the Acropolis right next to the Parthenon, or the 1990s Bangkok Hyperbuilding design—an ungainly mess of vertical, horizontal and diagonal towers—show that innovation is not always positive. Moreover, many of these designs could never have been constructed, not least because they presented insuperable engineering challenges. In many ways, these phantom projects' power to capture the imagination lies precisely in their freedom from the grubby reality of implementation. Inevitably—as long as one does not look too closely—they make even the most inventive real construction appear lamentably short on vision.

The same might be said of phantom constitutions—the constitutional texts, projects, and imaginaries produced as political plans or manifestos to envision a different constitutional reality, but which could not be realised or which had a short life. In the US context, for instance, Robert Tsai, in his 2014 work *America's Forgotten Constitutions*, explores alternative constitutions that emerged across the fledgling republic and into the twentieth century, countering the narrative of a hegemonic and monolithic US constitutional tradition by examining the texts produced by 'dissenters': "squatters, Native Americans, abolitionists, socialists, internationalists, and racial nationalists".[2] From the utopian constitution of the Icarian movement in the latter half of the nineteenth century to the Republic of New Afrika conceived by Malcolm X's followers in the 1960s as a route to true emancipation, these strains of constitutional thought have either nested uncomfortably within mainstream US constitutional thought, or in the case of New Afrika, have constituted an outright

* Professor at Melbourne Law School (Australia), Director of Demoptimism (www.demoptimism.org), Director of the Electoral Regulation Research Network (ERRN), and a co-convenor of the Constitution Transformation Network at Melbourne Law School. Email: thomas.daly@unimelb.edu.au.

1 *Philip Wilkinson*, Phantom Architecture, New York 2017.

2 *Robert L. Tsai*, America's Forgotten Constitutions: Defiant Visions of Power and Community, Cambridge MA 2014.

rejection of it. Tsai's account reminds us that, for all of their pretensions to permanence, the adoption of a new constitution is not a neat resolution of political antagonisms and ideation, but rather, a re-framing and re-shaping of contestation.

Reclaiming and revisiting these counter-narratives is clearly important, not only to achieve a more plural account of a nation's constitutional story and history, but also to ground possible alternatives to what may be perceived as an unjust, artificial, or illegitimate order. As Tsai puts it "it is crucial to develop a feel for the ideological periphery" and "the points of friction between conventional ideas about the American Constitution and insurgent theories of law."[3] Like phantom architecture, these phantom constitutions run the gamut from the realisable to the impossible and along a broad spectrum of normative commitments to democracy, inclusion and exclusion. In this response to Theunis Roux's highly important article seeking to prompt a more fruitful debate between adherents to liberal-progressivist and culturalist grand narratives ("LPN" and "CGN")[4], I raise three questions that may be useful in furthering current debates on decolonising constitutional thought, practice, and form.

B. Decolonisation and Detail

The first question is raised by Arghya Sengupta in his original symposium response: how much do we expect decolonial thought to pay attention to detail and the practical operation of an alternative constitutional order?[5] Roux's most compelling critique of at least some CGN arguments is that, by remaining within the upper reaches of abstraction, its proponents can remain wedded to aspiration unsullied by the challenges of practical implementation. As Roux suggests, any claim for root-and-branch constitutional change must surely be capable of offering a more detailed picture of how a different system would work, at least in its fundamentals. Is it the perception of exogenous ideation or even imposition that matters, or is it specific institutional choices? Is it about replacing perceived elite domination by popular empowerment? Is it about re-naming and re-founding the state, or is it about giving more space to autochthonous modes of governance? Is it about an evolution of the current constitutional order or a form of constitutional revolution? If it is revolution, Jacobsohn and Roznai remind us that this can happen incrementally, or as a paradigm shift without any change in the formal constitutional text.[6]

Here, comparative enquiry has much to offer in exploring what lessons are afforded by attempts to decolonise constitutions in the past. Although experiences from the Global South should rightfully take centre stage, others can also prove illuminating. Take the

3 Ibid., p. 3.

4 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024).

5 *Arghya Sengupta*, The Roux Balm, IACL-AIDC Blog, 4 March 2025, https://blog-iacl-aidc.org/2025-posts/2025/3/4/the-roux-balm (last accessed on 1 September 2025).

6 *Gary Jeffrey Jacobsohn / Yaniv Roznai,* Constitutional Revolution, New Haven 2020.

author's own home country of Ireland, for instance, as a post-colonial state that is now commonly perceived to be part of the Western world. Scholars such as David Kenny have analysed what might be characterised as decolonial dynamics in how the drafters of Ireland's first written constitution approached their task. Drafting of the 1922 Constitution, which established the Irish Free State (*Saorstát Éireann*) as a dominion within the British Empire, was conducted through negotiation between Irish and British experts, with the Irish drafters making serious and inventive attempts to break free from the party-dominated Westminster tradition.[7] These included: the use of proportional representation with a single transferable vote (to replace the British first-past-the-post system); the establishment of a Senate designed to have very different composition than the house of deputies (aiming to be more representative of Irish society than its upper-house counterpart in Westminster); direct democracy mechanisms (including referendums as part of the legislative process and popular initiative referendums for legislative or constitutional reforms); vocational councils (allowing various social and economic sectors to have a direct connection to the law-making process); and external ministers (to be drawn largely from the vocational councils).

That these innovations all ultimately failed to de-centre parties was due not only to the stickiness of the political and constitutional culture inherited from the British, but due also to how British traditions, encompassing political and constitutional culture had shaped pro-independence actors' understandings of political power. As Saunders observes, "constitutions and culture have a reflexive relationship, in which constitutions shape culture and culture shapes constitutions, in both form and operation."[8] In the Irish case, the potential of these innovative constitutional features was undermined in practice by successive constitutional amendments that included switching from direct to indirect voting for the Senate and reducing senators' terms of office, as well as never employing the direct democracy mechanisms.[9]

Roux's framework, differentiating LPN and CGN, is certainly a useful heuristic to illuminate dynamics of post-colonial and decolonial constitutional design. The aim to de-centre political parties in Ireland, and to give life to insurgent theories of law with popular sovereignty at their centre, was not a wholesale rejection of the Westminster tradition, but rather the aim to develop an autochthonous model that drew on that tradition while remedying some of its perceived defects. The failure of that project, and what Kissane has called its "radical potential",[10] also raises questions about whether larger unrealised CGN-

7 *David Kenny*, The 1922 Constitution as a Failed Attempt to Break with Westminster Tradition, in: Laura Cahillane / Donal K. Coffey (eds.), The Centenary of the Irish Free State Constitution: Constituting a Polity?, London 2024.

8 *Cheryl Saunders*, Constitutional Cultures, in: Tom Gerald Daly / Dinesha Samararatne (eds,), Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways, Oxford, p. 160.

9 *Kenny*, note 7, p. 183.

10 Ibid., p. 184.

esque proposals would have run into similar implementation obstacles, whether because of political and institutional opposition or for simply being unworkable. An intriguing example is the proposal of one of the central constitution drafters, Hugh Kennedy—who went on to become the first Chief Justice of the new dominion state—to re-found the entire legal system as a blend of Roman law and a modernised form of Brehon law; the autochthonous island-wide legal system that was later supplanted by the common law under English rule.[11] As it was, his aims were thwarted not only by political powers, but also by a highly conservative judiciary that refused to accept even his much more modest aims to replace British-style judicial attire with colourful robes based on Brehon styles.[12]

Returning to Tsai's account, it is striking that so many alternative visions of constitutionalism in US history since 1789 have been highly detailed. The 1850 Icarian Constitution, for instance, as a charter for a small community committed to utopian ideals, established and unleashed a frenzy of regulation covering an extraordinary range of matters, from major political institutions (including limited inclusion of women in deliberative channels) to hunting and fishing, to requiring each household to retain key Icarian texts or prohibiting children from climbing fences or eating green fruit.[13] Evidently, it would be unfair to seek such a level of detail from proponents of culturalist grand narratives. It is also vitally important to heed Frantz Fanon's warnings of the "curious cult of detail"[14] that can starkly limit our political and constitutional imaginations, replacing any possibility of a truly novel vision for governance with a horizon dominated by incrementalism.

Yet, to seek greater detail about how an alternative constitutional order would function is certainly not to dismiss CGN perspectives out of hand. Without answers to key questions about governance and rights protection, CGN narratives remain rather slippery. Equally, raising such questions does not necessarily place one in the LPN camp. Proponents of both narratives clearly bear the burden of justifying in greater detail why they are wedded to their particular narrative. There is a world of difference between a narrative of critique and an insurgent theory of law.

C. Democratic Decolonial Critique

The discussion above leads us to the second question: what is distinctive about a *democratic* decolonial critique of existing constitutions? Ireland's decolonial constitutional innovations a century ago may be characterised as grounded in democratic ideals in their eschewal of any easy binaries between popular empowerment and counter-majoritarian power, as well as the ambition to achieve a better institutional balance that would avoid

11 *Tom Gerald Daly*, Hugh Kennedy: Ireland's (Quietly) Towering Nation-Maker, in: Rehan Abeyratne / Iddo Porat (eds.), Towering Judges: A Comparative Study of Constitutional Judges, Cambridge 2020, p. 105.

12 Ibid., p. 105.

13 *Tsai*, note 2, p. 69.

14 *Frantz Fanon,* The Wretched of the Earth, New York 1963, p. 49.

excessive power being wielded by any single institution. Similarly, Udit Bhatia in recent work examines how the founders of India's Constitution viewed the need for a fundamental recalibration of parliament as an institution, from one focused centrally on the law-making process and oversight of the executive to one more supportive of a strong executive—deemed necessary for development of the state—and focused on its "pedagogical" mission to better equip a "backward" population to develop into a democratic citizenry.[15]

This demonstrates, as Mathew John offers in his response in this symposium, that one should not allow the "dark side" of CGN—such as the BJP's illiberal Hindutva project—to exemplify all decolonial projects and thereby cast them as inevitably authoritarian.[16] Yet, as Dinesha Samararatne and I discuss in recent work, the potential for a decolonial project to provide cover for autocratisation requires close scrutiny.[17] Projects to dismantle democracy have too often been cloaked in the guise of merely "doing democracy differently". A paradigmatic case is Venezuela's move to hyper-presidential autocracy, presented as simply a shift to "post-liberal" socialist revolutionary democracy through an innovative constitutional model—including a five-part separation of powers, a panoply of direct democracy mechanisms and councils (which were never meaningfully employed), and lesser focus on classic liberal features such as judicial independence.[18]

Perhaps more concerning, as Roux seems to suggest, is that CGN narratives grounded in good-faith commitment to democracy simply appear rather cavalier regarding the potential risks of a constitutional overhaul owing to insufficient attention to the political context. In a similar vein, beyond the decolonisation paradigm, in debates on addressing the democratic crisis during the Bolsonaro presidency from 2019-2023, multiple Brazilian scholars strongly criticised Bruce Ackerman's arguments for a new constitution.[19] They emphasised that, despite serious political crises since the democratic transition of the 1980s,

15 *Udit Bhatia*, The Pedagogical Account of Parliamentarism at India's Founding, American Journal of Political Science 68 (2024), p. 1286.

16 *Mathew John*, Democratic Constitutionalism and the Blandishments of Grand Narratives, IACL-AIDC Blog, 26 February 2025, https://blog-iacl-aidc.org/2025-posts/2025/2/26/democratic-constitutionalism-in-india-and-the-blandishments-of-grand-narratives (last accessed on 1 September 2025).

17 *Tom Gerald Daly* / *Dinesha Samararatne*, Decolonising Comparative Constitutional Law (and Democratisation Studies)?, in: Tom Gerald Daly / Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways, Oxford 2024, p. 18.

18 See *R Uprimny*, The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges, Texas Law Review 89 (2010/2011), p. 1587.

19 See *Thomas da Rosa Bustamante* / *Emilio Peluso Neder Meyer* / *Marcelo Andrade Cattoni de Oliveira* / *Jane Reis Gonçalves Pereira* /*Juliano Zaiden Benvindo* / *Cristiano Paixão*, Why Replacing the Brazilian Constitution Is Not a Good Idea: A Response to Professor Bruce Ackerman, Blog of the International Journal of Constitutional Law, 28 July 2020, https://www.iconnectblog.com/why-replacing-the-brazilian-constitution-is-not-a-good-idea-a-response-to-professor-bruce-ackerman/ (last accessed on 1 September 2025); and *Bruce Ackerman,* O Brasil Precisa de Nova Constituição, Correio Braziliense, 13 July 2020, https://www.correiobraziliense.com.br/app/notic

the 1988 Constitution had set the scene for successive peaceful alternations of government, enhanced institutional accountability, and enshrined a suite of defensible political compromises. Mirroring Roux's core argument, they emphasised that constitution-making is a high-stakes and risky endeavour during febrile political moments, one in which "there are no simple answers". It is certainly easy to overlook what has been achieved under an existing constitutional text, especially in difficult transitional conditions, if its competition is a dream text that would have inevitably performed so much better.

Finally, it is also all too easy to forget the external constraints placed on constitutional possibilities for establishing democratic rule. While we tend to think of these most clearly in the context of the internationalisation of constitution-making during the third wave of democratisation from the 1970s to the twenty-first century, constraints are always present in some form. A relevant historical example, provided again by Tsai, is the Sequoyah Constitution of 1905. Drafted in the ultimately unsuccessful attempt to achieve a First Nations state within the Union, the project was an attempt to confront rapidly shrinking tribal sovereignty, settler encroachment, federal intervention, and the expansion of the federal state westwards by reconceiving of Indian Territory as the State of Sequoyah. Although the drafters could draw on a tradition of constitutional law that dated to the "Great Binding Law" (*Gayäněshä''gowā*) of the twelfth century—the federal constitutional framework governing the Iroquois Nations—the Convention's "highly detailed"[20] text presented a deeply conventional suite of state institutions and made no space for First Nations customs or governance mechanisms. The need to win external approval, from Washington and the wider American public, severely constrained what was possible. Due to practical politics and the need to be taken seriously in Washington, the constitution was still bound to the forms and frames of mainstream US constitutionalism and could not stray too far from mainstream thought. As such, it was not an attempt at decolonisation as such, but rather, an attempt at an accommodation with the colonial state-building project through the technology of a written constitution.

Recent constitution drafting experiences, albeit not subject to quite the same level of pressure, have nonetheless been significantly constrained by international standards, models, and prevailing constitutional thinking. That said, and although the Sequoyah Constitution was strongly influenced by the US Constitution, the drafters also went far beyond the federal constitution; for instance, by regulating predatory practices by corporations and setting a maximum interest rate of ten per centum per annum on bank loans.[21] As Tsai puts, it such measures codified "a growing suspicion against monopolies and the avaricious behavior of corporations" with another constitutional provision directing the General Assembly to "enact laws preventing all trusts, combinations and monopolies,

ia/opiniao/2020/07/13/internas_opiniao,871622/o-brasil-precisa-de-nova-constituicao.shtml (last accessed on 1 September 2025).

20 *Tsai*, note 2, p. 166.

21 Ibid., p. 172.

inimical to the public welfare", while others addressed the exploitation of workers and children.[22] Even within a conventional constitutional frame, then, much innovation remains possible, and its realization becomes an issue of political will. Constraints can also be diffuse and ideational, to the extent that they seem home-grown. To return to Ireland, for instance, one finds a serious dissonance between a constitutional text that rivals Socialist constitutions in its empowerment of the State to regulate private property, but in which the outsized influence of both UK and US political thought on the Irish political imagination has produced a policy mindset in which neoliberalism and a reluctance to robustly regulate predatory capitalist practices is virtually inescapable.[23]

D. Diversity and Democratic Constitutionalism

This leads us to the third, and perhaps most fundamental, question: in seeking to push forward this debate, is the presumed "other" of Western liberal constitutionalism itself a phantom? As Heinz Klug observes in his response in this symposium, in speaking of "Southern Democratic Constitutionalism" (SDC), we must remain mindful that there are many variants of constitutionalism and democracy across the Global South.[24] A key corollary of this observation is whether it is truly possible to speak of Western liberal constitutionalism as a monolith.

What, for instance, does US or British constitutionalism share with its Belgian, German or Australian counterparts? Is the presentation of a singular tradition a mere rhetorical construct, or is it a stand-in for the specific constitutional tradition of the former coloniser(s) in any given post-colonial state? If the myth of a monolithic US constitutional tradition must be challenged, as Tsai offers, it also seems necessary to problematise and disaggregate Western liberal constitutionalism as a joint point of reference for both narratives. Indeed, as the historian Naoíse Mac Sweeney offers, "the West" as a shared space and tradition is a far less stable notion than is often understood; its operation as an abstract "politico-cultural concept" requires us to continually divide the abstract from the reality, and rhetoric from empirical fact.[25] Roux recognises this by drawing a sharp distinction between comparative constitutional realities and narratives; the latter being somewhat unmoored from the former.[26]

22 Ibid., pp. 172, 173.

23 *Carmen Leah Kuhling*, Zombie banks, zombie politics and the 'Walking Zombie Movement': Liminality and the post-crisis Irish imaginary, European Journal of Cultural Studies 20 (2015), p. 397.

24 *Heinz Klug*, Beyond a Bimodal Southern Democratic Constitutionalism, IACL-AIDC Blog, 6 March 2025, https://blog-iacl-aidc.org/2025-posts/2025/3/6/beyond-a-bimodal-southern-democratic-constitutionalism (last accessed on 1 September 2025).

25 *Naoíse Mac Sweeney*, The West A New History of an Old Idea, London 2024.

26 *Theunis Roux*, Workshop my Paper Series – Grand Narratives of Transition and the Quest for Democratic Constitutionalism, IACL-AIDC Blog, 3 June 2025, https://blog-iacl-aidc.org/2025-pos

Yet, narratives cannot simply wish away constitutional realities. This tracks us back to the need for more detail in decolonial projects, in not only articulating what they dislike about the current order but also, in specific terms, how a (more fully) decolonised order would be preferable. Otherwise, it would be all too easy for the current debates to become a rather unproductive re-tread of longstanding debates about whether democracy or human rights are merely Western constructs.[27] The discussion above has underlined that democratic practices can be found far beyond the Global North, as well as underscoring that democracy can indeed be "done differently" in a manner that accords with local tradition and understandings.

For instance, the Iroquois constitutional order prior to full expansion of the US federal state has been characterised as a broadly democratic form. Described as a "heteronomous democracy", in the sense that it conceived governmental forms as granted by a deity, its conception as a democratic society (or even anarchy) is based on the primacy of the council and central focus on deliberation and inclusion. Clan councils, tribal councils, the Great Council (a federal council), and even extraordinary councils to deal with emergencies placed constraints on rulers and, according to Karavitis, allowed Iroquois women to influence council decisions "at all levels".[28] Pre-colonial democratic systems can inform today's decolonial projects in a way that avoids essentialism or a rejection of democratic institutions, norms and practice as a colonial construct. A contemporary example worthy of greater visibility is the development of highly egalitarian and decentralized democratic governance in the Kurdish Rojava region in northern Syria. As Biagi recounts in a new book:

> *"This text, which has been described as "extraordinarily progressive," incorporated the ideas and principles of the polity system known as "democratic confederalism," as theorized by the Kurdistan Workers Party (PKK) leader Abdullah Öcalan. This system, which is based on the principles of autonomy, direct democracy, environmentalism, feminism, and self-governance, aims to foster coexistence in multicultural societies by transcending the notion of the nation state."*[29]

That much lies beyond the North-South dynamic indicates that a more productive approach, methodologically, might be to "go wide" and "go deep". Going wide would involve gathering more examples worldwide—especially on a South-South basis—of how institutions seek to perform the work of diffusing, constraining, and marshalling public power, pro-

ts/2025/6/3/workshop-my-paper-series-grand-narratives-of-transition-and-the-quest-for-democratic-constitutionalism-response-to-commentators (last accessed on 1 September 2025).

27 Attempts toward a more productive approach include *Jimmy Chia-Shin Hsu*, Human Dignity in Asia: Dialogue Between Law and Culture, Cambridge 2022.

28 *Gerasimos Karavitis*, The Iroquois Confederacy and the Possibility of Heteronomous Democracy, Comparative Political Theory 4 (2020), p. 316.

29 *Francesco Biagi*, Constitution-Building After the Arab Spring: A Comparative Perspective, Cambridge 2024, pp. 114-115.

tecting individuals and communities from vertical and horizontal domination, and doing so in a way that reflects local needs. Going deep would involve critically revisiting the development of the "standard" constitutional forms we have all inherited today. Needless to say, work in both directions is generating an expanding literature. Building on this work inevitably faces multiple challenges, including language as both a barrier and an axis of reproduction, critique, and contestation, with complex inclusionary and exclusionary dynamics.

E. Conclusion

None of the above are easy questions, which underscores the value of Roux's agenda-setting account that prompts much-needed soul-searching about the current debates on decolonising constitutionalism. His paper deserves a very wide readership. It is vital to recognise that culturalist grand narratives, as the name implies, do not have to present a full project for an alternative constitutional-political order. Rather than aiming to supplant the constitutional status quo, they can focus on re-framing the meaning of the existing constitution, or push back against its excesses. If the "Overton window" in politics refers to the range of issues and policies that are politically acceptable to the mainstream population in a given state, within a particular time period, culturalist grand narratives can operate to broaden our constitutional horizons, imaginations, and expectations by bringing the ideological periphery into fuller view. As Ben Okri offers: "If we change the stories we live by, quite possibly we change or lives."[30] The stories we tell ourselves about what is constitutionally possible have a power to shape democratic community every bit as powerful as the force of formal law, if not more so. However, even where narratives operate mainly as a rhetorical device or a lightning rod for fuller ideation, detail matters in assessing whether a narrative constitutes constitutional dreaming, revolution, or threat.

30 *Ben Okri,* A Way of Being Free, Manila 1997, p. 46.

Beyond a Bimodal Southern Democratic Constitutionalism

By *Heinz Klug*[*]

A. Introduction

Theunis Roux has made an important contribution in stimulating a debate over the nature of "Southern Democratic Constitutionalism" (SDC).[1] Roux describes two approaches to SDC which he places in dialogue with one another but argues that they together reflect and contribute towards a single dynamic version of SDC. While the interlocutors in this debate engage in a sophisticated theoretical discussion at a high level of abstraction, I intend in my response to dwell on a few contextual issues that I feel might enrich the discussion, including questions of legal continuity, urban-rural divisions and the role of both the legal profession and legal education more generally. Before turning to these contextual issues, I do however want to question the decision to frame the debate over "southern democratic constitutionalism" as a bimodal discussion rather than as a spectrum of ideological and legal alternatives.

Much of the present debate, which Roux is responding to, focuses on distinguishing between a "liberal" versus a potentially more "de-colonial" notion of constitutionalism. This dichotomy ignores a variety of constitutional forms that exist in the global South. Variation exists even within the constitutional orders Roux uses as examples in his debate. Apart from different notions of democracy—including the less than democratic forms that exist—there are numerous experiences of democratic constitutionalism today, including in Africa. These include Ghana since 1992, Kenya and Zambia as well as cases across South-East Asia, such as the Philippines and Indonesia that might provide additional dimensions to a debate over SDC. Roux's dichotomy also tends to preclude an adequate engagement with the rich, critical, and ongoing debate over constitutionalism in Africa, beyond South Africa.

B. Debating Constitutionalism in Africa

While debates over constitutionalism in Africa have emphasized the nature of the post-colonial state and the legacies of colonialism,[2] Ben O. Nwabueze focused in his work

* Professor at the University of Wisconsin Law School, USA, and University of Ghana School of Law (2024-2025), Ghana. Email: klug@wisc.edu.

1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), pp. 5-71.

2 *Yash Ghai*, The Theory of the States in the Third World and the Problem of Constitutionalism, Connecticut Journal of International Law 6 (1991), pp. 411–24.

on issues of constitutionalism that had specific relevance to the continent,[3] including military rule,[4] democratization,[5] presidentialism[6] and the role of the courts.[7] Despite this rich literature the idea of constitutionalism in Africa was often exemplified by reference to Hastings W. O. Okoth-Ogendo's famous argument that Africa had "constitutions without constitutionalism".[8] However, there is a renewed recognition that "constitutional claims have become a regular feature of African politics."[9] Discussing the "challenge of constitutionalism in contemporary Africa" H Kwazi Prempeh noted that although "constitutions, bills of rights, and judicial review are not new phenomena in Africa" post-colonial history has seen nearly every country in Sub-Saharan Africa experience "the phenomena of a formal constitution existing side-by-side with authoritarianism."[10]

Explaining this phenomenon, Prempeh argues that the "assault on constitutionalism was spearheaded by Africa's larger-than-life founding fathers" who "chose to create sources of legitimacy not in constitutions or democratic elections but in supra-constitutional welfarist projects tied to the pressing material concerns of the people"[11] or what might be termed an ideology of developmentalism. However, since the end of the cold-war, constitutionalism and its concomitant empowerment of judges, presidential term limits and bills of rights became markers of democratization across the continent.

Despite this embrace of constitutionalism, Prempeh notes that three distinct features of the initial post-colonial constitutional order persist in the new order. First, there is a "persistence of unitary centralism" in which sovereign power continues to be consolidated or centralized in a unitary government.[12] Second, presidentialism, without "meaningful horizontal restraints on executive power" emerged unscathed in the process of post-1980s constitutional reform,[13] and was even extended to the newly emerging constitutional

3 *Benjamin Obi Nwabueze*, Constitutionalism in the Emergent States, London 1973.

4 *Benjamin Obi Nwabueze*, Military rule and constitutionalism in Nigeria, Ibadan 1992.

5 *Benjamin Obi Nwabueze*, Transition from military rule to constitutional democracy, Benin City, 1988 and Our march to constitutional democracy: being the 1989 Guardian lecture, delivered on 24 July 1989, Lagos 1989.

6 *Benjamin Obi Nwabueze*, Presidentialism in commonwealth Africa, London 1974.

7 *Benjamin Obi Nwabueze*, Judicialism in Commonwealth Africa: the role of the courts in government, London 1977.

8 *H.W.O. Okoth-Ogendo*, Constitutions without Constitutionalism: Reflections on a Political Paradox, in: Issa Shivji (ed), State and Constitutionalism: An African Debate on Democracy, Harare 1991.

9 *Heinz Klug*, African Constitutionalism: Between Power, Persuasion, and Irrelevance? Law & Social Inquiry 49 (2024), p. 1262.

10 *Henry Kwasi Prempeh*, Marbury in Africa: Judicial review and the Challenge of Constitutionalism in Contemporary Africa, Tulane Law Review 80 (2006), p. 5.

11 *Henry Kwasi Prempeh,* Africa's "constitutionalism revival": False start or new dawn?, I-CON 5 (2007), p. 481.

12 *Prempeh*, note 5, p. 494.

13 Ibid., pp. 497-498.

democracies in Southern Africa—Namibia and South Africa. Third, Prempeh argues that despite the embrace of constitutionalism, there is a "relative lack of concern with bureaucratic or administrative, as opposed to political power" leaving the majority of citizens subject to "unchecked bureaucratic power".[14] Jeremy Gould, in his recent ethnography on *Postcolonial Legality*, traces the impact of these limitations in the case of Zambia,[15] but also identifies additional constraints on this emergent constitutionalism, including an urban-rural divide that mimics Mamdani's analysis of the citizen-subject divide that characterized the colonial state[16] and remains alive in the tensions between democratic institutions and the constitutional recognition of traditional authority in many African constitutions.[17]

Even as a new wave of coup de Etat's have swept across the Sahil and presidential term limits have been set aside by constitutional amendments in Rwanda and other "constitutional democracies" there has also been a reassertion of democratic expression in recent years. As a result, ruling parties have lost elections to opposition parties, as was the case in 2024 in Botswana, Ghana and Mauritius, or in the case of South Africa—a unipolar democracy in which the African National Congress dominated national elections—which witnessed a dramatic loss in electoral support for the ruling party, forcing the ANC to invite opposition parties to join a Government of National Unity in order to continue governing. Understanding these developments and the implications for constitutionalism requires a broader constitutional imagination than what might be captured in a dialogic conversation between two alternatives. This might, as Berihun Gebeye has argued, require a "legal syncretic paradigm"[18] in which political and constitutional imaginations may "build on, and respond to, the different elements of the African constitutional matrix."[19]

C. Alternative Visions

Even within the constitutional orders discussed by Roux, there are alternative constitutional visions that do not fit into either of the bimodal options he describes. If we take South Africa, for example, there are a range of clauses within the 1996 Constitution that provide a constitutional vision of a social democratic social order that sought to empower the state to address apartheid's legacies more directly than what the policies of subsequent ANC governments or the jurisprudence of the Constitutional Court have settled upon. Whether it is Section 25(8) of the property clause which provides an exemption from the rest of

14 Ibid, pp. 499-500.

15 *Jeremy Gould*, Postcolonial Legality: Law, Power and Politics in Zambia, New York 2023.

16 *Mahmood Mamdani*, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton, 1996, pp. 16-18.

17 *Heinz Klug*, Clashing Identities? Traditional Authority and Constitutionalism in Africa, in: Ran Hirschl / Yaniv Roznai (eds.), Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity, Cambridge 2024.

18 *Berihun Adugna Gebeye*, A Theory of African Constitutionalism, Oxford 2021, p. 243.

19 *Klug*, note 3, p. 1264.

the clause for all land and water reform,[20] or the early policy proposal for a wealth tax in the form of a capital levy,[21] these are alternatives that were not constitutionally precluded but rather set aside by decisions of ANC governments to embrace the neoliberal global economic order. A more substantial debate over SDC would need to look more closely at the constitutional viability of these more social democratic options—whether in the form of the Brazilian "*bolsa familia*" program[22] or Chilean land reform under President's Frei and Allende,[23] as well as other examples of redistributive policies that attempted to aggressively implement the positive social and economic rights that are considered a defining feature of SDC.

Aside from my concern to broaden the debate over SDC I want to focus for the remainder of this comment on the contextual issues I flagged above. First, I believe that a valuable contribution being made by the "de-colonialists" is the focus on legal continuity.[24] While much more work needs to be done to explore the nature and effects of legal continuity on SDC more broadly, it seems that we may at least agree on some common starting points. On the one hand, legal continuity is ubiquitous, despite the theoretical notion that formal breaks in recognition of the law, such as in the American or Russian revolutions, amount to discontinuity.

In practice, however, legal continuity is the effective reality, even in the wake of revolutions or coups d'Etat, in which the first decrees of the new order recognize all existing law and legal rights, until they are changed by the new regime. On the other hand, the consequences of legal continuity are deeply embedded in most legal orders, especially when the new political order has been negotiated and the new constitutional authorities have accepted the continuity of law and legal rights—unless explicitly changed by legislation or held in to be in conflict with the new constitution in litigation before the courts.

We have long been warned that the elongated processes of legal change effectuated by legal continuity effectively entrenches existing social interests and undermines further radical change.[25] Pre-existing law and legal culture provides the space in which newly

20 *Heinz Klug*, Decolonisation, compensation and constitutionalism: land, wealth and the sustainability of constitutionalism in post-apartheid South Africa, South African Journal on Human Rights 34 (2018), pp. 469–491.

21 *Heinz Klug,* Redistributive Justice, Transformational Taxes and the Legacies of Apartheid, in: Olaf Zenker, Cherryl Walker / Zsa-Zsa Boggenpoel (eds.), Beyond Expropriation Without Compensation: Law, Land Reform and Redistributive Justice in South Africa, Cambridge 2024, p. 269.

22 *Gay Seidman*, Brazil's 'pro-poor' strategies: what South Africa could learn, Transformation: Critical perspectives on Southern Africa 72/73 (2010), pp. 95-97.

23 *Alberto Valdés / William Foster*, The Agrarian Reform Experiment in Chile: History, Impact, and Implications, International Food Policy Research Institute Discussion Paper 01368 (August 2014).

24 *Joel M. Modiri*, Conquest and constitutionalism: first thoughts on an alternative jurisprudence, South African Journal on Human Rights 34 (2018), pp. 300-325.

25 *Robert B. Seidman*, State, Law and Development, New York 1978.

empowered elites will find themselves enmeshed in the existing system of social power and economic distribution. In contrast, the one example of an attempt to forego all existing legal forms in order to overcome the stasis of social privilege was China's cultural revolution which had disastrous consequences for millions of people.[26] Pointing out these outcomes, whether the entrenchment of privilege that legal continuity often brings, or the disastrous consequences of legal abnegation, is not to despair at the possibility of profound social transformation. Rather it is a call for an aspirational SDC that includes a focus on the need to address the economic and social disparities that threaten the very idea of constitutionalism. A constitutionalism that goes beyond liberal restraint and instead seeks to ensure a more secure and sustainable life for everyone.

The second contextual issue that I feel is not adequately addressed in the present debate is the rural-urban divide that is so prominent in the global south and therefore essential to any sustainable conception of SDC. While many "post-colonial" constitutions in Africa include some recognition of "traditional authorities" and or indigenous or customary law, Mahmoud Mamdani's analysis of the bifurcated structure of the colonial state in former British colonies, points to the existence of dualistic legal orders in the "post-colony",[27] yet there has been little focus on what this means for SDC. Whether framed as legal pluralism, the recognition of indigenous rights, or simply a form of local government based on local custom, the effect is that people's lives often straddle different legal orders, depending on whether they and their families are rooted in a rural community, in a city, or in-between.

As a result, the focus of constitutional debate, litigation and change is on political parties, social movements and constitutional courts that are located in the major urban areas, and while rural voters are often mobilized at election time, they remain peripheral to constitutional debates and outcomes. Even where constitutional courts have produced innovative interpretations of indigenous law, so as to bring these rules into conformity with the constitutional order,[28] there are legitimate questions about whether the indigenous system is being truly recognized or simply assimilated into an urban dominated constitutional imagination. Alternatively, Sindiso Mnisi Weeks points out that indigenous law claims its own constitutional law with its own conception of rights that should be recognized.[29]

The third contextual issue I wish to flag is the question of legal culture that is inherited and incorporated within the new constitutional order. Both the legal profession and legal education are central components of the legal order and while they soon respond to the formal constitutional change that decolonization brings, their existing conceptions of law are deeply engrained and often resurface in how the new constitution is interpreted

26 *Yang Jisheng*, The World Turned Upside Down: A History of the Chinese Cultural Revolution, New York 2021.

27 *Mamdani*, note 16.

28 Shilubana and Others *v* Nwamitwa [2008] ZACC 9; 2009 (2) SA 66.

29 *Sindiso Mnisi Weeks*, Our law is constitutional law, and it has rights, Political and Legal Anthropology Review 47 (2024), p. 234.

and implemented. South Africa's legal culture is a legacy of colonial-apartheid[30] and although both the profession and judiciary have been transformed to more closely reflect the country's demography, the formalism and positivism that marked the legal culture and an elitist tendency to valorize erudition and eloquence at the Bar continues to shape the country's legal culture. The result has been a continuing tension within the profession with accusations of incompetence and racism undermining the legitimacy of the legal process with dire implications for the constitutional order.

The elitism of the legal profession and unwillingness to promote paralegals or other forms of legal advice to ensure greater access to justice by marginalized communities, especially rural communities, is another way in which legal culture is strangling constitutionalism in the global south. While urban elites tend to dominate the legal process, both in terms of access to legal advice, representation and institutions, in some cases, cause lawyers, working with non-governmental organizations, have pursued justice for less privileged litigants, especially in the realm of socio-economic rights. However, another aspect of legal culture has been the reluctance by both lawyers and judges to look to the jurisprudence of the global south. While many global south courts look to comparative jurisprudence in their opinions, as a source of persuasive arguments rather than rules, the tendency is most often to discuss and quote from the jurisprudence of jurisdictions in the global north rather than other countries in the global south.

D. Conclusion

In conclusion, I wish to again congratulate Roux and the *World Comparative Law* journal for stimulating such a valuable debate on the nature and parameters of a SDC that refocuses debates over constitutionalism away from the dominant concerns of the global north and towards more encompassing and possibly sustainable forms of constitutionalism across the globe. This is a glimmer of hope at a time when constitutionalism, understood capaciously to include "southern" conceptions, is being challenged by a populist and antidemocratic wave that threatens to impose autocratic constitutional orders around the globe. It is this threat to democratic constitutionalism that behooves us to expand our comparative vision and cooperate to formulate a clear and convincing conception of a "southern democratic constitutionalism" that should provide creative examples for consideration around the global south and beyond.

30 *Martin Chanock*, The Making of South African Legal Culture 1902-1936, Cambridge 2001.

Between Myth and Meaning: Ethiopia's Fractured Constitutional Narratives and the Crisis of Legitimacy

By *Alemayehu Fentaw Weldemariam*[*]

In his recent contribution to comparative constitutional thought, Theunis Roux invites us to consider the generative power of grand narratives in transitional context.[1] For countries like South Africa and India, he argues, constitutional legitimacy is not solely a matter of institutional design or legal text. It rests on the capacity of constitutions to embed themselves in collective memory—to serve as instruments of narrative, repositories of struggle, and promises of renewal.[2] But what becomes of constitutionalism when no shared memory exists, when history is not reconciled but weaponized, and when competing imaginaries pull a country in opposite directions? Ethiopia offers a sobering answer.

Ethiopia's modern constitutional history is not a chronicle of democratic evolution but a succession of ruptures—each constitution an emblem of ambition, yet each faltering under the weight of contested legitimacy. Unlike the anti-colonial transitions of India and South Africa, Ethiopia's constitutional origins are post-revolutionary, not postcolonial. No foreign empire departed; rather, one internal order succeeded another, often violently. Its constitutions emerged not from negotiated pacts among equals but from victorious assertions of power cloaked in the legal form. Consequently, Ethiopia suffers not from the absence of constitutional texts, but from their proliferation and dissonance—multiple orders, multiple narratives, none hegemonic, none secure.

The 1995 Constitution—the most recent and most radical of Ethiopia's foundational texts—lies at the heart of the country's contemporary crisis. Drafted under the direction of the Tigray People's Liberation Front (TPLF), acting through the broader coalition of the Ethiopian People's Revolutionary Democratic Front (EPRDF), the Constitution articulated a bold and unprecedented vision of ethnic federalism. It granted Ethiopia's "nations, nationalities, and peoples" the right to self-determination, up to and including secession.[3] For its architects, this was a charter of ethnonational liberation—an act of historical redress aimed at dismantling the legacy of imperial centralism and elevating long-marginalized ethnonational communities. Yet for many others, it was a document of dismemberment: an

* PhD Fellow, Center for Constitutional Democracy, Maurer School of Law, Indiana University, Bloomington, USA. Email: aweldema@iu.edu.

I would like to thank Anmol Jain for inviting me to contribute to the WCL Symposium, and Adem K. Abebe for the invitation to participate in a related conference and to contribute a book chapter based on it, on which the present piece builds.

1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World View Symposium, World Comparative Law 57 (2024).

2 Ibid.

3 Constitution of the Federal Democratic Republic of Ethiopia, 1995; Preamble and Art. 39.

alien text imposed by victors who clothed their revolutionary dominance in the language of democracy and pluralism. What the drafters saw as emancipation, critics experienced as imposition. In this foundational ambiguity, Ethiopia's post-1991 constitutional order has remained suspended—radical in aspiration, but fragile in allegiance.[4]

Herein lies the constitutional paradox of post-1991 Ethiopia. Where India and South Africa grounded their foundational texts in inclusive national struggles, Ethiopia's was born of selective liberation. It was never a social contract; it was an instrument of rule. The narratives that sustain constitutional legitimacy elsewhere—a collective memory of oppression overcome, a vision of unity in diversity—found no purchase in a society fractured by ethnic mistrust, historical grievance, and mutual suspicion. As Roux suggests, even heuristic narratives can orient democratic debate. Ethiopia lacked even this. Its grand narratives clashed, calcified, and collapsed.

This failure is not merely ideological—it is institutional. For decades, the EPRDF's centralized dominance papered over constitutional contradictions. Its tight control allowed a semblance of order even as the foundational principles of federalism and unity pulled in opposing directions. But once the coalition began to unravel, the underlying tensions surged to the surface. Competing visions now jostle for supremacy: one seeking radical regional autonomy bordering on confederation, the other resurrecting a centralizing nationalism under ethnic majoritarian rule. Neither offers a viable path. One fragments the state; the other threatens to entrench permanent exclusion.

Andreas Eshete, coming full circle from his central role in the 1993 Symposium on the Making of the New Ethiopian Constitution, returned nearly three decades later—this time alongside Samuel Assefa—to deliver a sobering reappraisal of the 1995 constitutional project.[5] In a paper presented at the InterAfrica Group Conference in June 2021, the two scholars diagnosed the foundational tensions that have haunted Ethiopia's federal experiment. The 1995 Constitution, they observed, embodied both "coming-together" and "holding-together" models of federalism, as defined by Alfred Stepan. Yet their conclusion marked a decisive turn away from earlier optimism: both frameworks, they argued, had exhausted their political utility and should be abandoned as viable paths forward.[6]

What had once appeared a bold—if imperfect—attempt to reconcile Ethiopia's deep internal diversity with the imperatives of unity had reached the end of its narrative arc. In its place, Andreas Eshete and Samuel Assefa urged a principled disavowal of the two rival visions that have come to dominate Ethiopia's constitutional imagination: the centrifugal logic of confederalism and the exclusionary impulse of ethnic majoritarianism. Neither,

4 See InterAfrica Group. Genesis of the Ethiopian Constitution of 1994: Reflections and Recommendations from the Symposium on the Making of the 1994 Ethiopian Constitution, 17–21 May 1993, Addis Ababa, Ethiopia. Addis Ababa: InterAfrica Group, 1993.

5 *Andreas Eshete / Samuel Assefa*, Rescuing Ethiopia's Integrity: Emergent Dilemmas Facing Ties between Federal and Regional Rule, in: Research economic-Socio Crucial And Ethiopia, Addis Ababa 2021, pp. 18–20.

6 Ibid.

they contended, offers a just or sustainable foundation for the Ethiopian polity. The former reduces national unity to a tenuous modus vivendi—an uneasy cohabitation rooted in fear, isolation, and mutual suspicion. The latter reimagines federal authority not as a covenant among equals, but as an instrument of ethnic dominance masked by majoritarian rule. Both obstruct the pursuit of shared interests, mutual obligations, and the integrity of the state itself.[7]

What is required instead is the cultivation of a genuine common ground—one that affirms equal and free citizenship, respects the dignity of all cultural communities, and embraces solidarity not as a rhetorical flourish but as a civic ethic rooted in shared struggle and commitment.[8] This common ground, they argue, does not preempt debate over the design of future constitutional arrangements. Rather, it sets forth the minimal moral and political conditions for any legitimate public life: equal consideration of minorities, a principled pride in Ethiopia's cultural diversity, and a collective resolve to confront the twin enemies of disenfranchisement and poverty. The task is exacting, and the path uncertain. But precisely in that difficulty lies its promise. As Andreas Eshete and Samuel Assefa remind us, the very effort to forge this shared civic ground may itself revive the spirit of political maturity and patriotism in Ethiopia's fractured republic.[9]

In what echoes Theunis Roux's conception of the Liberal-Progressivist Narrative (LPN), Eshete and Assefa argue that the 1995 Constitution failed to satisfy what John Rawls famously called the "publicity condition"—the demand that political arrangements be justifiable in terms that all reasonable citizens can endorse.[10] The Constitution, they contend, offered power without persuasion, identity without solidarity, and institutional form without moral foundation. It did not generate allegiance, but deepened alienation. The result was not reconciliation through constitutional community, but a precarious truce among divided sovereignties—a federation in name, but a house still haunted by suspicion and estrangement.

Nor was this the first time Ethiopia's constitutions sought legitimacy through mimicry. The 1931 and 1955 imperial constitutions, inspired by the Meiji model, were instruments of monarchical modernization, not democratic governance. The 1952 Eritrean constitution—Ethiopia's only experiment with federalism—was imposed externally and swiftly abrogated, fueling Eritrea's long march to independence. The 1987 constitution of the Marxist-Leninist regime embraced the language of popular sovereignty while entrenching centralized control, using rights-based rhetoric to justify mass resettlement and economic

7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.

coercion. In each case, the constitution functioned as performance, not pact—designed to consolidate rule, not distribute it.[11]

Indeed, if one surveys Ethiopia's constitutional history, what emerges is less a tradition than a pattern: constitutions drafted at moments of regime consolidation, not transition; texts that mirror external models but ignore domestic realities; promises of pluralism betrayed by coercive centralism. These are not failures of technique. They are failures of legitimacy—failures to connect text to people, law to life, symbol to substance.

Ethiopia's deeper constitutional malaise, then, is not the absence of law, but the absence of meaning. Its constitutional culture is marked by what Nietzsche, in On the Use and Abuse of History, called an excess of historical memory: monumental histories that glorify imperial unity, antiquarian fixations on ethnic purity, and critical histories that reduce the present to inherited injustice. This triad of memory has produced not a shared narrative, but a tragic dialectic of mutual ressentiment. Politics becomes a theater of competing victim-hoods; history, a ledger of grievance.

The recent civil war between the federal government and the TPLF (2020–2022) was not merely a political breakdown—it was a rupture of constitutional meaning. The Pretoria Agreement may have halted violence, but it did not restore legitimacy. The TPLF's legal status was revoked and its internal cohesion shattered. Meanwhile, the federal government oscillates between procedural fidelity and authoritarian drift. The war has left not just institutional wreckage, but moral exhaustion. What remains is not consensus, but silence.

If Roux's typology of Liberal-Progressivist and Culturalist Grand Narratives helps elucidate the postcolonial dynamics of Indian constitutionalism, Ethiopia demands a different interpretive lens: one shaped by the unresolved contest between pan-Ethiopian civic nationalism and ethnonationalist liberation ideology. Neither has secured narrative dominance; both remain haunted by histories of exclusion. Unlike South Africa's constitutionalism of reconciliation, or India's inclusive nationalism—however frayed—Ethiopia lacks a hegemonic ideal capable of anchoring constitutional reform. In the absence of such an ideal, constitutional discourse degenerates into a zero-sum struggle, where one identity's gain is perceived as another's loss.

A parallel may be drawn with India's own crisis of constitutional identity following the Emergency, which witnessed the rise of ethnic majoritarianism and the erosion of inclusive democratic norms. As Pankaj Mishra observes in his essay, the consolidation of Hindutva nationalism has transformed constitutional discourse into a vehicle for cultural dominance, rather than pluralist accommodation.[12] Though Mishra does not address the Modi government's revocation of Kashmir's autonomy, his account offers a cautionary analogue for

11 *Christopher Clapham*, Constitutions and Governance in Ethiopian Political History, in: Genesis of the Ethiopian Constitution of 1994: Reflections and Recommendations from the Symposium on the Making of the 1994 Ethiopian Constitution, 17–21 May 1993, Addis Ababa 1993; and *Christopher Clapham*, The Horn of Africa: State Formation and Decay, Oxford 2023, pp. 65–121.

12 *Pankaj Mishra*, A Long & Undeclared Emergency, New York Review of Books 66 (2019), pp. 32–35.

Ethiopia: when national narratives become instruments of exclusion, constitutions cease to mediate difference—they instead sharpen it.

Yet Ethiopia is not condemned to eternal fracture. The lesson from Roux is not that narrative ensures stability, but that its absence guarantees crisis. Ethiopia must craft a new constitutional story—not a return to imperial centralism, nor a doubling down on ethnic fragmentation, but a civic narrative of mutual dependence and political maturity. This is not merely a task for lawyers or legislators. It is a cultural project, a pedagogical one. It demands civic education that fosters coexistence; public rituals that honor collective struggle; political discourse that privileges dignity over grievance.

Ethiopia's tragedy is existential before it is institutional. Its constitutions have named power but rarely checked it; listed rights but seldom protected them. The task ahead is not to draft another text, but to cultivate a constitutional ethos—an imagination of political life grounded in restraint, reciprocity, and shared belonging.

As Camus warned, rebellion without limits leads to nihilism.[13] So too with constitutionalism: it must be more than a legal script. It must be a shared act of moral imagination. Ethiopia's future depends not on the next constitution it writes, but on the people, it dares to become.

13 *Albert Camus,* The Rebel: An Essay on Man in Revolt, trans. Anthony Bower, New York 1991.

The Grand Narrative of the Current Transition of Mexican Constitutionalism

By *Roberto Niembro Ortega*[*]

A. Introduction

In his interesting article Roux presents us with two grand narratives that describe the constitutionalism of India and South Africa since their constitutions of 1950 and 1996 respectively, which he calls the liberal progressive and culturalist grand narratives.[1] By grand narratives, Roux means, following Lyotard, "comprehensive explanations of the causality of long-term historical processes and which endow them with legitimacy".[2] According to the first, the progressive liberal one, the transition from a colonized country to a post-colonial one was due to a good institutional design and the values of freedom, equality and democracy of liberal constitutionalism adapted to the Global South. According to this narrative, these transitions demonstrated the universality of liberal constitutionalism beyond the West and its adaptability to different circumstances.

On the other hand, according to the second, culturalist narrative, the progressive liberal design is a new form of colonialist imposition that does not allow non-Western and indigenous traditions of governance to flourish. What was done was to assimilate liberal forms and perpetuate colonialism by endowing it with democratic legitimacy. The constitutions of India and South Africa are only a sample of the hegemonic permanence of the West, which did not allow the incorporation of the national values of the majorities.

My participation in this symposium aims to reflect on the transition we are experiencing in Mexican constitutionalism in the light of the narratives that Roux offers us to think about Indian and South African constitutionalism. From my point of view, there are certain characteristics of the current Mexican constitutional development that can be better understood with the help of the theoretical apparatus presented by Roux and, above all, can help us to understand the performative and instrumental character of the great narratives for the exercise of power.

Now, before reflecting on the transition that Mexican constitutionalism is currently undergoing, initiated with the presidential election of Andrés Manuel López Obrador in 2008—a charismatic and popular leader like very few others—it is necessary to recall some antecedents of Mexican constitutionalism developed since the 1917 Constitution.

* PhD Universidad Complutense de Madrid, LL.M in legal theory NYU School of Law (Hauser Global Scholar). Email: nroberto84@hotmail.com.

1 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), pp. 5-71.

2 Ibid., p. 10.

As is well known, the 1917 Constitution emanated from a popular and peasant struggle and was one of the pioneers in establishing social rights such as education, agrarian distribution and labor rights. However, for a good part of the 20th Century, it was a Constitution subordinated to a revolutionary ideology, of which the Constitution was its maximum expression. However, being a Constitution subordinated to that ideology, shaped by patriotic dates, national heroes and managed by the Institutional Revolutionary Party (PRI), the Constitution could not completely impose itself to the designs of the caudillos and the dominant political party. Let us say that the Constitution was a binding political document to the extent that it served the revolutionary ideology, interpreted and expressed by the President of the Republic.

This political conception of the Constitution, subordinated to the revolutionary ideology, began to change with the democratic transition (from 1977) and the decline of the PRI (Institutional Revolutionary Party). Likewise, the strengthening of the judiciary as a guarantor of the rule of law and legal security, which was part of the neoliberal agenda initiated in the six-year term of Miguel de la Madrid in 1982, was also highly relevant. Indeed, the guarantee of property rights and freedom of enterprise required independent courts. For this reason, at the end of 1994, one of the most important constitutional reforms to the judiciary was carried out in order to strengthen it and safeguard its autonomy. Thus, the role that the federal judiciary began to play in 1995 made it possible, in a few years, to conceive of the Constitution as a binding legal norm.

Likewise, from 1994 to 2008, through multiple constitutional reforms, the neoliberal conception of the State was introduced into the Constitution, privatizing companies and industries previously controlled by the State, entering into free trade agreements and, finally, developing the protection of human rights, particularly civil and political rights and, belatedly and briefly, social rights.

However, since 2008, with the election of President López Obrador, a new grand narrative has emerged to explain the constitutional reforms made in recent years. This narrative is that of the "Fourth Transformation" of national public life. For López Obrador and his followers, his government initiated a transformation similar to those carried out in the 19th and early 20th centuries by presidents Juárez, Madero and Cárdenas. These three presidents marked milestones in national history, separating the Church from the State, recovering democracy and prohibiting reelection, as well as reinforcing the social and nationalist character of the government.

Since 2008, with the "Fourth Transformation" what we are experiencing in Mexico is the confrontation and not the dialogue between two grand narratives of contemporary Mexican constitutionalism, which to some extent resemble the grand narratives identified by Roux.

On the one hand, the liberal grand narrative that understands the separation of powers as a conflict between opposing interests, the need for an independent judiciary that guarantees the rule of law and human rights, and autonomous bodies made up of experts. A vision of constitutionalism that bet strongly on the judicial protection of rights, designed in the

light of the constitutional systems of the United States and Europe and incorporating the best of the doctrine of those countries. A development that, moreover, was based in part on international treaties and the jurisprudence of the Inter-American Court of Human Rights, the reports of international committees, etc. that could be tied to Roux's progressive liberal narrative.

On the other hand, the grand narrative of the "Fourth Transformation" that pretends to recover the social, popular-majoritarian and nationalist character of the 1917 Constitution. A grand narrative that understands that the separation of powers also requires collaboration, that adopts new social rights and institutional designs, particularly, through the total renovation and popular election of all judicial power holders, both federal and in all federal entities, as well as the disappearance of autonomous constitutional bodies. Moreover, a narrative that not only affects the institutional design, but even has ethical and moral pretensions based on what has been called "Mexican humanism" and that seeks to be more autochthonous than the liberal constitutionalism implemented with the 1994 reform.

In this way, Mexico is abandoning the pretension of emulating progressive liberal constitutionalism in order to present recent constitutional reforms as something unprecedented in the world, guided by our own needs and interests. In fact, the grand narrative of the "Fourth Transformation" is little concerned with the adaptability of progressive liberal values, rather it is interested in highlighting the distinctive notes of Mexican constitutionalism such as social rights. On multiple occasions these reforms are publicly presented as something autochthonous and popular that recovers the spirit of the 1917 Constitution, as opposed to the progressive liberal constitutionalism imposed by a neoliberal ruling elite that incorporated North American and European visions to our system.

Unfortunately, in this confrontation of grand narratives, what is actually happening is the concentration of power in a few hands, in a way that we have not seen for a long time. On the one hand, with the total renewal of the federal and local judicial powers, one of the last mechanisms of control of power is co-opted. On the other hand, the disappearance of the autonomous bodies implies the return of all their competencies to the State Secretariats subordinated to the Executive Branch. Thus, wrapped up in the grand narrative of the recovery of the autochthonous and popular character of the Mexican constitutionalism of 1917, the current transition of Mexican constitutionalism is heading towards a less liberal, more nationalistic and hyper-presidential port.

Mexican current affairs clearly show us the usefulness and performative character of grand narratives, because beyond the reason or not they have in the description of past events, they have a fundamental role in guiding and legitimizing the present and the future. In other words, they not only serve to describe the past, but also and above all to exercise power.

Grand Narratives Interwoven: Pacific Constitutions and Constitutionalism of the Global South

By *Anna Dziedzic**

A. Introduction

The Pacific islands are undoubtedly of the global south. They share with others in the global south the experience of colonisation, foreign domination for the purposes of resource extraction, and the marginalisation and subordination of indigenous knowledges and institutions of governance.[1] The southern turn in comparative constitutional studies has tended to focus on constitutions in Africa, Latin America and Asia, with specific countries, such as South Africa, Colombia and India, receiving much of the attention.[2] Their constitutional experiences have provided the recurring themes from which the defining features of southern constitutionalism have been drawn.[3] In this contribution to the Symposium 'Grand Narratives of Constitutional Journeys and the Crisis of Democracy', I take up the invitation to reflect on where Pacific island constitutions fit in the wider scholarship on southern constitutionalism.

The primary point of departure is Theunis Roux's article 'Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa'.[4] The purpose, however, is not to critique that Article,[5] but to take the conversation beyond India and South Africa and trace the features of debates about constitutionalism in the Pacific region in order to identify how the constitutional experiences of the Pacific might contribute to wider scholarship on global south constitutions. In this, this brief reflection

* Honorary Senior Fellow, Melbourne Law School, Australia, Email: anna.dziedzic@unimelb.edu.au.

1 These recurring features of the colonial experience are set out in *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 1-38.

2 Ibid., p. 11.

3 E.g., *Daniel Bonilla Maldonado* (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia, Cambridge 2013.

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

5 For such critique see contributions to the World View Symposium: Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa by Theunis Roux, World Comparative Law 57 (2024), pp. 1-126; see also IACL-AIDC Blog, Workshop my Paper Series–Grand Narratives of Transition and the Quest for Democratic Constitutionalism, 2025, https://blog-iacl-aidc.org/2025-posts/2025/6/3/workshop-my-paper-series-grand-narratives-of-transition-and-the-quest-for-democratic-constitutionalism-response-to-commentators (last accessed on 28 August 2025).

cannot be comprehensive. The constitutional experiences of the countries[6] of the Pacific region are all different; and there is often diversity between different groups within each country. The examples I draw on are intended to illustrate some of the features of debates about constitutions in the region, not to exclusively or exhaustively define a 'Pacific constitutionalism'. That is a much bigger task, and one that is being led by Pacific scholars and actors, drawing on the diversity of constitutional knowledge, experience and expressions in the region.

B. Narratives of External Influence and Constitutional Transition

In his article, Roux sets out two competing 'grand narratives' about the constitutional transitions in India and South Africa. Each narrative seeks to make sense of the adoption of western liberal constitutional forms by polities in the global south. One narrative cast constitution-makers as creative adapters of western constitutional forms, making deliberative choices about what parts to adopt and what parts to change to meet the needs of post-colonial India and post-apartheid South Africa. The other narrative casts constitution makers as restricted and constrained by western constitutional forms, which entrench inequality and subordinate Indigenous laws and norms.

There are similar narratives in the scholarship and practice of constitutional transitions in the Pacific. Pacific constitutions draw on the legal forms and institutions created during colonial administration and the constitutions of colonising states. Foreign influence is apparent in the constitutional texts, which share structures, language and provisions adopted from foreign sources.[7] In addition, the mode of constitution making in many states facilitated foreign influence. The constitutions of former British colonies were all formally made by Order in Council, following conferences of representatives from the Pacific country and British officials.[8] In those countries where constitutions were made and adopted by national representatives, foreign advisers had a role in constitutional design and drafting, albeit with varying degrees of influence.[9] In some counties constitution making was carried out in conjunction with negotiations on resource ownership and extraction, such

6 The term 'countries' is used to encompass independent states as well as polities in the region that are not states but nevertheless have their own constitutional systems.

7 *Graham Hassall*, Governance, Legitimacy and the Rule of Law in the South Pacific in: Anita Jowitt / Tess Newton Cain (eds.), Passage of Change: Law, Society and Governance in the Pacific, Perth 2003; *Peter Larmour,* Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands, Honolulu 2005; *Brij V Lal* / *Kate Fortune* (eds.), The Pacific Islands: An Encyclopedia, Honolulu 2000, p. 314.

8 *W. David McIntyre*, Winding up the British Empire in the Pacific Islands, Oxford 2014.

9 *Elisabeth Perham*, Modes of External Constitutional Advising in Constitution-Making Processes, Thesis, UNSW Sydney 2024, pp. 12–20.

that foreign interests directly influenced constitutional choices.[10] Transitional provisions extended colonial laws and institutions into independence,[11] while provision was made for foreign judges, in practice often drawn from the former colonising country, to serve on Pacific courts.[12]

However, Pacific constitutions also feature innovations and departures from the conventional constitutional model, which provide evidence of the agency of Indigenous actors engaged in constitution making during colonial times, at independence and in later reform processes. Many constitutions in the region explicitly protect customary land ownership, departing from western liberal models of the individual ownership, sale and acquisition of property.[13] Indigenous custom is recognised as a source of law, giving constitutional space to legal pluralism.[14] Some constitutions have created institutions through which customary leaders can provide advice to government on lawmaking and policy.[15] Constitutions feature express exceptions and limitations on individual rights that seek to recognise and elevate customary communal conceptions of rights over individualistic ones.[16] Authority has been decentralised to local communities, some of which are working to create their own constitutions.[17] Constitutions have grappled with the effects of migration and the displacement of peoples as a result of colonial exploitation of resources, in some cases providing constitutional space for diaspora and migrant communities.[18]

10 E.g., Kiribati: *Katerina Martina Teaiwa*, Consuming Ocean Island: Stories of People and Phosphate from Banaba, Bloomington 2014. Nauru: *Cait Storr,* International Status in the Shadow of Empire: Nauru and the Histories of International Law, Cambridge 2020.

11 *Jennifer Corrin Care*, Discarding Relics of the Past: Patriation of Laws in the South Pacific, Victoria University of Wellington Law Review 39 (2009), p. 635.

12 *Anna Dziedzic*, Foreign Judges in the Pacific, London 2021.

13 *Joseph D. Foukona*, Customary Land in Pacific Island Countries: Laws and Threats, in: Margaretha Wewerinke-Singh / Evan Hamman (eds.), Environmental Law and Governance in the Pacific, Abingdon 2020.

14 *Jennifer Corrin Care / Don Paterson*, Introduction to South Pacific Law, Cambridge 2022, pp. 5-6.

15 E.g., The Malvatumauri in Vanuatu, the Council of Iroij in the Marshall Islands, and the House of Ariki in the Cook Islands. On this and other sites of mixing see *Miranda Forsyth*, Custom Inside and Outside of Constitution in the Pacific Island Countries Today, Journal of South Pacific Law (2017), p. 146.

16 For a general limitation provision see e.g., the Constitution of Tuvalu 2023, s 29. Specific examples include limitations on the right to vote in Samoa: see *Anna Dziedzic*, Constituencies in a Hybrid State: An Examination of the Shift from "Territorial" to "Electoral" Constituencies in Sāmoa, Journal of Pacific History 57 (2022), p. 498 and proposed limitations on freedom of movement in Solomon Islands: see *Rebecca Monson / George Hoa'au*, (Em)Placing Law: Migration, Belonging and Place in Solomon Islands, in: Fiona Jenkins / Mark Nolan / Kim Rubenstein (eds.), Allegiance and Identity in a Globalised World, Cambridge 2014.

17 *Miranda Forsyth*, The Writing of Community By-Laws and Constitutions in Melanesia: Who? Why? Where? How?, IB2014/53, https://openresearch-repository.anu.edu.au/server/api/core/bitstreams/adef7152-096d-4bfb-a786-e48efee6678d/content (last accessed on 28 August 2025).

18 See e.g., provisions relating to the people of Banaba in Constitution of Kiribati 1979 Ch. IX.

These examples support narratives of constitutional transition as Indigenous-led adaptations of western constitutional forms as well as narratives of colonial impositions. Such narratives have played a role in recent debates on constitutional reform in the region, especially those which seek to elevate Indigenous norms, practices and institutions. For example, in 2020, amendments were made to Samoa's Constitution to give the Land and Titles Court equal status to the Supreme Court and to give it jurisdiction over constitutional rights as well as Samoan custom. In justifying the amendments, Samoa's Prime Minister asserted that original constitution was made 'by *papalagi* [foreigners] who have no customs and culture like Samoa' and that changes were needed for the 'court to equally view individual rights, which [are] based on *palagi* beliefs, and communal rights, which are at the fore of our cultural governance'.[19] This characterisation of the constitution and the constitution making process was contested[20] and the amendments were reversed by the subsequent parliament.[21]

In 2023, Tuvalu adopted a new constitution, which also sought to better balance individual human rights and Tuvaluan customs and values, through a new Charter of Duties and Responsibilities and constitutional recognition of island governments. Tuvalu's Constitution of 1986 had already gone some way to elevate customary values and institutions, but controversial court cases prompted further debate the distinction between 'ideas of human rights as championed by bodies like the United Nations' and Tuvalu's consensus-oriented communal traditions.[22] For the 2023 amendments, constitution makers adopted what they described as a 'decolonial' approach that sought to 'interweave culture and local Tuvaluan knowledge into Westminster parliamentary and government systems'.[23]

C. A Counter Narrative: Interwoven Constitutions

In Samoa and Tuvalu, constitution makers drew on narratives of the colonial imposition of constitutional forms as well as narratives of their adaptation to context. Rather than being pitched against each other, however, they are used to produce what is described in the Tuvaluan context as an 'interweaving' of the external and indigenous in the constitutional system. Weaving is also used by Tongan scholar Mele Tupou Vaitohi as an analytical frame to understand how Pacific constitutions are created by combining international, colo-

19 *Mata'afa Keni Lesa*, LTC Bills: Masked PM Slams "Unfounded Palagi Thinking", Samoa Observer, 28 April 2020, https://www.samoaobserver.ws/category/samoa/62059 (last accessed on 28 August 2025).

20 *Malama Meleisea / Penelope Schoeffel*, Sāmoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court, The Journal of Pacific History 57 (2022), p. 439.

21 Constitution Amendment Act 2025.

22 *Simon Kofe / Jess Marinaccio*, Tuvalu Constitution Updated: Culture, Climate Change and Decolonisation, Devpolicy Blog, 20 September 2023, https://devpolicy.org/tuvalu-constitution-updated-culture-climate-change-and-decolonisation-20230921/ (last accessed on 28 August 2025).

23 Ibid.

nial, Indigenous and liberal constitutional norms and practices to produce a single woven constitutional floor.[24] Weaving is a creative, communal process, which involves deliberate choices about which strands to use, and how to arrange and interlink them in ways that are functional and which convey meaning. As such, constitutional weaving provides a counter narrative to the idea that constitutions must be entirely autochthonous to be authentic as well as to the assertion that written constitutions derived from western models are necessarily foreign and imposed. It suggests the possibility that the grand narratives that Roux outlines can not only find common ground in shared goals, but that they can coexist in other ways that are mutually supportive.

The idea of a syncretic constitution that amalgamates western and indigenous ideas is discussed briefly in Roux's article in the dialogue between the liberal and culturalist grand narratives. There, the critique is made that while constitution makers sought to innovate and extend written constitutions to capture and incorporate indigenous forms and values of governance, their constitutional 'imagination' was limited by the constitutional forms provided by the west.[25] This is a common starting point for post-colonial constitutions. As Sandipto Dasgupta explains, postcolonial constitution making was conducted under an understanding that 'constitutions now were an ideal set of norms and institutional attributes that granted membership to the liberal family of nations. Instead of polities creating their constitutional forms, adherence to a constitutional form made polities legitimate.'[26] In this way, the western liberal constitutional form was the necessary framework through which colonised polities could communicate their sovereignty and self-government.[27] While this is one way to read Pacific constitutions, it is a reading that risks marginalising and mischaracterising the plural nature of Pacific constitutional systems.

One understanding of legal pluralism presents it as different systems of law coexisting in the same place. In this, it is a feature of many societies in the global north and south. In many Pacific contexts, however, the different legal systems and values of introduced state law, Indigenous customary law, and Christianity are not neatly contained and ordered in a hierarchical fashion. Rebecca Monson, in her book 'Gender, Property and Politics in the Pacific' shows how the state legal system has become embedded in Solomon Islands through the way in which Solomon Islanders navigate the three different systems of law. She shows that in doing so, they do not merely *access* and *use* law, but actively *produce*

24 *Mele Tupou Vaitohi*, Constitutional Weaving in Tonga, a Small State with Traditional Authority: A Theoretical Framework for Tonga's Constitutionalism, in: Elisabeth Perham / Maartje De Visser / Rosalind Dixon (eds.), Small State Constitutionalism, London 2025.

25 *Roux*, note 4, pp. 48–49.

26 *Sandipto Dasgupta*, Legalizing the Revolution: India and the Constitution of the Postcolony, Cambridge 2024, p. 8.

27 For a study of this process in the Pacific see *Anna Dziedzic*, Patterns of External Influence in Making and Interpreting Three Pacific Constitutions, Comparative Constitutional Studies 2 (2024), p. 172.

it.[28] Through this process, the multiple legal orders are vernacularised, in ways that challenge the centrality of state law while simultaneously recognising its authority, albeit it as just one legitimate source of law amongst several. Once again, the weaving metaphor seems apt, because it captures the sense that pluralism is not a mixing or a hybrid, but a process in which the different strands of law are still discernible such that, in Demian and Rousseau's terms, 'one can be used as a background or source of authority for the other'.[29]

It is possible, and theoretically productive, to try to understand the pluralism of Pacific constitutions in a similar way. Doing so would present some fundamental challenges to western liberal understandings of constitutionalism. It might, for example, require some rethinking of key concepts such as constitutional supremacy[30] and human rights.[31] It would take seriously the call to reject colonial framings of Indigenous custom as 'not law'.[32] It would harness decolonial methodologies that take different sources and norms seriously, not in order to romanticise or treat one as more superior than the other, but to recognise and value each of the component epistemologies.[33] This might mean decentring the constitutional text and looking to other places and processes through which constitutional norms are generated and made legible and authoritative across different legal orders[34] or to the history of encounter and experimentation with constitutional forms in the pursuit of self-determination.[35] Intra-regional constitutional comparison and conversation would help to shift the constitutional template against which constitutions and their workings

28 *Rebecca Monson*, Gender, Property and Politics in the Pacific: Who Speaks for Land?, Cambridge 2023.

29 *Melissa Demian* / *Benedicta Rousseau*, Owning the Law in Melanesia, in: Eric Hirsch / Will Rollason (eds.), The Melanesian World, Oxfordshire 2019, p. 317.

30 See e.g., *Stephen Levine*, Constitutional Change in Tuvalu, Australian Journal of Political Science 27 (1992), p. 492.

31 See e.g., *Eselealofa Apinelu*, Standing under Fenua: Customary Rights and Human Rights in Postcolonial Tuvalu, Thesis, Swinburne University of Technology Melbourne 2022.

32 *Eugénie Mérieau*, Area Studies and the Decolonisation of Comparative Law: Insights from Alternative Southeast Asian Constitutional Modernities, International Quarterly for Asian Studies 51 (2020), p. 153.

33 On methodology see *Aparna Chandra*, Detangling Knots in the Narratives: A Response to Theunis Roux, World Comparative Law 57 (2024), pp. 114, 122; *Zoran Oklopcic*, The South of Western Constitutionalism: A Map Ahead of a Journey, Third World Quarterly 37 (2016), p. 2080. On pluralism and the global south see *Tobias Berger*, The "Global South" as a Relational Category: Global Hierarchies in the Production of Law and Legal Pluralism, Third World Quarterly 42 (2021).

34 To again draw inspiration from Monson, see her discussion of how women speak for land in Solomon Islands: *Monson*, note 28. On the transdisciplinarity of self-determination in the region, see *Katerina Teaiwa*, Our Rising Sea of Islands: Pan-Pacific Regionalism in the Age of Climate Change, Pacific Studies Journal 41 (2018), p. 26.

35 See e.g., *Tracey Banivanua-Mar*, Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire, Cambridge 2016; *Demian / Rousseau*, note 29, on the legal framing of self-determination movements.

are tested[36] away from a liberal western constitutional model to a Pacific one. In short, constitutional amendment and reform is not the only way to decolonise a constitution.

D. Moving Beyond Transformative Constitutionalism

In the cases of South Africa and India, Roux identifies that the two competing narratives share an ideal, which he calls southern democratic constitutionalism, which is that constitutions in the global south should be designed to empower a democratic state to undo the colonial legacy of social, economic and cultural inequality. Southern democratic constitutionalism moves beyond classic liberal constitutionalism as 'limits on government', to transformative constitutionalism, in which the state and its institutions have a positive obligation to address economic injustice and inequality.[37] This idea of transformative constitutionalism does not resonate in much of the Pacific. With the notable exception of Papua New Guinea,[38] Pacific constitutions do not seek to empower the state to lead the task of social change. Instead, Pacific constitutions seek to maintain a meaningful role for local customary forms of government (with which Christianity is in many cases now intertwined) alongside imported institutions and principles of governance. As such, if pressed to identify a shared ideal that resonates with theories of southern and decolonial constitutionalism that drives constitutional design and change in the Pacific, I would suggest that it is this interwoven pluralistic character of constitutions. As with transformative constitutionalism, the realisation of the ideal interwoven constitution is a difficult and sometimes perilous task, but there is much done and being done by scholars, activists and leaders of the Pacific to understand, theorise and realise this aspect of 'Pacific constitutionalism', in ways that resonate with and contribute to the wider field of comparative constitutional law.

36 To take up a provocation from *Chandra*, note 33, pp. 118–119.

37 *Roux*, note 4, p. 51.

38 On Papua New Guinea's transformative constitution see *Bal Kama*, Rethinking Judicial Power in Papua New Guinea: A Mandate for Activism in a Transformative Constitution, Singapore 2024. Even here pluralism features, as the National Goals and Directive Principles and Basic Social Obligations direct the government and the people to build on Indigenous social orders and values in the pursuit of development, see *Vergil Los Narokobi*, Narokobi's Melanesian Philosophy in the Papua New Guinean Legal System, The Journal of Pacific History 55 (2020), p. 274.

Public Participation and Grand Narratives of Constitutional Transitions: The Case of Fiji

By *Abrak Saati*[*]

A. Introduction

Theunis Roux's article about two opposing grand narratives of constitutional transition, the liberal-progressive narrative and the culturalist-decolonial narrative, is a thought-provoking read.[1] Though Roux makes an important contribution as he inspires us to bring the two narratives into conversation with each other, his essay can also be criticised as a dichotomous interpretation that does not account for an empirical reality that is much more complex. Whether or not decolonized countries have constitutions that "reflect the values of the Westernised political elites that adopted them"[2] is not the focus of this article, however. Rather, the focus here is to understand the *process* of making the constitution and particularly so when the population at large are invited to participate; what has come to be termed as "participatory constitution-making".[3] One might wonder how, then, does this article relate to Roux's ideas of the two different grand narratives, if it does not deal directly with constitutional content? I argue that the notion of participatory constitution-making forms part of a liberal-progressive narrative in the sense that the call for broad based participation is strongly advocated by primarily (western) international organizations. I have elsewhere discussed that the extent to which contemporary constitution-making processes have been participatory—in the sense of allowing participants to exert influence—widely varies between cases.[4] Roux's article, however, spurs additional thoughts on why certain cases have talked the talk of "participation" but not quite managed to walk the walk. In this piece, I will focus on a case in the Pacific region—namely Fiji—to elaborate this matter.

The rest of the article is organized in the following way. The next section discusses participatory constitution-making as a transnational norm, influenced by bottom-up approaches to peace-and state building. This is followed by a section that describes, in brief, the

* Associate Professor, Department of Political Science, Umeå University, Sweden. Email: abrak.saati@umu.se.

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

2 Ibid., p. 5.

3 See *Alexander Hudson,* The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes, New York 2021; *Abrak Saati*, Public Participation, Representative Elites and Technocrats in Constitution-Making Processes: Nigeria, Uganda, South Africa and Kenya, in: Rosalind Dixon et al. (eds.), Comparative Constitutional Law in Africa, Cheltenham 2022.

4 *Abrak Saati,* The Participation Myth: Outcomes of participatory constitution-building processes on democracy, Umeå 2015; *Abrak Saati,* Constitution-Building Bodies and the Sequencing of Public Participation: A comparison of seven empirical cases, Journal of Politics and Law 10 (2017).

two participatory constitution-making processes that have taken place in Fiji (1993-1997, 2012-2013) to then ask whether participation was not fully realized due to a discrepancy between traditional ways of arriving at decisions as opposed to an open participatory approach. Thereafter, I provide a small glimpse into indigenous Fijian culture to substantiate this argument further to, lastly, offer some concluding thoughts.

B. Participatory Constitution-Making as a Transnational Norm

Indeed, much has happened since James Tully stated that constitution-making is the single activity in "modern politics that has not been democratized" over the last three centuries.[5] Over the past 30 years, the common perception of constitution-making as an elite affair has been challenged.[6] Contemporary constitution-making processes—particularly when they take place in states that are transitioning from war to peace and in states transitioning from authoritarian rule—include a host of new actors and organized interests. The United Nations (UN)[7], International IDEA[8], United States Institute of Peace (USIP)[9] and Interpeace[10] have through numerous publications asserted that broad based public participation should be an inherent part of any constitution-making process that takes place during circumstances of serious social upheaval. I contend that there is ground to view this international call for public participation as part of a broader peacebuilding agenda inspired by what has come to be referred to as the "local turn" or as "bottom-up" approaches to peace-and state building. I.e., a notion that suggests that if people in a given territory are

5 *James Tully*, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge 1995, p. 28.

6 See *Hudson*, note 3 and *Saati*, note 3; see also *Gabriel Negretto*, Replacing Constitutions in Democratic Regimes: Elite Cooperation and Citizen Participation, in: Gabriel Negretto (ed.), Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives, Cambridge 2020.

7 UNDPA, Constitutions and Peace Processes: A Primer, 2021, https://peacemaker.un.org/sites/peacemaker.un.org/files/2021_ConstitutionsPeaceProcessesPrimer_EN.pdf (last accessed on 27 March 2025).

8 *Christine Bell / Rhys Ainsworth*, Constitution-building and disruption: Addressing Changing Conflict Patterns, International IDEA, 8 September 2022, https://www.idea.int/publications/catalogue/constitution-building-and-disruption-addressing-changing-conflict-patterns (last accessed on 1 September 2025)*; Sumit Bisarya / Thibaut Noel*, Constitutional Negotiations: Dynamics, Deadlocks and Solutions Constitution Brief, International IDEA, April 2021, https://www.idea.int/sites/default/files/publications/constitutional-negotiations.pdf (last accessed on 1 September 2025); *Erin Houlihan / Sumit Bisarya*, Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?, International IDEA Policy Paper 24, 9 July 2021, https://www.idea.int/publications/catalogue/practical-considerations-public-participation-constitution-building (last accessed on 1 September 2025).

9 *Lauren Miller* (ed.), Framing the State in Times of Transition: Case Studies in Constitution Making, Washington 2010.

10 *Michele Brandt / Jill Cottrell / Yash Ghai / Anthony Regan,* Constitution making and Reform: Options for the Process, Geneva 2011.

to feel a sense of ownership over decisions being made, and processes taking place, they cannot be overridden by outsiders but must rather be allowed to have a voice.[11] This, however, requires that one understands local perceptions of legitimate decision-making. It also requires that we reflect upon whether we are sure that local perceptions align with "our" notions of legitimate decision-making.

Numerous laudable goals are associated with broad-based participation in constitution-making, ranging from increased levels of democracy post-promulgation of the new constitution[12] to an increased sense of legitimacy vis-à-vis the constitution among the populace.[13] The extent to which these aspirations are born out in practice are still being investigated by the research community and the results have, thus far been, to say the very least, mixed.[14] Still, the norm of public participation in constitution-making processes is by now transnational;[15] we have seen it practised—more or less successfully—in countries all over the globe. Nevertheless, it is, undeniably, interesting that the push for public participation, i.e., "bottom-up" influence is coming from above. It raises a set of question. For one, what if this bottom-up, localized approach to broad based public participation—regardless of how well-intended it is—does not find resonance with local ways of arriving at decisions? Secondly, what if broad based public participation results in numerous constitutional submissions which do not (at all) align with a liberal progressive constitution? Which begs the question: what do the enforcers of this norm do in such a case?

C. Participatory Constitution-Making in Fiji

During a time period of 30 years, Fiji has re-written its constitution not only once but twice. The first constitution-making process lasted 1993-1997, and the second 2012-2013. Both processes included public participation. In the larger context of Roux's argument about the two grand narratives of constitutional transition—the liberal-progressive and the culturalist-decolonial—it is relevant to mention that animosities between the two main

11 See *Isabell Schierenbeck,* Beyond the local turn divide: lessons learnt, relearnt and unlearnt, Third World Quarterly 36 (2015); *Roger Mac Ginty / Oliver P. Richmond*, The Local Turn in Peace Building: a critical agenda for peace, Third World Quarterly 34 (2013); *Kristin Ljungkvist / Anna Jarstad*, Revisiting the local turn in peacebuilding – through the emerging urban approach, Third World Quarterly 42 (2021).

12 *Todd A. Eisenstadt / Carl, A. LeVan/ Tofigh Maboudi*, When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making, 1974-2011, American Political Science Review 109 (2015).

13 *Ran Hirschl / Alexander Hudson,* A Fair Process Matters: The Relationship between Public Participation and Constitutional Legitimacy, Law & Social Inquiry 49 (2024).

14 *Eisenstadt et al*., note 13; see also *Hirschl & Hudson*, note 13, *Saati*, note 4, *Hudson*, note 3 and *Negretto*, note 6.

15 See *Hudson*, note 3; see also *Abrak Saati*, Participatory Constitution-Making as a Transnational Legal Norm: Why Does it "Stick" in Some Contexts and Not in Others?, in: Gregory Shaffer et al. (eds.), Constitution Making and Transnational Legal Order, Cambridge 2019.

ethnic groups in Fiji is an inherited legacy from the British colonial power. Though the country became independent in 1970, the ethnic nature of politics persists to the present day, albeit efforts have been made to come to terms with structural inequalities.

I have in a previous contribution[16] analysed these two constitution-making processes in depth and will therefore, for reasons of space limitations, only describe them briefly here. Though these processes were different in many respects, during neither one of them did the participation of the public render any real influence over constitutional content. Thus, "participation" in these instances may be described as symbolic, at best. I have arrived at this conclusion by analysing different aspects of these constitution-making processes including who the initiators of the process were; how the forms of communication between constitution-making bodies and the general public were constructed; the extent to which constitution-making was preceded by constitutional education programs; the extent to which all social/ethnic/religious groups and political parties agreed to participate in the process, and the question of final authority over the constitutional draft (referendum, executive decision or other).

From a participatory perspective, both processes were, indeed, flawed. In the 1993-1997 process the Commission who was in charge of soliciting public input and writing the draft constitution was too small, and its resources far too limited for it to be able to involve the entire population in the process. The fact that constitutional education programs were not made available to the public made it even more difficult for the general population to adequately understand the issues on which they were asked to participate and voice their opinions about. Much of the deliberations concerning the content of the final draft were handled in secrecy by a parliamentary committee, and particularly by trade-offs and negotiations between political elites from opposing sides. In the 2012-2013 process, the participatory aspects were somewhat better addressed. The Commission in charge of gathering input and writing a draft produced handbooks concerning constitution-making for distribution, and it travelled throughout the country to meet people. Yet, the time frame for the exercise was, by many CSOs, deemed too short—a mere three months, and no constitutional education programs preceded the soliciting of input this time either. Research shows that many participants did not even understand the role of a constitution in a society, which of course made it challenging for them to provide informed input as to what the Constitution should contain.[17] Once finalized, the draft was sent to the President of the Republic who did not view it with benevolent eyes and therefore mandated the Prime-Minister to re-write it. How submissions from members of the public that were solicited in the

16 *Abrak Saati,* Participatory Constitution-Building in Fiji: A Comparison of the 1993-1997 and the 2012-2013 Process, International Journal of Constitutional Law 18 (2020).

17 *Romitesh Kant / Eroni Rakuita*, Public Participation and Constitution Making in Fiji: A Critique of the 2012 Constitution-Making Process, State, Society and Governance in Melanesia, Discussion Paper 2014/6 (2014).

earlier stage of the process were handled in this turn of events, is shrouded in the unknown. A safe assumption would be that they were not prioritized.[18]

I would contend that the analysis of both processes and the subsequent conclusion that they were not participatory in any real sense of the word is still valid. Even so, Roux's article about the two opposing grand narratives of constitutional transition and the above discussion about participatory constitution-making as an overarching transnational norm—in a sense, a part of the liberal-progressive narrative—raises additional ideas as to why participation in Fiji never materialized into something more genuine. Did public participation, as a practice, not align with traditional ways of arriving at decisions in Fiji?

D. A Small Glimpse Into Indigenous Culture

As mentioned earlier, the political landscape in Fiji continues to be ethnically polarized. Late Vice President of Fiji, Ratu Joni Madraiwiwi, has brought attention to how most Fijian leaders have encouraged indigenous Fijians to be united—i.e., they have not promoted a multicultural society as something to strive for.[19] Rather the message has been that the only way for indigenous Fijians to secure their rights and interests, is that their group maintain political power. He argued, albeit back in 2006, that "these perceptions continue to be held by a significant number of Fijians […] they resonate more than any current constitutional safeguard", and further stated that "these beliefs are continually reinforced by their chiefs, non-traditional leaders and the clergy and are endorsed in discourse among ordinary Fijians".[20] Chiefs exercise a considerable amount of authority in the Fijian traditional system, and it is not inconceivable that this might have had an effect during the participatory constitution-making processes that took place in 1993-1997 and 2012-2013. There are, however, other traditional Fijian cultural traits that may have had a greater impact. Farrelly[21] describes the challenges of conducting focus group interviews in Fiji upon understanding the importance of *veiwe'ani* (to behave respectfully also in relationships with individuals one prefers to avoid), *madua* (to be reserved and to have manners), and *va'anomodi* (to be respectfully silent). If these characteristics are obstacles for conducting focus group interviews, it is quite likely that they impede the possibilities for public participation in constitution-making as well. The idea of participatory constitution-making is formed with the liberal democratic state in mind – a notion that takes for granted the possibility, and willingness, to form an opinion and convey it. But what happens when

18 *Saati*, note 16.

19 *Ratu Joni Madraiwiwi*, Keynote Address: Governance on Fiji: The interplay between indigenous tradition, culture and politics, in: Stewart Firth (eds.), Globalisation and Governance in the Pacific Islands: State, Society and Governance in Melanesia, Canberra 2006.

20 Ibid., p. 291.

21 *Trisia Angela Farrelly*, Indigenous and democratic decision-making: issues from community-based ecotourism in the Boumā National Heritage Park, Fiji, Journal of Sustainable Tourism 19 (2011), p. 825.

this does not resonate with traditional ways of deliberating matters of importance, and traditional ways of arriving at decisions? It implies that even if many of the shortcomings of the 1993-1997 and 2012-2013 processes had not been a fact; even if the Commissions who were in charge of conducting public hearings had been granted the necessary resources and sufficient time for travelling the country to meet people, and even if Fijians throughout the country had been offered constitutional education programs that had sensitised them to the issues that they were to voice their opinions about, and even if all other circumstances had been near to perfect—the processes might have failed to be as participatory as one might have hoped, simply due to certain cultural traits. It might very well have been the case that indigenous Fijians held views that contradicted those of their elders or their chiefs but refrained from communicating these to the constitutional commissions (both times around).

The matter of indigenous cultures can, and should, however be problematized and one may question the extent to which "traditional ways" have relevance in the globalized world of today. Even individuals who reside in the most remote areas, in some of the most secluded islands in the world, have Internet connection and can get in contact with people from other cultures, nations and traditions than their own. In addressing Roux's ideas, Heinz Klug has brought attention to another dimension that is overlooked when dichotomising the liberal-progressive versus the culturalist-decolonial narrative, namely that neither the former nor the latter are uniform entities.[22] When attempting to understand the why/why not public participation in Fiji's constitutional endeavours was successful, one might also need to take the rural/urban divide into consideration. The extent to which chiefs have overwhelming authority, might arguably be higher in the rural areas of the country compared to the more densely populated cities. The rural/urban divide must surely have been relevant already during the first constitution-making process in the mid-90's but likely even more so in the later process in 2012-2013. If the public submissions that were gathered during these processes were accessible today, it would have been quite interesting to learn whether there was a notable difference as to the number of submissions gathered from rural versus urban areas, and whether the issues that were raised in these submissions were very different. For example, could we expect that submissions from rural areas would emphasise indigenous or customary law? If so, would we applaud a constitution with customary provisions that contradict some of fundaments of what it implies to be a liberal democracy even if it was produced under a liberal progressive narrative that holds public participation in high regard? These are issues to ponder as participatory constitution-making processes are carried out in the future.

22 *Heinz Klug*, Beyond a Bimodal Southern Democratic Constitutionalism, IACL-AIDC Blog, 6 March 2025, https://blog-iacl-aidc.org/2025-posts/2025/3/6/beyond-a-bimodal-southern-democratic-constitutionalism (last accessed on 1 September 2025).

E. Conclusions

At this stage, it is necessary to have a nuanced discussion. My understanding of the Fijian constitution-making processes and the following, very preliminary, argument that they were flawed from a participatory perspective in part due to a mismatch between the norm of participatory constitution-making and local ways of arriving at decisions, is relevant for Fiji. In other words, there might very well be other cases of past, current and future constitution-making processes, in contexts that are more familiar with open, deliberative and participatory approaches of decision-making. Perhaps the likelihood of genuine engagement is greater in such contexts where the overarching ambitions of participatory constitution-making align with already recognized ways of arriving at important decisions. Needless to say, superimposed public participation—regardless of it being in a post-colonial state, a post-conflict state or any other state—has slim chances of success. There is something very paradoxical in a call for "home-grown", "localized", "bottom-up" approaches to decision-making, etc., coming from above rather than below. With that said, however, it is difficult to refute the intrinsic value of public participation in something as important as making a constitution. Even though this idea is rooted in a liberal democratic tradition, firmly situated in Roux's liberal-progressive narrative, it does not mean that the idea must be abandoned altogether for societies outside of the West. Rather it should imply that for it to be as successful as possible, the ways through which participatory programs are carried out need to be tailored to the context in which they are to be implemented, taking into account the urban/rural divide, matters of indigenous ways and traditions, level of familiarity with constitutionalism and many other aspects.

Rejoinder

By *Theunis Roux*[*]

A. Introduction

I am grateful for this opportunity to reply to the four reflections on my 'Grand Narratives' piece that appeared in the first issue of World Comparative Law in 2024 and, less fulsomely, to the nine additional comments published here.[1] I have learned a lot from them, and this response is offered in the spirit of scholarly dialogue, not attempted refutation. Rather than replying to each comment individually, I have organised this reply under three headings: B. Key concepts; C. Methodology; and D. Defending constitutionalism. Section E will offer some concluding remarks.

B. Key Concepts

Both Aparna Chandra and Anuj Bhuwania say that key concepts in my article require further elaboration. For Bhuwania, the ideal of Southern Democratic Constitutionalism (SDC) remains 'curiously undertheorized',[2] while Chandra notes that 'Roux does not define what he means by liberal constitutionalism'.[3] The short answer is that a full exposition of these concepts was not necessary given the purposes I was pursuing. My article was thus offering SDC as a common-denominator ideal to which adherents of both the Liberal-Progressivist Narrative (LPN) and the Culturalist Grand Narrative (CGN) could subscribe. The point of that was to support an argument that, despite the seemingly intractable differences between these two narratives, debates over the future of constitutionalism in India and South Africa might fruitfully occur within the parameters of SDC. For those limited purposes, a brief delineation of SDC's essential features sufficed.[4] Likewise, liberal constitutionalism figures

* Professor of Law and Head of the School of Global and Public Law, Faculty of Law & Justice, UNSW Sydney, Australia. E-mail: t.roux@unsw.edu.au.

1 Six of these additional comments were originally published in the IACL-AIDC Blog in a symposium titled "Grand Narratives of Transition and the Quest for Democratic Constitutionalism", either in exactly the form in which they appear here or in a slightly different form. Since I have already responded to earlier versions of these six comments in the IACL-AIDC Blog, I will not respond again here; see IACL-AIDC Blog, Grand Narratives of Transition and the Quest for Democratic Constitutionalism, https://blog-iacl-aidc.org/wmps-grand-narratives (last accessed on 15 September 2025).

2 *Anuj Bhuwania*, Spectres of Decoloniality: Comparing Constitutional Histories of India and South Africa, World Comparative Law 57 (2024), pp. 98-113, p. 99.

3 *Aparna Chandra*, Detangling Knots in the Narratives: A Response to Theunis Roux, World Comparative Law 57 (2024), pp. 114-126, p. 116.

4 For a full discussion, see *Philipp Dann / Michael Riegner / Maxim Bönnemann* (eds.), The Global South and Comparative Constitutional Law, Oxford 2020.

in my article as the tradition of constitutionalism that proponents of the LPN say has been extended in India and South Africa. It is not a tradition whose moral attractiveness I am myself defending in the piece. Nevertheless, I am happy to take up the invitation to explore these two concepts a little more, in the interests of deepening the conversation.

To start with liberal constitutionalism. On page 59 of my article, I say that adherents of the LPN view liberal constitutions as 'revisable conjectures about the institutional preconditions for human flourishing in a defined context'.[5] This statement conveys the two essential features of liberal constitutionalism on the progressivist account.

First, the ideal that this tradition is interested in promoting is human flourishing—an ideal in which individual liberty is highly prized but not absolutized.[6] The significance of this is that it leaves open the question of how much freedom from social control the individual requires in order to flourish. Depending on the context, a liberal constitution—according to the LPN—might strike that balance in a variety of ways, some towards the more libertarian end of the continuum and some towards the more social-democratic.[7] The tradition of liberal constitutionalism, in other words, is capable of accommodating, and historically has accommodated, a range of institutional-design choices along the left-right political spectrum, including institutional-design choices that leave the oscillation between those two poles to the ordinary political process. Thus, for example, the 1949 German Basic Law, for adherents of the LPN, is a social-democratic constitution within the liberal-constitutionalist tradition, whereas the US Constitution is an example of the leave-it-to-the-political-process model.[8]

Second, the ideal of human flourishing, according to the LPN, is pursued in a pragmatic, experimentalist way.[9] Each liberal constitution presents an opportunity for learning about how best to promote this ideal, both in the context of that constitution itself and more generally, in terms of what the evidence emerging from the implementation of that constitution contributes to the storehouse of comparative knowledge. At the level of the individual legal system, liberal constitutions include a number of institutions that provide feedback on progress towards the achievement of value-laden goals. Courts, for example, fulfil this

5 *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 59.

6 On 'human flourishing' as the ideal animating 'progressive capitalism', see *Joseph Stiglitz*, The Road to Freedom: Economics and the Good Society, London 2024, p. 264. As with Stiglitz, my use of this term is intended to signal that in the liberal tradition individual liberty has always been subject to social control in some shape or form.

7 On liberalism's capacity to accommodate a wide range of political philosophies, see *Cass R. Sunstein*, On Liberalism: In Defense of Freedom, Cambridge MA 2025.

8 See *Mark Tushnet*, Editorial: Varieties of Constitutionalism, International Journal of Constitutional Law 14 (2016), pp. 1-2 (agreeing that for some social-democratic constitutionalism is a species of liberal constitutionalism).

9 On the importance of experimentalism to liberalism, see *John Stuart Mill*, On Liberty, London 1859, pp. 101-102; *John Dewey*, Liberalism and Social Action, New York 1935, p. 92.

function as they assess the impact of legislation on individual rights.[10] At the same time, the tradition of liberal constitutionalism as a whole treats each liberal constitution as an opportunity for developing comparative insights about the institutional preconditions for human flourishing.[11] On this understanding, liberal constitutionalism is decidedly not an 'ideology'.[12] Rather, it is a pragmatic, experimentalist *tradition*. As the tradition progresses, it accumulates insights, not just about the institutional preconditions for human flourishing but also about what it means to flourish. Neither the preconditions nor the central ideal is absolutely fixed in that sense.[13]

Presented in that way, liberal constitutionalism resembles the scientific tradition in its commitment to experimental learning. In place of scientific precepts, liberal constitutionalism works with certain well-known principles, such as the rule of law, freedom, equality, and democracy. These principles may be thought of as sub-ideals of the central ideal of human flourishing, which have emerged over time as being relevant to the pursuit of that ideal. Importantly, these principles—like the central ideal—are not absolutely fixed but rather 'essentially contested'.[14] Their moral content and knowledge about how best to pursue them is open to change in light of experience. More controversially, but again resembling the scientific tradition, these principles are also purportedly universal. Adherents of the LPN thus contend that they are relevant to understanding the preconditions for human flourishing in *any* society, once adapted to local conditions, including culturally distinct understandings of those principles. For example, the *Rechtsstaat* is a uniquely German take on the universal rule-of-law principle, while the Indian Constitution's preferencing of 'scheduled castes' is an example of the principle that all groups in society ought to have equal access to public benefits. Viewed thus, there is nothing in liberal constitutionalism's animating principles, for adherents of the LPN, that precludes their application outside the West.

10 On this conception of the role of courts in liberal constitutionalism, see *Michael C. Dorf / Charles F. Sabel*, A Constitution of Democratic Experimentalism, Columbia Law Review 98 (1998), pp. 267-473.

11 As an aside, it is this feature that makes liberal constitutionalism peculiarly apt, according to adherents of the LPN, for acting as the normative lodestar for the field of comparative constitutional studies.

12 See *Martin Loughlin*, Against Constitutionalism, Cambridge MA 2022 (depicting written constitutionalism as an ideology). Loughlin does not offer a definition of 'ideology', but typically this word is taken to mean a purportedly coherent set of propositions about the fundamental nature of human society and how it ought to be organised. Liberal constitutionalism is not an ideology in that sense because its propositions are not offered as eternal truths but as revisable conjectures.

13 On the experimentalist pursuit of ideals in ways that allow for adjustment of an ideal as it is pursued, see *Martin Krygier*, Philip Selznick: Ideals in the World, Stanford 2012.

14 See *WB Gallie*, Essentially contested concepts, Proceedings of the Aristotelian Society. New Series 56 (1955-1956), pp. 167–198.

This understanding of liberal constitutionalism is very different from Giovanni Sartori's conception, to which Bhuwania refers.[15] For Sartori, the essence of constitutionalism is its concern for the *limitation* of political power. For adherents of the LPN, by contrast, that is just one understanding of liberal constitutionalism that held sway for a time but has since given way to superior insights. What we now understand better, they say, is that human flourishing requires a capable state and thus the tradition needs to be concerned, not just with the limitation of political power, but also with how best to direct political power towards the end of human flourishing.[16] This would be the case, for example, where past injustices cannot be left to the market to remedy, or where protection of the negative liberties associated with classical liberalism requires the state actively to promote the fulfilment of social and economic rights.

Because the institutional preconditions for human flourishing are not absolutely fixed, this shift towards embracing the need for positive state action does not entail any departure from liberal constitutionalism for adherents of the LPN. It simply marks a stage in that tradition's evolution towards enhanced understanding of those preconditions. There is accordingly no reason to accord the label 'post-liberal' to constitutions that are more statist than the American. Indeed, to do that is to fundamentally misconceive what liberal constitutionalism is about. On that approach, the first constitution to give women the vote or to recognise a fourth branch of government would also need to be classified as post-liberal. The silliness of that idea reveals the wrong-headedness of any attempt to place fixed parameters around a tradition that is constantly adjusting its understanding of how its core principles might best be institutionalised.[17]

For adherents of the LPN, it follows that the question whether the German and the Indian Constitutions of the mid-twentieth century and the South African Constitution of the mid-1990s are part of the liberal-constitutionalist tradition must be settled by asking whether it is reasonable to see them as extending that tradition to new circumstances. When the question is posed in that way—in contrast to asking whether they depart from some preconceived notion of what the fixed parameters of liberal constitutionalism are—the answer is obvious. All three constitutions were more statist in orientation than the classical model exemplified by the US Constitution, but none of them for that reason alone falls outside the tradition. At least for adherents of the LPN, it makes sense to say that the statism in these constitutions was a considered response to the question of how human flourishing ought to be pursued in the circumstances of these constitutions' drafting:

15 *Bhuwania* note 2, p. 100 referring to *Giovanni Sartori*, Constitutionalism: A Preliminary Discussion, The American Political Science Review 56 (1962), pp. 853-864.

16 On 'positive constitutionalism', see *Stephen Holmes*, Passions and Constraint: On the Theory of Liberal Democracy, Chicago 1995; *N. W. Barber*, The Principles of Constitutionalism, Oxford 2018.

17 See *Theunis Roux*, Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference? Stellenbosch Law Review 20 (2009), pp. 258-285.

post-war Germany, post-imperialist India, and post-apartheid South Africa (the 'posts' are all in the context, not the tradition).

This exposition of liberal constitutionalism explains how adherents of the LPN come to classify the Indian and South African Constitutions as liberal constitutions. It is not an argument, however, about the merits of the particular institutional-design choices that were made or the strategic wisdom of classifying them in that way when it comes to defending them against the culturalist critique. Those are separate questions, which I will partly address here and partly in section D.[18]

First, in response to Bhuwania's point that the statism in the Indian Constitution was a departure from liberal constitutionalism that helped facilitate the rise of the Bharatiya Janata Party (BJP),[19] adherents of the LPN would say, first, that there was no such departure (for the reasons just given) and, second, that the tendency of the institutional features in question to promote human flourishing should be assessed in light of experience. They would thus welcome Bhuwania's invitation to consider whether the Indian Constitution, in overly qualifying individual rights in deference to the public interest (say), made the BJP's style of ethno-nationalist populism easier to implement without any large-scale amendment of the Constitution.[20] But for adherents of the LPN the purpose of this discussion would not be to decide whether the Sartorian understanding of constitutionalism would have been preferable, but to understand better how the tradition of liberal constitutionalism should be pursued in the Indian setting. Perhaps it is now possible to see that the Indian Constitution, either in its original design or as amended after 1950, did lean too far in favour of statism, and that this facilitated the rise of the BJP. If so, however, that would not on its own be a reason to say that it departed from liberal constitutionalism. It is simply an insight that could be used to amend the Constitution to provide better protection against ethno-nationalist populism when political conditions are again propitious for that.[21]

Second, and likewise, explaining why it is that the LPN classifies the Indian Constitution as a liberal constitution is not a direct response to Chandra's argument that this framing is a strategically ineffective way of engaging the culturalist critique.[22] But it does help to clarify the terms on which adherents of the LPN would enter this debate. For them, any

18 Here, I address the questions from the perspective of the LPN. In section D, I address them from the perspective of someone committed to Indian and South African constitutionalism.

19 *Bhuwania*, note 2, p. 100,

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

21 To my mind, the problem with the Indian experiment is not statism per se but its abandonment of core aspects of the separation of powers. I thus agree with Bhuwania that the Indian Supreme Court took a wrong turning in its Public Interest Litigation jurisprudence because it took over governmental functions instead of shoring them up. The South African Constitutional Court fared much better in that respect. See *Theunis Roux*, A Tale of Two Citadels: Constitutional Court Resilience Against Creeping Autocratisation in India and South Africa, Global Jurist 25 (2025) (forthcoming).

22 See section D below.

question of strategy must be approached consistently with their conception of the essential features of liberal constitutionalism. Since that conception leads them to treat the Indian Constitution as extending that tradition, any concession to the view that it is post-liberal would involve a trade-off between their conceptually coherent views and the strategic benefits of adopting a position inconsistent with those views. While there is such a thing in liberal political philosophy as 'non-ideal theory', i.e., notions that, in the real world, the ideal society might need to be pursued in incremental steps that could require short-term compromises on principle,[23] this is not an occasion on which compromising would make any sense for adherents of the LPN.[24] The reason for that is that the claim to the universality of its principles is a key, non-negotiable aspect of liberal constitutionalism on their account. If the strategic purpose of describing Indian constitutionalism as 'post-liberal' is to deflect the critique of its Western-ness, doing that would amount to abandoning an essential feature of liberal constitutionalism in order to win a side argument. Much better to double down on the claim to universality and confront the culturalist critique head on.

Of course, Chandra is not writing as an adherent of the LPN, and thus the strategic considerations for her are different. For Chandra, the question is whether conceiving of Indian constitutionalism as post-liberal provides a better normative vantage point from which to engage the culturalist critique, which she sees as crucially different from the decolonial critique.[25] Since that is not a definitional issue, I deal with it in a separate section—section D—below.

The remaining definitional issue concerns Bhuwania's claim that my conception of SDC is undertheorized. My concededly brief exposition of this concept is contained on page 51 of my article.[26] I say there that SDC conceives of constitutions as more than mere 'procedural frameworks for managing competition between groups with different conceptions of the common good'.[27] Rather, constitutions are conceived as 'instruments for transforming society in line with a clearly articulated vision of post-colonial justice'.[28] I then add that SDC recognizes that both the state and the citizenry must be empowered to play their respective roles in this constitutional transformation process, through measures designed at supporting democratic institutions to perform their constitutional functions and to provide citizens with the material and non-material means to participate in the democratic process.

23 See *Ronald Dworkin*, Law's Empire, Cambridge MA 1986, pp. 380-381. The distinction between ideal and non-ideal theory originates in *John Rawls*, The Law of Peoples, Cambridge MA 1999, p. 89 ("[n]onideal theory asks how this long-term goal [of achieving a just society] might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible, and politically possible as well as likely to be effective").

24 This is raised in the dialogue. See *Roux*, note 5, p. 46.

25 *Chandra*, note 3, pp. 120-126.

26 *Roux*, note 5, p. 51.

27 Ibid.

28 Ibid.

The purpose of this brief exposition, as noted already, was not to offer a full theorization of SDC but to articulate a common-denominator ideal that could serve as the framework within which adherents of the LPN and CGN could advocate for constitutional reform in India and South Africa. It was deliberately articulated in very general terms so that neither side would feel alienated by it, unless of course they were not committed to fundamental social and economic transformation or to capacitating the state and the citizenry to play their respective roles in that process. The point, in other words, was to sketch the parameters of an ideal that would keep the adherents of the two narratives within conversational range of each other while excluding anyone who was not prepared to subscribe to even so broadly-sketched an ideal.[29]

The other reason that I did not attempt a full theorization of SDC was the sheer complexity of addressing that question in an article whose length, I thought, might already be trying my readers' patience. The 'Global South' on its own is an amorphous and contentious term, without bringing constitutionalism into the mix. Whatever SDC or 'constitutionalism from the Global South' means, it undoubtedly sucks into its semantic orbit a vast array of different constitutional experiences, cultures and institutional-design options. Philipp Dann has done magisterial work in attempting to draw out the common themes underlying this perspective,[30] and there will, I hope, be another occasion on which I can enter the conversation he has started. But, in this piece, I had not laid any kind of conceptual or empirical basis for doing that, and thus I restricted myself to stating some essential features that Indian and South African constitutionalism, as prominent examples of attempts to pursue SDC, share. Given some of the other contributions to this symposium, it appears that this was a wise choice. Anna Dziedzic, Abrak Saati and Heinz Klug, for example, all raise questions about how representative my depiction of SDC would be if offered as a full theorization of constitutionalism from the Global South. Dziedzic, for her part, argues that, if the heart of SDC is something like 'transformative constitutionalism', it does not 'resonate' in the constitutional imaginaries of the Pacific-island states she is studying.[31] Saati and Klug likewise point to a great deal of variety within the Southern perspective that makes offering an overarching theorization difficult.[32] It is just as well, then, that I was not doing that.

29 Kate O'Regan, in her comment (*Catherine O'Regan*, Some Reflections on Theunis Roux's Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), pp. 72-81) questions the logic of that choice, which is a methodological point to which I return in section C below.

30 See *Philipp Dann et al*. note 4; see also *Philipp Dann*, Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies, Comparative Constitutional Studies 1 (2023), pp. 174–196.

31 *Anna Dziedziec*, Grand Narratives Interwoven: Pacific Constitutions and Constitutionalism of the Global South, World Comparative Law 58 (2025).

32 *Abrak Saati*, Public Participation and Grand Narratives of Constitutional Transitions: The Case of Fiji, World Comparative Law 58 (2025); *Heinz Klug*, Beyond a Bimodal Southern Democratic Constitutionalism, World Comparative Law 58 (2025).

When the time for offering a fuller theorization comes, the purpose in any case would not be to present SDC as a species of constitutionalism with fixed parameters, but rather as a perspective on constitutionalism from the Global South. This is the approach that Dann advocates,[33] and I think it is the right one, albeit for different reasons. For a liberal-constitutionalist like me, SDC is a particularisation of that tradition to the circumstances of the Global South. As such, it possesses all the characteristics of that tradition, including its willingness to reinterpret core principles and rethink institutional-design options in light of experience. There would thus be no uniform, one-size-fits-all SDC on this account, just as there is a great deal of conceptual and institutional variation within liberal constitutionalism more generally. Rather, the point of identifying SDC as a separate species of liberal constitutionalism would be, first, to delineate a perspective on that tradition based on a shared set of experiences, and, second, to assess what can be learned from SDC, both with a view to improving the institutional-design options associated with that perspective and also with a view to contributing to comparative understanding of the possibilities of liberal constitutionalism more generally.

C. Methodology

I turn now to questions of methodology and, in particular, to comments that took issue with the device I adopted in the piece of putting the LPN and CGN into conversation with each other. The most forceful objection here came from Joel Modiri who argued that this device was just a 'ruse' to (a) obscure the ideological precommitments that I bring to this discussion; and (b) mask the privileged position from which I assume the right to be charitable.[34] Catherine O'Regan in her comment, is also very critical of this device, albeit for different reasons. In her view, the problem is that I hold back from challenging decolonial critics like Modiri to be more specific about what it is about the 1996 South African Constitution that they would change.[35] O'Regan further feels that my decision to exclude the exclusionary, nativist side of the CGN from the shared ideal of SDC biases my conclusion.

The easiest way to respond to these two comments would be to pit them against each other and say, 'I told you so'. Modiri, in his response, thus doubles down on his critical-theory approach that is epistemologically averse to saying anything empirically contradictable.[36] If you accept his critical perspective that the 1996 South African Constitution was the morally illegitimate product of the unjust balance of political power that

33 See *Dann*, note 30

34 *Joel Modiri*, Narrating Constitutional Dis/order in Post-Apartheid South Africa: A Critical Response to Theunis Roux, World Comparative Law 57 (2024), pp. 82-97.

35 *O'Regan*, note 29.

36 For a good example of this style of scholarship, see *John L. Comaroff / Jean Comaroff*, Law and Disorder in the Postcolony: An Introduction, in: Jean Comaroff / John L. Comaroff (eds), Law and Disorder in the Postcolony, Chicago 2006, pp. 1-56.

prevailed at the time it was drafted, everything follows. But if you do not, there is no real conversation to be had. At the same time, O'Regan in her piece, argues from her situated perspective as a former Constitutional Court justice who took an oath of affirmation to uphold the 1996 Constitution. She would not have taken that oath, she says, had she thought that the Constitution was 'deeply illegitimate'.[37] That is a perfectly reasonable position for her to adopt. But it does mean that she and Modiri enter the debate over South Africa's constitutional future from irreconcilable positions: the one implacably opposed to the 1996 Constitution's moral legitimacy and the other profoundly committed to it.

Given that, one possible response for me would be to say that this is precisely why I adopted the device of putting the LPN and CGN into dialogue with each other. The point of that device, it will be recalled, was to shift the debate away from the moral legitimacy of the Indian and South African Constitutions to practical suggestions for constitutional change. If the dialogue revealed that adherents of the LPN and CGN shared at least some normative commitments, those could be used to ground a discussion about constitutional change with due regard to the political context in which such change would take place. Modiri's and O'Regan's diametrically opposed responses to my piece tend to confirm the need for such a device, and thus I might leave it there. That would be a little too neat, however. Modiri and O'Regan both argue their case very forcefully, and so it behoves me to deal with each argument separately.

Starting with O'Regan's comment: The nub of her complaint is that my methodology amounts to a disinclination to engage 'with the substantive aspects of colleagues' work in the field of comparative constitutional scholarship because those colleagues are understood to be so committed to their scholarly paradigm that they will dismiss any critiques of their work'.[38] With respect, I think that this misstates my position. Anyone who reads my piece, and Modiri's impassioned response to it, cannot but be left with the impression that I was engaging with the substance of it. The difference between O'Regan's position and mine concerns how best to do that.

In pointing out that scholarship in this area is beset by the problem of competing grand narratives, I was referring to something akin to John Rawls's idea of 'reasonable comprehensive doctrines', i.e., a view formed through an exercise of both 'theoretical and practical reason [that] covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner [and] belongs to, or draws upon, a tradition of thought and doctrine'.[39] In my conception, the LPN and CGN are something like that. This does not mean that they cannot be engaged. It simply means they need to be engaged in a particular way. In *Political Liberalism*, Rawls thus uses the idea of an 'overlapping consensus' to suggest how citizens with competing reasonable comprehensive doctrines may nevertheless agree on a 'political conception of justice' (such

37 *O'Regan*, note 29, p. 78.

38 Ibid.

39 *John Rawls*, Political Liberalism, expanded edition, New York 1993, p. 59.

as 'justice as fairness') as a basis for political decision-making.[40] In my article, SDC was performing that function—a common-denominator ideal around which adherents of the LPN and CGN could debate South Africa's constitutional future without agreeing on the moral legitimacy of the current constitutional framework. Within the parameters of that shared ideal, it is perfectly possible to engage opposing arguments. Thus, I do call out both Modiri's and Tshepo Madlingozi's scholarship in my piece for their failure to provide concrete examples of what their alternative constitution would look like.[41] But I do that only after I have accepted the reasonableness of their premises.

O'Regan's second point is that the way I pursue the 'grand narratives' methodology prejudges the issues in contention. By excluding the morally offensive, nativist side of the CGN from the SDC ideal, she contends, I artificially tilt the argument in favour of my conclusion that there likely would be much for adherents of the LPN and CGN to agree on.[42] Again, I think this mischaracterises my argument.

What I say in my article is that, in bringing the LPN and CGN into dialogue with each other, we need to ascribe the most charitable interpretation to both of them. In the philosophical literature, 'interpretive charity' is perfectly compatible with fierce disagreement.[43] Indeed, the whole point of adopting this approach is to ensure that when one finally engages one's opponent's argument, one is engaging the best version of it. This is what I was attempting to do in my piece. The exclusionary version of the CGN is easy enough for adherents of the LPN to dismiss,[44] and thus the latter narrative needs to be put in contention with the best version of the former. Of course, exclusionary arguments will still be deployed in the real world. But the purpose of my piece was not to rehearse a real-world debate, but a scholarly debate between the adherents of two narratives who are currently talking past each other. I disagree that this approach tilts the argument in favour of my conclusion. Rather, I think it (a) helpfully conditions entry into the scholarly debate on the renunciation of exclusionary views and (b) moves the debate onto a terrain where the scholars concerned can discuss practical questions without endlessly disputing premises that no one is inclined to give up.

In response to Modiri's point that the 'grand narratives' device is just a 'ruse' for disguising my own situated perspective and arrogating to myself the privilege of being charitable,[45] my view is that there was nothing underhand about what I was doing. As Modiri himself notes,[46] my liberal commitments are well known, and thus there would

40 Ibid., p. 482.

41 *Roux*, note 5, pp. 67-68.

42 *O'Regan*, note 29, p. 81.

43 See *Donald Davidson*, Inquiries into Truth and Interpretation, Oxford 1984.

44 See *Meera Nanda*, Postcolonial Theory and the Making of Hindu Nationalism: The Wages of Unreason, London 2025.

45 *Modiri*, note 34, p. 84.

46 Ibid., p. 83.

have been no point in hiding them. Rather, what I was attempting was a sincere exercise in distancing myself from my own subject position—in putting views with which I am not naturally inclined to agree in their best light so as to genuinely listen to them. I know that the process of writing the piece did that for me. It forced me to take seriously arguments that provoke in me, as a white South African, profound feelings of anxiety and unbelonging. I worked hard to overcome that visceral reaction to give the CGN its due. So much so that, if I am allowed to share an anecdote, there were occasions when liberal constitutionalists reading the dialogue section of my article complained to me that I had given 'all the best lines to the CGN'. They would not have responded that way had they thought that the exercise was entirely contrived. To O'Regan, who objects to my not engaging decolonial critics more forcefully, I would say that there are occasions to be forceful, and there are occasions to try to listen, and I was engaging the latter mode in this piece.

D. Defending Constitutionalism

I return now to Chandra's argument that, when it comes to defending Indian constitutionalism from the culturalist critique, it would be better to conceive of it as post-liberal in character.[47] That is primarily a strategic argument, but it is also based on certain underlying conceptual considerations. In this section, I deal first with these considerations, both to clear away some underbrush and also to clarify where I think Chandra misconstrues my argument. I then proceed to the strategic issue, this time addressed not from the perspective of the LPN,[48] but from the perspective of a friend of Indian and South African constitutionalism, whether conceived as liberal or post-liberal.

As a conceptual matter for Chandra, Indian constitutionalism is best conceived as post-liberal because it transcended what she regards to be liberal constitutionalism's preoccupation with the limitation of political power.[49] This becomes clear in the passage to which I have already referred in section B, in which she queries my understanding of liberal constitutionalism. Having noted that I do not offer a definition of this concept, Chandra proceeds to assume, based on a decontextualised quotation from my article,[50] that my conception is something akin to the classical conception of constitutions as limits on power. Having in this way determined both my alleged conception and her own understanding of liberal constitutionalism, Chandra proceeds to describe a range of respects in which Indian constitutionalism departs from the classical conception and therefore warrants being classified as post-liberal.

47 *Chandra*, note 3, pp. 120-26.

48 See section B above.

49 *Chandra*, note 3, p. 116.

50 *Chandra*, note 3, p. 116 referring to *Roux*, note 5, p. 51. The quote in question occurs in a section in which I am setting out the parameters of SDC and explaining how it defines itself in contradistinction to the classic liberal idea. There is no reason for thinking that this conception amounts to my own personal conception.

This argument is perfectly logical if you accept Chandra's definition of liberal constitutionalism. But as a comment on my piece, it is both question-begging and misdirected. It is question-begging because the plausibility of the label 'post-liberal' depends on one's answer to the prior question as to whether liberal constitutionalism is best seen as an ideology with fixed parameters or a pragmatic, experimentalist tradition. As Chandra has helpfully pressed me to explain, adherents of the LPN adopt the latter view, and thus for them there is nothing 'post' about Indian constitutionalism. Chandra's response to my piece is in addition misdirected in so far as she attributes to me a conception of liberal constitutionalism as an ideology with fixed parameters. That is not my conception, and thus for the most part, she and I are arguing at cross-purposes.

So much for the conceptual underbrush. Despite these differences, I think that it is still possible to make some progress with the strategic question that Chandra raises, of how best to defend Indian—and by extension, South African—constitutionalism from the culturalist critique. Whether you view those two constitutionalisms as liberal or post-liberal, if you are well disposed towards their ideals, you would want to engage in this defence.[51]

For Chandra, as noted, the post-liberal conception of Indian constitutionalism holds distinct advantages when it comes to defending it against the culturalist critique.[52] That is primarily because it allows defenders of Indian constitutionalism to avoid all of the historical, conceptual and cultural baggage that comes with the label 'liberal' while still defending a morally attractive, and indeed, in Chandra's view, superior variety of constitutionalism. The 'post' in 'post-liberal' for Chandra, in other words, signals not just a break with liberal constitutionalism but also with the Western values that are said to be ineluctably bound up with that variety of constitutionalism. To the culturalist critics of the Indian Constitution, then, Chandra is able to say: your critique is misdirected. There is nothing culturally alien here. The Indian Constitution already embodies an authentically Indian understanding of constitutionalism.

This is an attractive argument. Indeed, in my original piece, in the dialogue, I have the LPN character conceding as much.[53] It is certainly easier to defend Indian and South African constitutionalism in that way. Nevertheless, there are reasons to think that it might not be as strategically advantageous as first appears.

To start with, it is not obvious that classifying Indian or South African constitutionalism as post-liberal allows one to sidestep the nub of the culturalist critique, which has to do with the degree of influence exerted by European Enlightenment ideas on the constitution-making process and ultimately the question of democratic political agency. One of the central claims made by proponents of the culturalist critique is thus that Indian and

51 I have already explained in section B above how I think adherents of the LPN would enter this debate. Here the purpose is to consider the strategic question from the perspective of defending Indian and South African constitutionalism.

52 *Chandra*, note 3, pp. 120-126.

53 *Roux*, note 5, p. 46.

South African constitution-makers were 'mentally colonized'.[54] While they might in their own minds have seen themselves as democratically elected representatives of the relevant formerly-colonized people, they were, as a matter of their own psychological make-up, members of a privileged sub-section of that people who had won the right to govern the postcolony on the basis that they had assimilated the coloniser's values. Whatever mandate they might have had, they were thus not really exercising any democratic political agency. Rather, for culturalist critics, it is as though the constituent assembles in India and South Africa were suffering from some kind of collective Stockholm syndrome, with the constitution just a long love letter to their former colonial masters. From this perspective, whether Indian and South African constitutionalism is classified as liberal or post-liberal does not matter all that much.

Not so, proponents of the post-liberal conception might respond. The distinct advantage of our approach is that it allows us to build a conceptual wall between the variety of constitutionalism that constitution-makers in India and South Africa drew on and the variety they adopted. This is why, they would say, it is so crucial to treat liberal constitutionalism as an ideology with fixed parameters. Doing that allows friends of Indian and South African constitutionalism to depict post-colonial constitution-makers as making a clean break with European Enlightenment thinking. Yes, the argument goes, they treated liberal constitutionalism as a resource of sorts, but in the end, they found it wanting. Emerging as it did from the very different context of Euro-America in the late eighteenth century, liberal constitutionalism was focused on different problems and founded on different, quintessentially Western values. It was therefore necessary to go *beyond* that tradition. In doing so, post-colonial constitution-makers broke decisively with Western values, and the charge of mental colonization accordingly fails.

This seems at first blush like a good defence. The problem with it, however, is that culturalist critics have been able to mount quite a powerful riposte, and one that interestingly draws on the LPN's conception of liberal constitutionalism as an evolving tradition.[55] Modiri, for example, argues that the post-liberal conception, and particularly that version of it that celebrates 'transformative constitutionalism' as a distinctive mode of constitutionalism from the Global South, is just liberal constitutionalism on acid.[56] It is the most evolved, most 'woke', if you like, version of liberal constitutionalism—all the more insulting because it was designed by people who would not have been able to adopt such a radically progressive constitution had they attempted to do so in Canada, say.[57] And yet here they are ramming all this Western liberal progressivism down the throats of

54 Ibid., p. 56.

55 As I noted in my original piece (*Roux*, note 5, pp. 46-47), there is thus an interesting point of agreement between culturalist critics and adherents of the LPN in this respect.

56 *Joel M. Modiri*, Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence, South African Journal on Human Rights 34 (2018), p. 300.

57 Socio-economic rights, for example, were included in the 1996 South African Constitution but not the Canadian Charter of Rights and Freedoms.

Indians and South Africans, who may from their own cultural perspective support such things as gender equality and same-sex marriage, but don't need the Western version of those progressive positions imposed on them.

Does that not then mean, though, that those who would classify the Indian and South African Constitutions as falling in the liberal-constitutionalist tradition are even less able to deal with the mental colonization point? Not necessarily. For adherents of the LPN, as we have seen, democratic political agency consists in the degree of creativity shown in the adaptation of liberal constitutionalism to local circumstances. Constitution-makers in India and South Africa, on this view, stood in exactly the same relationship to liberal constitutionalism as constitution-makers elsewhere in the world who have drawn on that tradition. Because it is a universal tradition, no one is a cultural insider to liberal constitutionalism. Everyone is in a sense at one stage removed from it, having to engage in the work of cultural adaptation and specification. Not just that but, because it not an ideology with fixed parameters, liberal constitutionalism is not capable of mentally colonizing anyone and never has. As a pragmatic, experimentalist tradition, it is inherently committed to both the re-interpretation of its ideals and to innovative institutional-design features. In this way, adherents of the LPN are able to own the progressivism of the Indian and South African Constitutions, not as external impositions, but as authentic local adaptations of liberal constitutionalism of which their citizens can be justifiably proud.

It should be clear by now that I am myself drawn to this second view. I think it is both aligned with the best understanding of liberal constitutionalism and more strategically advantageous. Not only that. It is also aligned in unexpected ways with the work of a scholar who does not self-identify as a liberal-constitutionalist, Philipp Dann.

Dann, as readers of this journal would know, has been at the forefront of the 'constitutionalism from the Global South' movement in comparative constitutional studies. One of the central concepts he has suggested in the course of this intervention is the idea of the 'double turn'—the notion that adopting a Southern perspective on constitutionalism involves a certain amount of 'epistemic reflexivity'.[58] As part of that, Dann and his co-authors argue, Northern scholars need to be open 'to effectively learn from and import Southern institutions, concepts, and theoretical approaches, and transform their own'.[59] Dann did not mean it in this way, but that approach is completely compatible with the liberal-progressivist understanding of constitutionalism from the Global South as an opportunity for comparative learning. The great advantage of seeing Indian and South African constitutionalism as a development of the liberal-constitutionalist tradition is that their moral insights and institutional innovations are not seen to be cordoned off to something called 'the Southern experience', as though developments like the justiciability of socio-economic rights and the identification of a fourth branch of government had no implications for constitutionalism in Europe and North America. Rather, that experience is taken to

58 *Dann et al.*, note 4, p. 31.

59 Ibid., p. 32.

be part of the universal struggle against the abuse of private and public power, which, suitably adjusted, might contribute to the revival of liberal constitutionalism in the countries in which it originated. On the liberal-progressivist view, as I have been stressing, every attempt to deploy liberal constitutionalism in service of the ideal of human flourishing is worthy of comparative learning.

E. Conclusion

There are many more arguments in the various comments to which I might have responded had space allowed. The fact that I have not, does not mean that I do not take them seriously or have not found them helpful. I thank all the commentators for pushing me to clarify my views. I hope that they are left with the feeling that this symposium has been worthwhile.

ABHANDLUNGEN / ARTICLES

On the Continuity of Submerged Island States

By *Theodor Schilling*[*]

Abstract: An island State whose territory has become submerged has thereby, according to an austere view, become extinguished. This may well lead to its people becoming stateless. To refute the austere view and thus to avoid this result requires to argue for the submerged State's continuity. An ILC Study Group has developed a number of possible arguments therefor. The most persuasive of them is the "Maintenance of international legal personality without a territory". However, the reasoning the Group has provided is rather elliptic. An intriguing approach to buttressing its argument is to look for a legal theory which defines the State with reference not to its territory but rather to its law and its population. Such a theory has been developed by Felix Somló. Once adapted to a situation in which the government and (parts of) the population of a submerged State function and live on the territory, and with the consent, of a host State, it allows to consider the entity constituted in this way as a peripheral case of the "State". While international law is free to recognise such an entity as a State, it ought to do so for a number of reasons, first among them the normative one to shield the submerged State's people from statelessness.

Keywords: Sea Level Rise; Legal Theory, Statehood

***

A. Introduction

The scenario evoked by the title of this contribution has not yet been fully realised.[1] No island State has become uninhabitable, much less wholly submerged, due to climate change.

* Dr. jur. utr. (Würzburg), Dr. jur. habil. (Humboldt Universität zu Berlin), LL.M. (Edin.), extraordinary Professor of Public Law, International Law and Legal Theory, Humboldt Universität zu Berlin, Germany. Email: theodor.schilling@gmail.com.

1 Cases in which parts of a State, especially low-lying islands, are threatened to, or have, become submerged may lead to the displacement of the impacted part of the State's population. Those cases are outside the purview of the present article. As *Jenny Grote Stoutenburg*, When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States, in: Michael B. Gerrard / Gregory E. Wannier (eds.), Threatened Island Nations, Cambridge 2013, pp. 57-87, 66, notes it is "[..] unlikely that other States would declare the island State nonexistent as long as it still had a government and some caretakers remained on the island."

This should not be a reason for complacence. In all likelihood, one or the other of the low-lying island States will be under water sometime soon, the Marshal Islands, Kiribati, Tuvalu and the Maldives being prime candidates. While there are efforts to hold back the water, at least to delay the onset of uninhabitability, they will likely not be enough to avoid that result indefinitely. Thus arises the question, much discussed recently, of the position in law, of an island State victim of such developments (hereinafter, for brevity's sake, submerged State) which prima facie endanger its very existence.[2] A Study Group of the International Law Commission (the Study Group) has considered "Possible alternatives for the future concerning statehood" of submerged States: "Presumption as to the continuity of the State concerned", "Maintenance of international legal personality without a territory", and "Use of some [other] modalities."[3] These so-called alternatives do not appear to be mutually exclusive. Rather, the second alternative must be taken to include some of the modalities looked at as a third possible alternative.

This article will focus on the factual and legal requirements a submerged State's continued existence must meet to be justifiably called a "State" and treated as such under international law. It will try to identify an apposite theoretical concept of "State" and to align it with the corresponding international law concept. But first, it will shortly discuss the reasons a continuity of a submerged State is normatively desirable.

B. Normative Reasons for the Continuity of a Submerged State

The State, although the primary person of international law, is not an end in itself. Rather, it ought to be a means to further the human good. Ideally, it is an association "to secure the whole ensemble of material and other conditions […] that tend to favour, facilitate and foster the realization by each individual of his or her individual development".[4] It follows that, normatively speaking, the continuity of a submerged State is desirable, on the collective level, insofar as it is conducive to the human good in general and to the good of its population in particular.[5] This good comprises both immaterial—such as a

2 See e.g. the contributions in *Michael B. Gerrard / Gregory E. Wannier* (eds.), Threatened Island Nations. Legal Implications of Rising Seas and a Changing Climate, Cambridge 2013, and especially International Law Commission (hereafter ILC), Sea-level rise in relation to international law. Second issues paper by *Patrícia Galvão Teles* / *Juan José Ruda Santolaria*, Co-Chairs of the Study Group on sea-level rise in relation to international law, Doc. A/CN.4/752, 19 April 2022, paras. 175 ff.; Additional paper to the second issues paper (2022), Doc. A/CN.4/774, 19 February 2024, paras. 100 ff.

3 ILC, Doc. A/CN.4/752, note 2, Part Two, Reflections on statehood, Chapter V.

4 "[But] we must conclude that the claim of the national State to be a complete community is unwarranted", see *John Finnis*, Natural Law and Natural Rights, Oxford 2011, pp. 147 ff., p. 150. On the question "Why should there be a State?", see *John M. Finnis*, Law and What I Truly Should Decide, American Journal of Jurisprudence 48 (2003), p. 129.

5 Judge *Cançado Trindade*, Separate Opinion, International Court of Justice (hereafter ICJ), Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo

distinctive culture of that population, which is also a human right of its members—as material aspects.[6] Accordingly, many of the propositions made by various authors for providing for the continued existence of a submerged State underline that the respective proposition "preserv[es] the existing State and hold[s] the resources and well-being of its citizens—in new and disparate locations—in the care of an entity acting in the best interest of its people"[7] or to "ensure the proper use of State resources for the benefit of its population".[8] This applies even if, in practical terms, "all [endangered States] are marked by their limited resources".[9]

On the individual level, the continuity of a submerged State is desirable as the consequences of its extinction for the members of its population are dire.[10] As the territory they used to inhabit has become submerged, they need to be received by other States.[11] But they have no obvious legal claim to be so received. They are, although often dubbed climate refugees, not refugees in the sense of international refugee law.[12] Rather, they do not have "any distinct legal status",[13] and have no claim under customary international law.[14]

It is true that an indirect legal claim of such people to be received into the territory of a State party to one or the other human rights treaty[15] may follow, under such a treaty, from the combination of a right to present a demand for international protection or asylum

(Advisory Opinion) [2010] ICJ Rep 403, 553 (para. 77), speaks of "the most precious constitutive element of statehood: human beings, the 'population' or the 'people'".

6 See especially Committee on Economic, Social and Cultural Rights, General comment no. 21, Right of everyone to take part in cultural life, para. 34: "States parties should pay particular attention to the protection of the cultural identities of migrants [..]."

7 *Maxine A. Burkett*, The Nation Ex-Situ, in: Michael B. Gerrard / Gregory E. Wannier (eds.), Threatened Island Nations, Cambridge 2013, p. 90.

8 ILC, Doc. A/CN.4/752, note 2, para. 197.

9 *Burkett*, note 7, p. 110.

10 See ILC, Doc. A/CN.4/752, note 2, Part Three "Protection of persons affected by sea-level rise". See also *Carolin König*, Small Island States and International Law. The Challenge of Rising Seas, Abingdon 2023, pp. 158-171.

11 ILC, Doc. A/CN.4/752, note 2, para. 197.

12 ILC, Doc. A/CN.4/752, note 2, paras. 243, 262 ff.; see also *Brianna Hernandez / Christine Bianco / Zenel Garcia*, Refugees without Recognition: Climate Change and Ecological and Gender Inequality, EJIL:Talk!, 15 August 2024, https://www.ejiltalk.org/refugees-without-recognition-climate-change-and-ecological-and-gender-inequality/ (last accessed on 8 October 2025).

13 ILC, Doc. A/CN.4/752, note 2, para. 234.

14 Some practical solutions to this unsatisfactory situation are offered by *Kate Jastram / Jane McAdam / Geoff Gilbert / Tamara Wood / Felipe Navarro*, International protection for people displaced across borders in the context of climate change and disasters: A practical toolkit, Center for Gender & Refugee Studies, Kaldor Centre for International Refugee Law and Essex Law School and Human Rights Centre (2024); see also Interamerican Court of Human Rights (hereafter IACtHR), Advisory Opinion OC-32/25 of 29 May 2025, Requested by the Republic of Chile and the Republic of Colombia, Climate Emergency and Human Rights, paras. 433 et seq.

15 On "The Right to Have Rights and Post-World War II Legal Developments" see *Seyla Benhabib*, Exile, Statelessness and Migration, Princeton 2018, pp. 111-115 and 123-124.

at a border crossing into such a State, and thus in its territory,[16] and the prohibition of refoulement derived from the treaty provision protecting the right to life.[17] Forced to leave the State becoming submerged its people, on arriving at the coast of another State, or on being taken aboard a vessel sailing under the flag of another State, have a human right to apply for international protection and, if such protection were to be refused, to appeal that decision nationally and internationally.[18] Once on board, they cannot be denied entry into the national territory of the flag State without examination of each applicant's individual situation as such denial would amount to collective expulsion,[19] prohibited under international human rights law. Once inside the national territory of a host State, they cannot be expelled individually, as to do so would be contrary to the prohibition of refoulement. Such expulsion would endanger (or end) their life, as their former State of residence has become uninhabitable.[20] This applies at least in cases in which there is no other State willing to accept them.[21] While it may be the case that States honour the legal obligation to receive a person displaced by rising waters into their territory often in the breach, the very existence of the corresponding claim contradicts, nowadays, Hannah Arendt's diagnosis of human rights' futility.[22] However, another aspect, underlined by Arendt, of the consequences of a State's extinction for its population is not remedied by human rights law: that they

16 European Court of Human Rights (hereafter ECtHR), M.K. and others v. Poland, 40503/17, 42902/17, 43643/17, 23/07/2020, paras. 10, 179.

17 Human Rights Council (hereafter HRC), Teitiota v. New Zealand, 2728/2016, 7 January 2020, para. 9.3, referenced by ICJ, Obligations of States in Respect of Climate Change, Advisory Opinion, 23 July 2025, paras. 377 et seq., and by IACtHR, note 14, para. 433 n. 734. Referring to ILC, Doc. A/CN.4/774, note 2, para. 238, Judge Aurescu, Separate Opinion to the ICJ Opinion, para. 26, would go beyond the mere prohibition of refoulment to require, "for example, ... an obligation to admit those seeking protection and even to issue temporary residence permits for them".

18 Insofar, the "devastating critique of human rights" (*Alison Kesby*, The Right to Have Rights: Citizenship, Humanity, and International Law, Oxford 2012, p. 3) by *Hannah Arendt*, The Origins of Totalitarianism, London 2017, p. 383 ff., is no longer fully convincing.

19 See ECtHR, Hirsi Jamaa and others v. Italy, 27765/09, 23/02/2012 (GC), paras. 183 ff.

20 See also Principle 9 of the Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, https://disasterlaw.ifrc.org/media/2035 (last accessed on 31 January 2025).

21 On the importance of this aspect see e.g. ECtHR, A. and others v. The United Kingdom, 3455/05, 19/02/2009 (GC), para. 176: "There is no evidence that during the period of the applicants' detention there was [...] any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment contrary to Article 3. Indeed, the first applicant is stateless and the Government have not produced any evidence to suggest that there was another State willing to accept him."

22 *Arendt*, note 18, pp. 383 ff., 392.

would become stateless[23] and thereby lose any protection a viable State would offer them,[24] including diplomatic protection.[25]

The ultimate normative reasons for looking for a submerged State's continuity thus are, on the collective level, to preserve the immaterial and material good of its population and, on the individual level, to secure the State's ability to shield its population from statelessness.[26] While, in practice, some third States have taken measures to allow (some) persons from some States threatened to become submerged to resettle, at least temporarily, on their territory, both by treaties with endangered States and unilaterally,[27] this does neither resolve the problem of those persons' becoming stateless in the case of the extinction of the submerged State nor eliminate the risk this case poses for the immaterial good that is the distinctive culture of the submerged State's population.

C. "Possible Alternatives For the Future Concerning Statehood" Considered by the Study Group

I. Presumption as to the Continuity of the Submerged State

The first alternative looked at by the Study Group is the presumption as to the continuity of the submerged State.[28] The widely accepted international law definition of a State contains four elements: "a permanent population, a defined territory, government and the capacity to enter into relations with the other states";[29] for the purposes of customary law, the fourth element is widely seen as having been replaced by the State's independence.[30] A State's territory has been claimed to be its defining element;[31] a State's "identity […] in

23 As defined in Art. 1 of the Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, Treaty Series, vol. 360, No. 5158, p. 117.

24 On stateless people's loss of State protection see *Arendt*, note 18, p. 384. On the different forms of contemporary State protection see *Frédéric Mégret*, The Changing Face of Protection of the State's Nationals Abroad, Melbourne Journal of International Law 21 (2020), pp. 450-469.

25 But see, *de lege ferenda*, Art. 8 para. 1 of the articles on diplomatic protection, Yearbook of the International Law Commission, 2006, vol. II (Part Two), para. 49.

26 According to ICJ, note 17, paras. 364 et seq., "co-operation in addressing sea level rise is not a matter of choice for States but a legal obligation. [...] [This] obligation [...] requires States […] to work together with a view to achieving equitable solutions, taking into account the rights of affected States and those of their populations", see also United Nations High Commissioner for Refugees, Climate Change and Statelessness: An Overview, https://www.unhcr.org/media/climate-change-and-statelessness-overview (last accessed on 31 January 2025).

27 ILC, Doc. A/CN.4/752, note 2, paras. 341 ff.

28 ILC, Doc. A/CN.4/752, note 2, paras. 183-196.

29 Article 1 of the (Montevideo) Convention on Rights and Duties of States.

30 See e.g. *Matthew Moorhead*, Legal implications of rising sea levels, Commonwealth Law Bulletin 44 (2018), p. 710.

31 The importance of territory for a State has recently been stressed in the context of the prohibition of annexations; see *Ingrid Brunk* / *Monica Hakimi*, The Prohibition of Annexations and The Foun-

time is based directly upon the identity of the territory".[32] From there follows the "austere view",[33] near unanimously agreed upon by States[34] and by those publicists who deal with the question, that the loss of its—inhabitable territory leads to a State's extinction.[35] This view is perfectly represented by the German legal term "*Staatsuntergang*" which connotes both (literally) the fact of the State's territory becoming uninhabitable and (metaphorically and technically) the legal consequence arguably following from this fact.

One might object that "international law is prepared to recognise previous facts as continuing"[36] and that the fact that a State once had an inhabitable territory was sufficient to presume, or to sustain the fiction, that that territory continues to exist. But this presumption is rebuttable. The recognition of previous facts is restricted to cases in which there is a realistic chance of the reconstitution of those facts.[37] "Once the chance of a reconstitution of previous facts has vanished and the fiction connected therewith has become implausible the principle of effectiveness requires a legal construction that reflects the factual situation."[38] In the case of a submerged State, the chance of the re-emergence of its territory, or of its becoming inhabitable again, in the foreseeable future is nil.[39] While it may be the case that "the principle of legality supersedes the principle of effectiveness [...] when serious violations of fundamental international norms are involved in the [...] extinction of States",[40] it is very doubtful whether the causation of rising sea levels can be seen as such a violation.[41] The austere view is difficult to avoid if one considers a State's very existence as dependent on its having its proper territory.

dations of Modern International Law, American Journal of International Law 118 (2024), pp. 417-467, 422 ff.

32 *Hans Kelsen*, General Theory of Law and State, Cambridge MA 1945, p. 220.

33 Term used by *Alex Green*, *The Creation of States* as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship, The Australian Year Book of International Law 40 (2022), p. 82.

34 *König*, note 10, p. 61, notes "that no State [...] has so far expressed the [...] opinion [...] that a State would not cease to exist when losing its territory".

35 See e.g. *Volker Epping*, Knut Ipsen, Völkerrecht, in: Volker Epping / Wolff Heintschel von Heinegg (eds.), München 2024, § 7 para. 198 (p. 189); According to Berber "a State gets extinct by the physical demise of its territory and its population (author's own translation), see *Friedrich Berber*, Lehrbuch des Völkerrechts, München 1975, p. 250; *Alfred Verdross* / *Bruno Simma*, Universelles Völkerrecht, Berlin 1984, para. 969 (p. 606).

36 *Eberhard Menzel*, quoted from *Berber*, note 35, p. 250 (author's own translation).

37 Ibid.

38 Ibid.

39 "[I]n principle, irreversible"., see ILC, Doc. A/CN.4/752, note 2, para 231.

40 *Stoutenberg*, note 1, p. 59.

41 *Stoutenburg*, note 1, pp. 72 ff.; also *Catherine Blanchard*, Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise, The Canadian Yearbook of International Law 53 (2015), pp. 66, 89 ff.

II. Maintenance of International Legal Personality Without a Territory

However, there is a different "presumption—in practice a strong presumption—[that] favours the continuity and disfavours the extinction of an established State".[42] This presumption may advance, under the Study Group's second alternative—maintenance of international legal personality without a territory—the case for the continuity of submerged States. This alternative takes as its point of departure, as it must, the submerged State's loss of its historic territory. The Study Group addresses this scenario only in one short paragraph and is somewhat coy about what it implies. Based on the exemplary cases it adduces, i.e. the Holy See between 1870 and 1929 and the Sovereign Order of Malta, which both had lost, at least for the time being, their former territory, the implication appears to be that the government of the submerged State continues to exist and takes its seat in the territory of another State (in both exemplary cases, Italy). The submerged State "would continue to […] act on behalf of its population or some of its nationals and ensure the proper use of State resources for the benefit of its population".[43] Thus, the realisation of this scenario requires the invitation by a host State of the government of the submerged State to function, and of (parts of) the latter's population to reside,[44] on the host State's territory.[45] Incidentally, for the host State to invite (parts of) that population to reside on its territory does justice to the invitees' human rights even if the host State has no corresponding obligations.[46] Understood in this way, this scenario might be a plausible way to secure the good of the population of a submerged State, and merits further discussion.[47]

42 *James Crawford*, The Creation of States in International Law, 2nd ed. Oxford 2007, pp. 701, 715, and see e.g. ILC, Doc. A/CN.4/752, note 2, para. 194. Rather cryptically, ICJ, note 17, para. 363, opines that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of ist statehood". *Epping*, note 35, para 7, p. 206 (p. 192), quoting *Georg Dahm*, Völkerrecht, Berlin 1958, p. 85, who speaks of a principle of "strongest possible continuity of the State" (my translation). "Different views were, however, expressed as to whether it was preferable to describe the prevailing legal situation as giving rise to a "presumption" of continuity or whether it was preferable to refer to the existence of a "principle of continuity.": Study Group on sea-level rise in relation to international law. Report, Doc. A/CN.4/L.1002, 15 July 2024, paras. 33 ff.; see also the discussion in *Jean-Baptiste Dudant* / *Géraldine Giraudeau*, Continuity of Statehood for Deterritorialized Nations: A Range of Principles but Few Concrete Prospects, EJIL: Talk!, 21 January 2025, https://www.ejiltalk.org/continuity-of-statehood-for-deterritorialized-nations-a-range-of-principles-but-few-concrete-prospects/ (last accessed on 8 October 2025). They refer to "State practice where it is understood as a 'strong' yet rebuttable presumption".

43 ILC, Doc. A/CN.4/752, note 2, para. 197.

44 ILC, Doc. A/CN.4/752, note 2, paras. 301 (a), 303; ILC, Doc. A/CN.4/774, note 2, para. 112.

45 This is one of the scenarios envisaged by *Rosemary Rayfuse*, W(h)ither Tuvalu? International Law and Disappearing States, University of New South Wales Faculty of Law Research Series, Research Paper No. 2009-9, p. 11.

46 See also Principle 7 of the Sydney Declaration, note 16.

47 See text after note 110 ff.

III. Use of Some other Modalities

Other scenarios the Study Group evokes include the transfer of the sovereignty over a portion of the host State's territory—"However, while this is a valid alternative [for the future concerning statehood] from a legal perspective, it would be very difficult to achieve in practice"—[48] and the cession of a portion of that State's territory without transfer of sovereignty.[49] Further, they include an association of the submerged State with a host State or a (con-)federation between those States.[50] Both would create their own problems: on the face of it, such an action, while extending the protection of the host State to the population of the submerged State, would risk to extinguish the identity and thereby the separateness of that population, even if "a degree of autonomy for the former nationals of the affected island State could be agreed upon beforehand, in order to preserve their cultural and group identity."[51] Also, while "for the disappearing State to merge […] with another State [might] sustain the preexisting maritime zones",[52] it would deprive the population of the submerged State of (parts of) the fruits of the exploitation of those zones. The same applies for the unification with another State, including the possibility of a merger.[53] Scenarios relating to the right of peoples to self-determination evoked by the Study Group[54] can only give colour to any of the other scenarios; the right to self-determination cannot connote a right to (parts of) the territory of another State, or the right to settle, as a group, on such territory, without the latter's consent.[55] In addition to those drawbacks of these scenarios none of them (with

48 ILC, Doc. A/CN.4/752, note 2, para. 198.

49 See ILC, Doc. A/CN.4/752, note 2, paras. 199 ff. See also *Rosemary Rayfuse*, Sea Level Rise and Maritime Zones. Preserving the Maritime Entitlements of "Disappearing" States, in: Michael B. Gerrard / Gregory E. Wannier (eds.), Threatened Island Nations, Cambridge 2013, p. 178. She argues that "as a practical matter, the political, social, and economic ramifications of ceding territory are likely to exceed the capacities—and courage –of existing governments." See also *Andrea Caligiuri*, Sinking States: The statehood dilemma in the face of sea-level rise, Questions of International Law 91 (2022), pp. 23-37, 28-30. The author also discusses the questions of the submerged State leasing territory and of floating States (pp. 30-31).

50 ILC, Doc. A/CN.4/752, note 2, paras. 205-215.

51 ILC, Doc. A/CN.4/752, note 2, para. 216.

52 *Rayfuse*, note 49, p. 178. This presupposes that those zones survive the disappearance of the territory on which their existence is founded. As *Rayfuse*, note 45, p. 12, states, "a strategy that sees [sic] international agreement on the freezing of baselines, at least in the case of island states facing inundation, will be a key element in a disappearing state's ability to utilize its maritime zones as both a bargaining chip and as a means of supporting its continued 'sovereign' existence as well as the continued livelihood of its displaced population." *Caligiuri*, note 49, p. 37, discusses the emergence of "Maritime States" in which the territory is replaced by the various maritime zones based on the State's former, and now submerged, territory. He does not indicate the fate reserved for that State's government and population.

53 ILC, Doc. A/CN.4/752, note 2, para. 216.

54 ILC, Doc. A/CN.4/752, note 2, paras. 225-226.

55 But see *Blanchard*, note 41, p. 114. According to the ICJ's view, "sea level rise is not without consequences for the exercise of [the right to self-determination]": ICJ, note 17, para. 357.

the arguable exception of the transfer of sovereignty)[56] explains how the identity of the submerged State can be seen to survive, against the austere view, the loss of its territory. This applies even to the "Maintenance of international legal personality without a territory" scenario.

D. "The State is the Law" in the Theory of Law and State

I. "The State is the Law" in Relation to one State

An intriguing way to try to avoid the austere view, and to explain the way the identity of the submerged State can be seen to survive, is to consider the question of the relationship between State and law. Hans Kelsen famously claimed that "the community we call 'State' is 'its' legal order",[57] that there is identity of law and State.[58] A legal order, as an instance of the law and thus of an ideal concept, does not obviously and necessarily end because of factual developments such as the submergence of the territory on which it used to be applied. If there is identity of law and State, the same must be true of the latter. In the following discussion of the theoretical relationship between State and law I shall start from the teachings of Kelsen's close contemporary Felix Somló[59] who insisted, against Kelsen, that legal theory must go back to a pre-juridical concept of the existence of law.[60] For him, the "State" is a society formed by habitually obeying the commands of a sovereign.[61] The very core of the "State" thus is its population which can be formed, by law, into a society. "Society" means simply a human group joined by norms.[62] The sovereign is defined, following Austin, as the highest power whose orders are habitually obeyed.[63] Where an order exists, there must be a sovereign.[64] *Vice versa*, "where there is a sovereign, there is

56 *Adolf Merkl*, Die Rechtseinheit des österreichischem Staates (1918), in: Hans Klecatsky / René Marcic / Herbert Schambeck (eds.), Die Wiener rechtstheoretische Schule, Vienna 2010, p. 916, claims that the resettlement of a whole population on a new territory does not necessarily interrupt the legal continuity of its State. In this sense also *König*, note 10, p. 63.

57 *Kelsen*, note 32, p. 182.

58 *Hans Kelsen*, Reine Rechtslehre, Vienna 1960, pp. 289 ff.

59 *Felix Somló*, Juristische Grundlehre, Leipzig 1917. Somló's work has been allowed quietly to be forgotten but was recently excavated by *Trevor N. Wedman*, Inverting the Norm, Tübingen 2022, pp. 112 ff.

60 *Somló*, note 59, p. 24.

61 *Somló*, note 59, p. 251. For *Kelsen*, note 58, p. 267, a definition of the State is "the legal community constituted by the State legal order". This is so although the identity of the State is based "only indirectly upon the identity of the population living in the territory", see *Kelsen*, note 32, p. 220. See also *Finnis*, note 4, p. 147 ff., who discusses the State as "complete community" and "all-round association", and *Finnis,* note 5.

62 *Somló*, note 59, p. 250.

63 *Somló*, note 59, p. 93. As *Wedman*, note 59, p. 115, remarks, "Somlo gives the Austinian frame a decidedly [...] non-hierarchical flavor".

64 *Somló*, note 59, p. 99 ff.

law as well as State".[65] This definition of the "State" implies that those commands cover a wide field of issues;[66] the "universality of aimed-for purposes"[67] is constitutive of a "State". Prior to the State's submergence, an island State, and its legal order, would presumably fit this definition.

It is only the effective legal order that is the (effective) State.[68] The effectiveness of a legal order is historically contingent. Any hitherto effective legal order may be overthrown by a revolution or *coup d'Etat*[69] or other historic events.[70] Once the legal order is no longer effective, once the specific sovereign (or its successor) is no longer habitually obeyed, it ceases to exist as a normative order. In such a case, the State that it was ends at the same time.

The question is whether the submergence of a State's territory is a historic event overthrowing the State's legal order or whether that order can continue to exist and to be effective in spite of the State territory's submergence.[71] While the legal order of a submerged State cannot be effective on its submerged territory it may still be applied, and be effective, somewhere else. The Kelsenian view on the identity of law and State[72] as well as Somló's view appear to allow a submerged State to continue as such as long as the legal order that it is applied somewhere, that is to say that the specific sovereign's orders are there habitually obeyed to form, or to maintain, the (displaced) society. To maintain its legal personality as a State thus requires, at a minimum, that it has a population and a governing body. As its population needs a place to live and its government a seat, the submerged State must have some territorial basis which however needs not be its own.[73] Rather, as there is today no *terra nullius* (if there ever was one in historic times), this implies the territory of some other State or States. As the required territorial basis of the continuation of a submerged State is necessarily the territory of some other State the meaning of "the State is the law" in situations involving more than one State needs to be considered.

65 Ibid., p. 252 (author's own translation).

66 Ibid., p. 97.

67 "Universalität der Zwecksetzung": *Somló*, note 59, p. 262.

68 *Kelsen*, note 58, pp. 10 ff., 215 ff.

69 See e.g. *Theodor Schilling*, Alec Stone Sweet's "Juridical *Coup d'État*" Revisited: *Coups d'État*, Revolutions, *Grenzorgane*, and Constituent Power, German Law Journal 13 (2012), pp. 287-312.

70 *Merkl*, note 56, p. 916.

71 According to Guilfoyle and Green "the open-ended commitment to Tuvalu's existential resilience in Article 2(b) [of the Australia-Tuvalu Falepili Union] represents the first binding rejection by any State of the view that inhabitable land is necessary for State continuity", see *Douglas Guilfoyle* / *Alex Green*, The Australia-Tuvalu Falepili Union Treaty: Security in the face of climate change … and China?, EJIL:Talk!, 28 November 2023, https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/ (last accessed on 31 January 2025).

72 This view appears to contradict Kelsen's view on the identity of the State being based on the identity of its territory; see text at note 32.

73 This point is, strangely, not addressed by ILC, Doc. A/CN.4/752, note 2, para. 197.

II. "The State is the Law" relating to a Plurality of States

One aspect of the definition of the (sovereign) "State" requires its sovereign to be the highest power and its commands to cover a wide field of issues.[74] In the present context, this aspect should allow, in principle, to distinguish, in situations involving more than one entity, between the sovereign "State" and non-sovereign entities. It does allow entities to switch, in the wake of historical developments, from one status to the other. Historically, quite a few sovereign States have become part of a federation or other association of States. Such an association will become itself a "State" (thus ending the statehood of its members)[75] if its commands cover a wide field of issues. Otherwise, it will remain a non-State entity and its members, "States".[76]

There are clear-cut historical cases of a federation becoming a "State" and thereby extinguishing the statehood, in Somló's meaning, of its formerly sovereign members. One example is the Free State of Bavaria which, under its 1946 constitution, was an independent State.[77] But Article 178 of that constitution provides that Bavaria will join a future German democratic federal State, which came to pass in 1949. While the law—the constitution—and thus the entity it constitutes, continued, the status of Bavaria changed from an independent to a federated State. Henceforth its commands covered only a restricted field of issues,[78] it lacked a proper sovereign wielding the highest power and therefore ceased to be a "State".[79] Other cases are less clear-cut. The US of A's commands cover a rather narrow field of issues; indeed, it has been said repeatedly to be "little more than an insurance company with an army".[80] It may also be asked whether the US of A is "a" society or rather a conglomerate of different State (California, Texas, […]) societies. In spite of these questions the status of the US of A as a State has rarely been seriously questioned.

Somló concedes, as he must, that it is difficult clearly to distinguish between an association of States which has become a "State" itself and one whose members remain "States".[81] This difficulty demonstrates that there is a sliding scale between the "non-State" associations of States—associations covering only a narrow field of issues—and those associations which have matured into "States"—associations covering a wide field of issues. It follows that the respective associations are not binary opposites but of one kind, and the

74 See text at note 60 ff.

75 *Somló*, note 59, pp. 295 ff.; see also *Merkl*, note 56, p. 916, on the transition from a confederation to a federation.

76 *Somló*, note 59, p. 287.

77 Albeit under Allied—US and French—occupation.

78 See the extensive list of matters under federal legislative power in Art. 73 and 74 of the Basic Law of the Federal Republic of Germany.

79 See *Somló*, note 59, p. 259.

80 See e.g. *Josh Lewis*, An Insurance Company with an Army, The Emory Wheel, 22 February 2017, https://emorywheel.com/an-insurance-company-with-an-army (last accessed on 31 January 2025).

81 *Somló*, note 59, p. 291.

same is true for their respective States members. This conclusion calls into doubt whether a theory of law and State should define the "State", as Somló does, by the width of the field of issues covered by the commands of its sovereign, and therefore deny "non-State" associations, and States members of associations which have matured into States, the status of "State".

III. The Central and the Peripheral Cases of "State"

The apparent contradiction between the conclusion that States, and associations of States, are of one kind whether or not they are sovereign, and the claim that sovereignty is a necessary feature of the "State", can be resolved by applying John Finnis' distinction between the central and the peripheral significance of theoretical terms including the term "State":[82] "[E]xploiting the systematic multi-significance of one's theoretical terms" Finnis "differentiate[s] the mature from the undeveloped in human affairs, [...] the fine specimen from the deviant case, the 'straightforwardly' [...] from the 'in a sense'".[83] Between the central and the more or less peripheral cases there will be differences (and similarities) "for example, of form, function, or content".[84] While Somló aims at giving the widest possible definition of the "State",[85] he appears to fail to do so. The similarity between sovereign and less than sovereign entities (States) is such that it appears arbitrary to exclude from a widest definition of the term the less than sovereign entities. It appears rather that Somló's "widest possible definition" identifies, in sovereignty, one of the aspects of the central case—the Weberian ideal-type—[86] of a "State".

The central case of the "State" has two broad aspects: a substantive one, and a formal one. For the analogous case of constitutional government, according to Finnis, the difference between the central and a peripheral case is, under the substantive aspect, primarily their respective moral quality: a central case of such government will be good for human beings.[87] The same is true for the substantive aspect of the central case of the "State".[88] This aspect implies two minimum elements of the formal aspect of the central case of the "State", also implied by the theory of the identity of law and State:[89] there needs to be a population to be supported, and a government to provide that support. Under modern conditions, a third constitutive element of the central case of a "State" would appear

82 *Finnis*, note 4, p. 10.

83 Ibid., pp. 10 ff.

84 Ibid., p. 11.

85 *Somló*, note 59, p. 255.

86 *Finnis*, note 4, p. 9.

87 Ibid., p. 11.

88 See quotation in the text at note 4. See also *Michelle Madden Dempsey*, On *Finnis*'s Way In, Villanova Law Review. 57 (2012), p. 838, and *John Finnis*, Response, Villanova Law Review 57 (2012), p. 928.

89 See text after note 72.

to be that it has a defined territory. A fourth element would be the State's independent sovereignty.[90]

It thus appears that the full central case of a "State" is a State that fulfils those four elements of the formal aspect and is good for human beings (substantive aspect, both immaterial and material). Peripheral cases are those which default on one or the other (or both) of those aspects. States that fulfil the formal aspect of the central case may well default on the substantive aspect: they may include, among other deformations, outright tyrannies, such as Hitler's Germany or Stalin's Soviet Union, which are not good for (most) human beings,[91] as well as cleptocracies—*magna latrocinia*—such as Putin's Russia.[92] But even in the case of such deformations, "there is no point in denying that they *are* instances"[93] of "State".[94]

Somló does not rely on the substantive aspect of the central case of a "State". Neither does he consider it a constitutive element of the "State" to have a defined territory.[95] Rather, his definition of the "State" includes some of what Finnis would consider peripheral cases e.g. a nomadic tribe which in other times may well have been a viable form of human organisation to fulfill the central functions of a State.[96] While this article will apply Finnis' distinction between central and peripheral cases,[97] it will consider "State" as defined by Somló as the central case. Under modern conditions, this definition and the Montevideo definition likely will lead to identical results.

To apply Somló's definition of the "State" to peripheral cases, it must be adapted. In this adapted version, a peripheral case of the "State" is a society formed by habitually obeying commands given by some power and covering a reasonably wide field of issues. One peripheral case would be a non-sovereign but otherwise statelike entity.[98] There used to be and still is a multitude of entities in which the sovereignty required by the central case of "State" is in doubt or lacking. A historical example of such a peripheral case of "State" is the Holy Roman Empire, famously described, in Westphalian times, as *irregulare aliquod*

90 See text at note 74.

91 See *Finnis*, note 4, p. 11.

92 *Augustine of Hippo*, De civitate Dei IV, 4.

93 *Finnis*, note 4, p. 11; author's italics.

94 *Kelsen*, note 58, p. 46, denies the normativity of only the "command" of a single highwayman but not of the *magna latrocinia* on which see Ibid., pp. 50 ff.

95 *Somló*, note 59, p. 254, discussing *Georg Jellinek*, Allgemeine Staatslehre, Berlin 1905, p. 172.

96 *Somló*, note 59, p. 255; *Brunk / Hakimi,* note 31, p. 423.

97 *Finnis* uses his analysis of the central and (some) peripheral cases mainly to be able to restrict his discussion of the law to its central case: in its central case, the law is a force for the human good. In contrast, he shows little interest in the peripheral cases (see *Dempsey*, note 88, p. 831) in which law may be used for instance as an instrument of suppression.

98 But see *Somló*, note 59, p. 281: "sovereignty is an inescapable characteristic of the concept of State [...] a non-sovereign State cannot be." (author's own translation).

corpus et monstro simile[99] (an irregular body much like a mythical beast),[100] and whose sovereignty over its constituent parts was doubtful at best. The same can be said today of the so-called supranational entity that is the EU on the one hand, and its Member States on the other, which are borderline cases between non-State association and State on the one hand, sovereign State and federated State on the other. There may be vassal-like States that have been granted territory (without sovereignty) by their souverain State.[101] The most common example, and the one most relevant, as will be seen, in the resent context, are (federations and) federated States.[102] While those deformations are not central cases of the "State", they may properly be called (peripheral cases of) "States" in the theory of law and State.

What there cannot be is an even peripheral case of a "State" without a population[103] and thus without a society.[104] But the State's population need not be permanent. Even an impermanent human group can be formed into a "society" by habitually obeying the commands of some power, and into a State if that power is sovereign.[105] Under this definition the State of the Vatican City[106] whose impermanent population[107] obeys the commands of the sovereign Pope may well be considered as a central case of the "State". Even during the years 1870-1929 when the Holy See had no territory attached its commands formed its members and employees into a society. Those commands, especially in the form of the *Codex iuris canonici*, covered a wide field of issues. However, the sovereign Pope was, during that period, no temporal sovereign: he was not invested with the highest power over his society. Therefore, the Holy See could be considered, under the theory here applied, as (only) a peripheral case of the "State". Similarly to the Holy See during that period, the

99 *Samuel von Pufendorf*, Die Verfassung des deutschen Reiches (1667) (ed. and transl. by Horst Denzer), Leipzig 1994, c. VI, para. 9 (pp. 198 ff.).

100 English translation by *Andreas Osiander*, Irregulare Aliquod Corpus Et Monstro Simile: Can Historical Comparisons Help Understand the European Union?, Draft paper for the Annual Meeting of the American Political Science Association, 2010 Revised Version, August 2010.

101 Mentioned in ILC, Doc. A/CN.4/752, note 2, paras. 199-201. The two examples discussed Ibid., paras. 202 ff., appear to be rather beside the point. According to *Verdross / Simma*, note 35, para. 395 (p. 235), such States do not exist anymore.

102 See text at note 74 ff.

103 See, for international law, *Verdross / Simma*, note 35, para. 969 (p. 606).

104 See text at note 63.

105 See text at and after note 61.

106 Considered by ILC, Doc. A/CN.4/752, note 2, paras. 113-125, because for some decades it had lost its whole territory but not its position as a subject of international law.

107 ILC, Doc. A/CN.4/752, note 2, para. 124: "a population (comprising persons residing in the Vatican or holding Vatican citizenship empowered to perform tasks of responsibility for the Holy See or the Vatican City itself, and the cardinals residing in Rome or the Vatican City)", and *Friedrich Germelmann*, Heiliger Stuhl und Vatikanstaat in der internationalen Gemeinschaft. Völkerrechtliche Praxis und interne Beziehungen, AVR 47 (2009), p. 147-186, 162.

Sovereign Order of Malta[108] which has jurisdiction over its members[109] whom it forms into a society, while a traditional subject of international law, does not wield the highest power over them and is thus not sovereign. In contrast to the Holy See, it cannot be considered as even a peripheral case of "State" as its commands, in the form of its *Carta Costituzionale*, do not cover a reasonably wide field of issues.

IV. The Continuity of the Submerged State as a Peripheral Case of the "State"

One way to try to avoid the dire consequences of the loss of a submerged State's territory for its population—the way on which this article is focussed—is to look for possibilities of securing its continuity in spite of that loss.[110] Whether a submerged State can continue to exist as "State" depends on what is going to happen to its population and its government. In practical terms, the more or less certain prospect of a more or less imminent loss of a State's territory creates an emergency for which the competent State authorities should, and most likely will, prepare.[111] Such preparation should include the adaptation of the State's legal order to the changes required by that loss[112] and, as a submerged State can only continue to exist on the territory of some other State,[113] also to authorise the government to conclude the necessary agreement or treaty with the State on whose territory it seeks to continue its existence.

It is true that a Nation *ex situ*[114] has been envisaged as a wholly deterritorialised State.[115] However, a State's deterritorialisation can only go so far. Its governing body, or at

108 Considered by ILC, Doc. A/CN.4/752, note 2, paras. 126-137, because it never regained its former, or any other, territory but is still considered a subject of international law.

109 See Art. 9 ff. Carta Costituzionale e Codice del Sovrano Militare Ordine Ospedaliero di San Giovanni di Gerusalemme di Rodi e di Malta.

110 While the Study Group discusses at length the "protection of persons affected by sea-level rise" (ILC, Doc. A/CN.4/752, note 2, paras. 227-416), it fails to draw any connection with the question of the continuity of the submerged State. This may indicate that, in the view of the Study Group, the protection of its population does not require the continuity of the submerged State.

111 See e.g., *Burkett*, note 7, pp 109 ff., and ILC, Doc. A/CN.4/774, note 2, para. 113; see also *Robin Beglinger*, Continued Statehood without Territory? The Recent Disappearance of a Swiss Mountain Village Holds Lessons for Small Island Nations, Völkerrechtsblog, 17 October 2025, https://voelkerrechtsblog.org/continued-statehood-without-territory/ (last accessed on 1 November 2025).

112 Michael Miller argues that "Tuvalu amended its constitution […] to state that the nation will maintain its statehood and maritime zones, meaning it will continue to assert sovereignty and citizenship, even if it no longer has any land", see *Michael E. Miller*, A sinking nation is offered an escape route. But there's a catch, The Washington Post, 26 December 2023, https://www.washingtonpost.com/world/2023/12/26/australia-tuvalu-deal-climate-change-pacific (last accessed on 31 January 2025).

113 See text after note 73.

114 *Burkett*, note 7, pp. 89-121.

115 *Andres Raieste et al.*, Government Resilience in the Digital Age, Report by the Oxford Internet Institute (2024), https://www.oii.ox.ac.uk/news-events/reports/government-resilience-in-the-dig

least that body's members, need to function somewhere, and even if its administration were completely digitalised, its data must be preserved on some server somewhere, preferably in a State-owned installation in an agreeable other State,[116] and in any case, the inevitable input into some computer terminal would be a sovereign action permitted as such under international law only with the consent of the State on whose territory the action is done.[117] This applies even if "the establishment of the ex-situ nation [is anchored in a UN structure]".[118] So some consent, whether expressed unilaterally or in an agreement with the submerged State, is necessary even in this scenario. Without such consent the loss of its territory inexorably leads to the extinction of the State.[119]

In the scenario here envisaged, a host State would invite the submerged State's government and (sizeable parts of its) population (the remainder of which presumably would be considered as expatriates) into its territory,[120] by way of an agreement between the two States. Depending on its contents, such an agreement could allow the continuation of a submerged State as a transplanted State, although only as a peripheral case of the "State": in the territory into which it is transplanted as a guest it cannot be the highest power and thus not sovereign within Somló's meaning. Neither can it have the "universality of aimed-for purposes" constitutive of a central-case "State",[121] as its commands to its transplanted population will certainly not cover so wide a field.

According to the attenuated definition of "State" adapted to its peripheral case, the continuity of the submerged State as "State" depends on the continuance of a society formed from (parts of) the population of the submerged State by that (part of the) population's habitual obedience to the laws issued by that State's power. Thus, while the agreement between the submerged and the host State should aim to provide for the future security of the submerged State's population, which is the foremost duty of any State, and more gener-

ital-age/ (last accessed on 31 January 2025), p. 14. Raieste et al. discuss the worst-case scenario that a State "no longer maintained control over its physical territory".

116 Among the recommendations given by *Raieste et al.*, note 115, p. 16, is to "position [...] at least part of the infrastructure beyond their own territorial borders". On Estonia's "Data Embassy" in Luxembourg see e.g. E-Estonia, Data Embassy, https://e-estonia.com/data-embassy-the-digital-continuity-of-a-state/ (last accessed on 31 January 2025), see also Government of the Grand Duchy of Luxembourg, E-embassies in Luxembourg https://luxembourg.public.lu/en/invest/innovation/e-embassies-in-luxembourg.html (last accessed on 31 January 2025).

117 See e.g. *Andreas von Arnauld*, Völkerrecht, Heidelberg 2022, para. 342 (p. 143); *Epping*, note 35, § 7, para. 60 (p. 117); *Dave Siegrist*, Hoheitsakte auf fremdem Staatsgebiet, Zürich 1987.

118 As envisaged by *Burkett*, note 7, p. 110.

119 On the question of a deterritorialised State see also *Derek Wong*, Sovereignty Sunk? The Position of 'Sinking States' at International Law, Melbourne Journal of International Law 14 (2013), pp. 347-391, 385 ff.

120 See text at note 44.

121 See text at note 67.

ally for its immaterial[122] and material good, including "the proper use of State resources for the benefit of its population",[123] this is not enough to secure the continuity of the submerged State and the legal order that it is. Rather, to get that result, the latter must retain some power so that, for certain issues (only), its transplanted population[124] could habitually obey its laws rather than the corresponding laws applying to the general population of the host State among whom they live (while, for other issues, they would habitually obey the laws of the host State). While Somló specifies that it is not possible that more than one power are obeyed habitually by the same people at the same time, this *is* possible if the obedience concerns commands on different fields of law or custom issues.[125] It is one of the constellations conceptualised as legal pluralism.[126]

To secure the continuity of the submerged State as a peripheral case of "State", therefore, the agreement would have to provide for a repartition of competences, over the transplanted population, between the two States, including the kind and extent of power which the transplanted State, and its government, may retain over that population, and the extent to which the host State would allow the transplanted State to legislate for them.[127] The unavoidable flip side of the transplanted State retaining its statehood is the host State's partial renunciation of sovereignty over some of the people living in its territory (i.e. the transplanted population).[128]

In contrast, the agreement must not provide for the naturalisation of the transplanted population by the host State, neither with nor without maintenance of their nationality

122 However, insofar as "vibrant cultures and traditions" are "intimately intertwined with [...] ancestral lands and seas" [ICJ, Public sitting held on Monday 2 December 2024, Verbatim record 2024/35, p. 96 (opening statement by the Republic of Vanuatu, # 2)] a full conservation in the territory of a host State may not be possible.

123 ILC, Doc. A/CN.4/752, note 2, para. 197. See also *Jane McAdam* / *Tamara Wood,* Kaldor Centre Principles on Climate Mobility, International Journal of Refugee Law 35 (2023), pp. 483-507, 495, They argue that "Cross-border relocations [...] entail [...] great [...] complexity, including matters relating to immigration, citizenship, governance and self-determination."

124 *Davor Vidas*, Sea-Level Rise and International Law: At the Convergence of Two Epochs, Climate Law 4 (2014), pp. 70-84, 84. The author argues that "people connected in a community will have to become a de-territorialized subject of international law, with a recognized legal subjectivity under it. The purpose should [...] be […] to serve the legitimate needs of such a group of people due to their unprecedentedly changed situation." But people cannot be deterrioralised.

125 *Somló*, note 59, p. 259.

126 See *Brian Z. Tamanaha*, Understanding Legal Pluralism: Past to Present, Local to Global, Sydney Law Review 30 (2008), p. 395.

127 See ILC, Doc. A/CN.4/774, note 2, para. 113. Some issues which may be covered by the transplanted State's commands are indicated in the text at note 161.

128 This would be incompatible with the Montevideo Convention, note 29, Art. 9: "The jurisdiction of states within the limits of national territory applies to all the inhabitants. […] Foreigners may not claim rights other or more extensive than those of the nationals."

of the transplanted State.[129] Were the population to lose that nationality, i.e. were the transplanted State to lose its population, it would *ipso facto* cease to exist.[130] Were they to retain it, the nationality of the host State, as their country of residence, would likely become the effective nationality of the dual citizens. In any case, the law of the host State would fully apply to them, leaving scant room for the transplanted State to issue commands to them, and thereby undermining the case for its continuity.[131]

Factually, the existence of a society requires a certain number of people living reasonably close together. Climate refugees from a submerged island likely would try to meet this requirement if allowed to do so,[132] e.g. by the invitation by a host State.[133] In contrast, if a population was "scattered across the globe",[134] as envisaged by the *ex-situ*-State scenario, it would likely not be able to continue as a society, and thus would not allow for the continuity of the submerged State.[135] Whatever authority were to be concerned with such a dispersed population as a whole—e.g. a trusteeship—[136] would necessarily miss any power to issue commands to them[137] which, if habitually obeyed, could form a society and thereby a "State". It would thus likely not be able to preserve "all other elements of the nation-state that should endure extraterritorially—key among them including the persistence of culture, connections among its people, and the security and well-being of its citizens".[138]

E. The Peripheral Case of "State" in Positive Law

I. The Necessary Condition for Calling an Entity a "State"

Positive law, whether national or international, is free to disregard this, or any, theoretical definition of the central and the peripheral cases of the "State". Still, it should call an entity

129 The Australia-Tuvalu Falepili Union, note 71, does not provide for the Australian naturalisation of Tuvalu citizens.

130 See text at note 103.

131 In contrast, *Burkett*, note 7, p. 116, argues for dual citizenship.

132 According to *Miller*, note 112, "Tuvalu struck a deal with Australia that would allow 280 people a year to move there". On one actual parallel development i.e. the settlement of Somalis in Minnesota, see e.g. Somali-Americans in Minnesota, https://libguides.mnhs.org/somali (last accessed on 31 January 2025).

133 On "diaspora communities" see e.g. *Itamar Mann*, Palestinian Refugees and the Future of Asylum, EJIL:Talk!, 19 November 2024, https://www.ejiltalk.org/palestinian-refugees-and-the-future-of-asylum/ (last accessed on 8 October 2025); *Mégret*, note 24, pp. 462 ff.; *Blanchard*, note 41, pp. 108 ff.

134 *Burkett*, note 7, p. 107.

135 In this sense also *König*, note 10, p. 63.

136 On this scenario see *Burkett*, note 7, pp. 108 ff.

137 The law of citizenship apparently apart, see *Burkett*, note 7, p. 115.

138 *Burkett*, note 7, p. 107.

a State only if it is one in substance: "Yet in the word must some idea be."[139] As the theoretical model of the "State" here discussed, including its peripheral cases, appears to be the widest, least demanding model imaginable, this means that positive law (although it may well use a narrower definition) should call an entity a State only if it is one at least in the attenuated sense of a peripheral case of the concept: it must retain some power so that, for certain issues (only), its transplanted population can habitually obey its laws. Indeed, to avoid a descent into pure fiction, this ought to be the necessary condition for calling an entity a "State".[140]

II. Domestic Law

Federated States are the most common examples of peripheral cases of the "State". As such, a federated State may well be considered a State, under its proper law, and also under the law of the federation of which it is a member. Indeed, domestic State practice in federations regularly, and justifiably, considers the federated States as States. Well known examples are the US of A, Switzerland and Germany.

III. International Law

The widely accepted international law (Montevideo) definition of the State[141] is close to the central case of the "State" as defined by Somló.[142] This definition is generally narrower than the one based on the minimum substance of the theoretical concept of the "State": at least *prima facie*, it excludes peripheral cases. Under international law, federated States, although peripheral cases of the "State", are generally not considered as States.[143] At least in their case, international law's supposed preparedness to recognise previous facts—the federated State's previous sovereignty—as continuing[144] is of no avail. This is so, arguably, not so much because of a supposed implausibility of the reconstitution of the previous facts—there are numerous cases in which federated States have been reconstituted as

139 *Johann Wolfgang von Goethe*, Faust, translated into English, in the original metres, by Bayard Taylor; in the German original: "Doch ein Begriff muß bei dem Worte sein."

140 Insofar as Art. 2(2)(b) of the Australia-Tuvalu Falepili Union, note 71, recognises that "the statehood and sovereignty of Tuvalu will continue [...] notwithstanding the impact of climate change-related sea-level rise" without providing for this necessary condition it envisages a purely fictional (or, at best, virtual) statehood of Tuvalu.

141 See Text at note 29.

142 See text after note 96.

143 See eg *Verdross / Simma*, note 35, para. 395 (p. 234). But the USSR republics Belarus and Ukraine were "curiously" (*Jan Klabbers*, An Introduction to International Institutional Law, Cambridge 2022, p. 103) considered as States with respect to their membership in the UN.

144 See quotation at note 36.

independent States—[145] but rather because of a (supposed) willingness of the federated States to surrender their sovereignty to the respective federation.

IV. The International Law Position of a Submerged State

The austere view, as recorded above,[146] equates the loss of a State's inhabitable territory with its extinction. The theory of State and law allows for the continuity of submerged and transplanted States as (peripheral cases of) "States" insofar as they fulfil the necessary condition for being so called, and thus, if adopted by international law, may offer a way out of this consequence. While a submerged and transplanted State, as a peripheral case of the "State", does not conform to the Montevideo definition, international law may consider whether to treat it, exceptionally, as a State in the same way it arguably treats (roughly) similar constellations. Regularly discussed in this context are the Holy See, governments-in-exile and federated States.[147]

1. The Holy See During the Years 1870-1929

The installation of the government of the submerged and transplanted State in the territory of a host State shows the strongest similarity with the position of the Holy See during the years 1870-1929. The historical State of the Church ended with its debellation in 1870, and the State of Vatican City was created in 1929. Thus, in between those dates there was only the Holy See as a traditional subject of international law, without any territory attached.[148] In accordance with the austere view, its recognised sovereignty was seen as a property of the Holy See as such a traditional subject, not as a State.[149] Effectively, during that period the Holy See's position in international law was not different from that of the Sovereign Order of Malta.[150] In contrast, under the theory here applied, the Holy See could be considered, as discussed above,[151] as a peripheral case of the "State".

It is remarkable that many commentators appear to be prepared to overlook the well-known historical facts and to consider the Holy See during the period in question as an example of a State without a territory.[152] This speaks for a pronounced willingness of those commentators to countenance that a State without its own territory, whose government

145 Especially after the dissolution of the USSR and the FRY.

146 See text at note 33.

147 On which see ILC, Doc. A/CN.4/752, note 2, para. 206.

148 See *Germelmann*, note 107, pp. 148 ff.

149 See *Germelmann*, note 107, pp. 153 ff., 168; *Wong*, note 119, pp. 357 ff.

150 In this sense also *König*, note 10, p. 51; *Caligiuri*, note 49, p. 37. This is somewhat glossed over in ILC, Doc. A/CN.4/752, note 2, paras. 117-121.

151 See text after note 107.

152 ILC, Doc. A/CN.4/752, note 2, paras. 113-125; *Burkett*, note 7, pp. 97 ff.; *Rayfuse*, note 45, p. 10.

functions, and whose population necessarily lives, in the territory of another State, can be recognised as a State by international law.

2. Governments-in-Exile

The installation of the government of the submerged and transplanted State in the territory of a host State shows similarities also with the many instances of governments-in-exile[153] in that there is in both cases a rupture between territory and government, causing the implantation of the latter in some host State. Both governments can play their role as "the 'representative organ' of the international legal persons' state"[154] only if they are accepted as such under international law. This requires them to "have a certain independence" from the host State.[155] In view of the presumably limited resources of the transplanted State[156] its government will likely need some kind of assistance[157] which, if offered by the host State, might be seen as calling its independence into doubt. But as long as it is not "a mere puppet of the host State", "restrictions resulting from the fact that the government is deprived of its home base are not regarded as derogating from its independence".[158]

But this similarity in the position of the respective governments' *ex situ* does not correspond to a likewise similar position of the States they represent. In the case of governments forced to flee their country due to belligerent occupation or illegal annexation the continued legal existence of the State is generally not affected,[159] whereas a State, according to the austere view, gets extinguished by its submersion. Thus, while the similarities between the two cases adumbrated may go some way to argue for the recognition of the government of a transplanted State by international law, they offer an argument for that State's continuity at best indirectly: the continued existence of its government may be seen as testifying to the continued existence of the State.[160]

153 Noted by the ILC, Doc. A/CN.4/752, note 2, many times in passing and especially in paras. 138-154. In para. 423(b) the Study Group proposes the following question: "How can the cases of ... Governments in exile be of use in addressing the topic?", see also *Stoutenburg*, note 1, pp. 68 ff.

154 *Stefan Talmon*, Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law, in: Guy S. Goodwin-Gill / Stefan Talmon (eds.), The Reality of International Law: Essays in Honour of Ian Brownlie, Oxford 1999, p. 501.

155 Ibid., p. 517.

156 See text at note 9.

157 *Burkett*, note 7, p. 110.

158 *Talmon*, note 154, pp. 519 ff.

159 Ibid., p. 501. On the other hand, under the theory of law and State here applied, a government-in-exile cannot be considered as the sovereign of the occupied or annexed State if its orders are no longer habitually obeyed by its people,

160 Similarly, the "[r]ecognition of the government in exile [may] impl[y] recognition of [a] new State", see *Talmon*, note 154, p. 506.

3. Federated States

The installation of the government of the submerged and transplanted State in the territory of a host State shows similarities especially with the situation of (governments of) federated States. Both the transplanted and the federated State exist on the territory of another entity, the host State and the federation, respectively. Both have, presumably, their proper legitimacy, based on their proper constitutional instruments. Both can issue commands to their population on a more or less wide field of issues which is limited by the complementary field reserved for itself by the entity on whose territory they exist. In the case of a transplanted State, the field of issues to be covered henceforth by its commands, and its width, will be a matter to be dealt with in its agreement with the host State. In the interest of maintaining the transplanted State's ability to form its people into a society this field should cover at a minimum the rules concerning the relation between the State and its people, especially the law of citizenship[161] and the law concerning the formation of the government, especially the law of elections. Important for the formation of a society are also the preservation of their distinctive culture and the law on private law affairs.[162] In the same vein, the transplanted State could also retain the criminal jurisdiction over its people—if the host State were to renounce insofar on its territorial jurisdiction. In practice, as the fields of issue under the respective commands of different federated States diverge widely, all the issues adduced above are also in the province of one or the other federated State.

While these similarities between the two peripheral cases of "State"—the federated State and the transplanted State—could be seen to argue for treating the two cases on a par under international law, viz. not as States,[163] there are also important differences between them. To start with, while a federated State may be presumed to have renounced on its sovereignty voluntarily, the submerged and transplanted State entered into its agreement with the host State quite obviously not of its own free will but under the constraint of circumstances beyond its control. This fact may support the argument that international law

161 Although some restrictions might be agreed to be applied even there. One might think of a prohibition of "Golden passport" schemes on an instance of which see e.g. European Commission, 'Golden passport' schemes: Commission proceeds with infringement case against Malta, Press release of 6 April 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2068 (last accessed on 31 January 2025); see also *Burkett*, note 7, p. 107.

162 Insofar as the transplanted State's private law applies to its people, interesting private international law questions arise as to the law applicable to interactions between those people and the nationals of the host State.

163 See text at note 143.

should be prepared to recognise previous facts—the submerged State's previous sovereign existence—as continuing,[164] in contrast to its position on federated States.[165]

Fundamentally, while the relationship between a federated State and the federation is generally based on the federal constitution and thus on State law, the relationship between the transplanted State and its host is based, in the scenario here envisaged, on a bilateral treaty under international law. Under a federal constitution, the jurisdiction of a federated State—the field of issues in which it can issue commands to its population—is subordinated to the one of the federation whose constitution defines its width and its limits. The jurisdiction of the federated State, and thereby "its" population, is generally defined territorially, and its population are automatically part of the population of the federation.[166] Under the treaty, the jurisdiction of the transplanted State is coordinated with the one of the host State by the treaty setting up their relationship rather than subordinated to it. It is necessarily defined personally, and the citizens of the transplanted State remain aliens for the host State,[167] albeit, presumably, with a special treaty-based status. Within the limits defined by the treaty the transplanted State maintains the sovereignty over its population. Indeed, with the conclusion of the treaty the host State confirms, bilaterally, this sovereignty and the continuity of the submerged State.[168]

4. Interim Conclusion

The result of the comparison of the international law position of a submerged and transplanted State on the one hand and of supposedly similar constellations on the other is somewhat inconclusive. The Holy See's position in the years 1870-1929 is indeed remarkably similar to that of a submerged and transplanted State. However, its international law treatment during that period was not that of a State but of a mere traditional subject of international law, akin to that of the Sovereign Order of Malta. In contrast, governments-in-exile are in no meaningful way similar to a submerged and transplanted State. On the other hand, the similarities between a federated and a transplanted State are very real but counterbalanced by equally real differences. Those differences allow not only to refute an argument for treating a transplanted State in international law on a par with a federated State, viz. not as a State; rather, they go some way to support the opposite argument. In the final analysis, what should be decisive for the question of international law's recognition of a submerged

164 On this recognition see text at note 36. Importantly, in the present context, in contrast to the discussion of the Study Group's first alternative (see text at note 41), the previous fact is not the inhabitability of a territory.

165 See text at note 144.

166 See e.g. Art. 9 S. 2 EUV.

167 See text at note 129.

168 This is also the effect of Art. 2(2)(b) of the Australia-Tuvalu Falepili Union, note 71; see e.g. *Dudant* / *Giraudeau*, note 42. For a parallel argument, see *Epping*, note 35, para. 7, p. 204 (p. 191).

and transplanted State as continuous are the normative reasons for the continuity of the latter identified above.[169] For international law to recognise, as a State, a transplanted State that fulfils the necessary conditions for such continuity[170] is normatively desirable in first line to protect the submerged State's people against statelessness,[171] and then to allow that State to act in their interest, especially by exercising diplomatic protection in their respect. This conclusion, as far as it goes, coincides with the strong presumption favouring the continuity of an existing State.[172]

However, it cannot be denied that it poses important problems for international law to accept Somló's theory of law and State, and thus to replace, in the peripheral case of a submerged and transplanted State, a State's territory as its defining element or characteristic by its population.[173] But if one takes seriously the claim that the population is "the most precious constitutive element of statehood"[174] international law will have to overcome those problems.

F. Conclusion

The very existence of low-lying (island) States is threatened by rising sea levels. If the territory of a State gets wholly submerged or otherwise uninhabitable its population can only survive in the territory of one or more other States. To avoid their becoming stateless they should be allowed to live within the framework of their somehow continuing State of origin. There are numerous proposals of how a State can survive the submergence of its territory. All of them inevitably deal with the fortunes of the submerged State's displaced population, often including the question of avoiding their becoming stateless. However, they generally lack a theoretical concept of the minimum requirements an entity—like a submerged State—must fulfil to be considered a State.

This article considers Somló's definition of "State", adapted to a peripheral case of "State"—a society formed by habitually obeying commands given by some power and covering a reasonably wide field of issues—as the widest, least demanding concept of a "State" imaginable. It argues that a submerged State can continue to exist as a "State", and thus to allow its population to maintain its citizenship, only if that population is formed into (or rather maintained as) a society by habitually obeying the commands of the power represented by the submerged State's government. Factually, this requires the transplant of (a sizeable part of) the submerged State's population and of its government onto the territory of one host State. Legally, it requires an apposite agreement between the

169 Sub B.
170 Identified sub. E.I.
171 See note 129.
172 See quotation at note 42.
173 On some of those problems see *Wong*, note 119, pp. 365-376.
174 See note 5.

submerged State and this host State which allows the former to exercise some governmental authority over its transplanted population. That a submerged State meets these requirements ought to be a necessary condition for international law to consider it as a State. It ought to be also a sufficient condition: international law i.e. the international community of States ought to recognise such an entity as continuation of the submerged State for a number of reasons, especially to save its people from statelessness, thereby making at least some sort of amends for the climate catastrophe by the causing of which they have collectively caused the submergence of the State.[175]

175 "Vanuatu's position is clear: the conduct responsible for this crisis is unlawful under a range of international obligations": Verbatim record 2024/35, note 122, p. 98 (opening statement by the Republic of Vanuatu, p. 5).

Rhetorical Invocation of Constitutional Guardianship as a Justificatory Tool: The Case of Bangladesh

By *Nafiz Ahmed*[*]

Abstract: The claim of constitutional guardianship by apex courts is not uncommon in jurisdictions with constitutional supremacy, including Bangladesh. The article introduces its readers to the notion of constitutional guardianship by examining the terminology and existing literature. It illustrates how the Supreme Court of Bangladesh (SCOB) used constitutional guardianship rhetoric while enforcing constructional rights in cases that may give rise to political tension. It shows how the SCOB has used the claim of constitutional guardianship to enforce its own preferred version of constitutional balance or political order. The article argues that SCOB uses claims of constitutional guardianship as a tool to add justificatory value to the use of extraordinary powers. It argues that when the SCOB decisions lack textual or precedential support, the Court uses its role as the guardian of the Constitution to add justificatory weight to its decisions.
Keywords: Guardian of the Constitution; Bangladesh; Judicial Review; Constitution; Separation of Powers

***

A. Introduction

The law claims to be a precise endeavor. However, those who are deeply engaged with legality would agree that the law is often unclear about some of its most important elements.[1] This is especially challenging when one tries to understand the demands of constitutional law. Despite being the supreme law in most countries, constitutions are not self-enforcing. In countries where constitutional designs favour legal constitutionalism, it is the courts that often enforce constitutional laws. In the process of enforcing constitutions, the courts also

* LL.M (University of Cambridge); LL.B (North South University); is a Senior Lecturer at the Department of Law, North South University, Bangladesh. Email: na538@cantab.ac.uk. The author would like to thank Sajidur Rahman Nirjhor, Ragib Shahriar, Shahriyar, and Durjoy Saha for their valuable research assistance. The author is grateful to Professor Md. Rizwanul Islam for his comments on an earlier draft of the paper. The article is a substantially expanded version of a paper presented under a different title at the NSU Law Working Paper Series on 1 December 2022. Lastly, the author is grateful to Nasir Uddin Ahmed and Wahida Parvin for being constant sources of inspiration and support. The usual disclaimers apply.

1 *Timothy Endicott*, Law is Necessarily Vague, Legal Theory 7 (2001), p. 379.

expand constitutional law.[2] Due to its position as the law above all laws in jurisdictions with constitutional supremacy, the propositions of constitutional law carry an extraordinary force within them. The inevitable vagueness in constitutional law thus poses a grave danger. The lifetime of a constitution in stable democracies ought to far exceed the lifetime of other laws.[3] As a constitution grows older, constitutional law becomes denser and more complex. In legal systems with moderate and strong judicial reviews,[4] the judiciary assumes the role of the interpreter and expounder of the Constitution. Certain judicial positions relating to the Constitution may obtain dogmatic status in this process. For instance, as this article shows in its later parts, the Supreme Court of Bangladesh (SCOB) has time and again held itself to be the guardian of the Constitution without much resistance from the other public players. Similar claims have been made in other jurisdictions as well.[5] However, the exploration of multiple jurisdictions demands longer discussions. This article solely focuses on the jurisprudence of constitutional guardianship that developed in Bangladesh through various judgments of the SCOB.

One may argue that being deficient in democratic legitimacy,[6] the judiciary's legitimacy and acceptability derive from it being a principled institution speaking with a unified voice in a principled and intellectual manner.[7] The academia should closely examine judgments delivered by the judiciary to make sure that the judiciary is deciding cases in a principled manner. It should also examine the possible outcomes of judgments.[8] Unfortunately, not much has been written about the judiciary holding itself to be the guardian of the Constitution. As an effort to fill in the gap in the literature regarding constitutional guardianship in Bangladesh, this article peruses the judgments of both divisions of the SCOB,[9] in which, the Court held itself to be the guardian of the Constitution.

2 *David A. Strauss*, Common Law Constitutional Interpretation, University of Chicago Law Review 63 (1996), p. 877.

3 *Hanna Fenichel Pitkin*, The Idea of a Constitution, Journal of Legal Education 37 (1987), p. 167.

4 For differences between strong and weak judiciaries, see, *Jeremy Waldron*, The Core of the Case against Judicial Review, Yale Law Journal 115 (2006), pp. 1354-1356.

5 For instance, the Indian Supreme Court has made similar claims in A.R. Antulay v R.S. Nayak, AIR (SCI) (1988) p. 1531; Ram Pal v The Hon'ble Speaker, Lok Sabha and Ors,. SCC (SCI) 3 (2007), p. 184. For more, see, *Gabor Halmai*, Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?, Constellations 19 (2012), p. 182.

6 *Waldron*, note 4, p. 1346.

7 *Kim Lane Scheppele*, Guardians of The Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe, University of Pennsylvania Law Review 154 (2006), p. 1757.

8 For more on the unpredictability of the consequences of some judgments, see, *J.W.F Allison*, Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication, Cambridge Law Journal 53 (1994), p. 367.

9 The SCOB is divided into two divisions, namely, the Appellate Division (AD) and the High Court Division (HCD). The HCD has, *inter alia*, original jurisdictions of judicial review. The AD has the jurisdiction to hear appeals arising out of judgments of the HCD. See Art. 102 and 103 of the Constitution of People's Republic of Bangladesh.

By analysing the judgments of the SCOB, the article shows the different powers the SCOB has exerted and is exerting by claiming to be the guardian of the Constitution. The article first introduces its readers to the notion of constitutional guardianship by existing literature. The article then illustrates how the SCOB used constitutional guardianship rhetoric while enforcing constructional rights in cases that may give rise to political tension. It then moves on to show how the SCOB has used the claim of constitutional guardianship to enforce its own preferred version of constitutional balance or political order. The article argues that SCOB uses claims of constitutional guardianship as a tool to add justificatory value to the use of extraordinary powers. It argues that when the SCOB decisions lack textual or precedential support, the Court uses its role as the guardian of the Constitution to add justificatory weight to its decisions.

B. Notion of Constitutional Guardianship

The concept of guardianship of a polity can be traced back to Plato's Republic, where he considered the rulers of a polity to be its guardians.[10] The claims of guardianship by judges can also be found in the Shi'ite Islamic legal systems.[11] The debate regarding the guardianship of the constitution garnered a lot of attention in the days of the Weimar Republic when two of the leading constitutional theorists of that time, Hans Kelsen and Carl Schmitt, were engaged in it.[12] Schmitt argued for constitutional guardianship to be bestowed upon a democratically elected executive leader, who may take extra-legal actions at times of emergency to ensure peace and security.[13] Constitutional guardianship by the judiciary, prima facie, seems better than constitutional guardianship in the hands of a single person. Thus, Kelsen's argument of viewing the judiciary as the guardian of the constitution gathered more support than Schmitt's when Schmitt argued in favour of constitutional dictatorship from the other side.

Lars Vinx argues that constitutional guardianship may mean one of two things.[14] The first meaning of constitutional guardianship is the guardianship of a concrete social and political order.[15] The second meaning is the guardianship of constitutionally guaranteed

10 *Brian Christopher Jones*, Constitutional Paternalism: The Rise and Problematic Use of Constitutional Guardian Rhetoric, New York University Journal of International Law and Politics 51 (2019), p. 773.

11 *Abbas Amanat*, From Ijtihad to Wilayat-i Faqih: The Evolving of the Shi'ite Legal Authority to Political Power, Logos: A Journal of Modern Society & Culture 2 (2003), p. 1.

12 *Lars Vinx*, The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law, Cambridge 2015, p. 6.

13 Ibid, pp. 11-12.

14 *Lars Vinx*, Carl Schmitt and the Problem of Constitutional Guardianship, in: Matilda Arvidsson / Leila Brännström / Panu Minkkinen (eds.), The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology, Oxfordshire 2016, p. 35.

15 Ibid.

rights.[16] Needless to say, the two meanings imply two very different powers. Protection of constitutionally guaranteed rights can be a completely legal matter fit for the judiciary to decide in litigation. However, guardianship over a social and political order is more of a political act than legal. Guardianship of constitutionally guaranteed rights may raise fewer eyebrows than guardianship of social and political order. The growth of jurisprudence regarding guardianship of constitutionally protected rights has remained largely uncontested, although those who have challenged the legitimacy of judicial review have criticized it.[17] However, the natural growth of guardianship of political and social order by the judiciary has led to the development of the 'unconstitutional constitutional amendment' movement in the form of the doctrine of basic structure, which has provoked many debates.[18]

There can also be a third meaning of constitutional guardianship. Courts, at times, used the term guardian in a metaphorical sense that ought not to be taken literally. For instance, the Supreme Court of India has remarked in a case that the lawyers are the guardians of the legal system, bestowed with authority to preserve and strengthen the constitutional government.[19] The consequence of metaphorical constitutional guardianship remains unresearched. It has to be understood by interpreting the context of the use of the term. The following discussions focus on how the SCOB has assumed the role of the guardian of constitutionally guaranteed rights and its preferred version of the political order in Bangladesh.

C. Guardian of Constitutional Rights

In this part, the article discusses two cases decided by the SCOB where it asserted its position as the guardian of the Constitution. The Part III of the Constitution of Bangladesh grants justiciable and entrenched fundamental rights to its citizens. The right to seek remedy from the High Court Division of the SCOB (HCD) is also guaranteed as one of the fundamental rights in the Constitution of Bangladesh.[20] Article 102(1) of the Bangladeshi Constitution bestows upon the HCD the power to perform the judicial review of actions violating the fundamental right(s) of the citizens. Article 102(1) of the Constitution states,

> *'The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate*

16 Ibid.

17 See *Jeremy Waldron*, The Core of the Case against Judicial Review, Yale Law Journal 115 (2006), p. 1346.

18 For more on this, see*, Gary Jeffery Jacobsohn*, An Unconstitutional Constitution?: A Comparative Perspective, International Journal of Constitutional Law 4 (2006), p. 460; *Nafiz Ahmed*, The Intrinsically Uncertain Doctrine of Basic Structure, Washington University Jurisprudence Review 14 (2022), p. 307.

19 Ramon Services Pvt. Ltd v Subhash Kapoor and Others, SCC 1 (2001), p. 118.

20 Art. 44(1) of the Constitution of the People's Republic of Bangladesh.

> *for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.'*

A careful reading of Article 102(1) shows that the HCD has the power to issue any appropriate direction or order against any person or authority for enforcing a fundamental right. The HCD's power to enforce fundamental rights is extraordinary with little limitation (the requirement of 'appropriateness'). The HCD's power under Article 102(1) is not limited to issuing orders and directions against those performing any functions of the republic. This has been confirmed by the HCD in *Liberty Fashion Wears Limited vs. Bangladesh Accord Foundation and Ors*. in which the Court held, 'When fundamental rights of a person is infringed the remedy under Article 102(1) is available to the aggrieved person irrespective of whether he is in the service of the Republic, local authority, statutory body or even a private capacity.'[21] Since fundamental rights in Bangladesh can also be enforced against private individuals, the HCD can even apply rights horizontally.[22] The Court, in several cases, applied Article 102(1) to enforce the fundamental rights of an aggrieved citizen.[23]

For this part, the relevant cases are those in which the Court has made claims of constitutional guardianship while enforcing a fundamental right. In *Government of Bangladesh v Delawar Hossain Sayedee and others*,[24] the Appellate Division of the SCOB (AD) dealt with the appeal of a judgment delivered by the HCD declaring the government's refusal to let the writ petitioner leave the country. The writ petitioner was a well-known opposition to the 1971 liberation war of Bangladesh and was alleged to have committed war crimes in 1971. The petitioner was later convicted by a court after allegations of war crimes against him were proved. However, no charges were brought against the writ petitioner when the petition was pending. The government's argument for refusing the writ petitioner to leave the country was that the trial of war criminals was to begin, and the writ petitioner could be charged for committing war crimes in 1971. The HCD decided that the government's action violated the petitioner's fundamental right of leaving and re-entering Bangladesh,

21 SCOB (HCD) 12 (2019), p. 1, [30].

22 For more on the horizontality of fundamental rights in Bangladesh, see, *Ridwanul Hoque*, Horizontality of Fundamental Rights in Bangladesh, Dhaka University Law Journal 32 (2021), p. 55; For more on the concept of horizontality, see, *Stephen Gardbaum*, The "Horizontal Effect" of Constitutional Rights, Michigan Law Review 102 (2003), p. 387.

23 See for example, Children's Charity Bangladesh Foundation (CCB Foundation) v Bangladesh and Ors., DLR (HCD) 70 (2018), p. 491; Dr. Mohiuddin Farooque v. Bangladesh, DLR (AD) 49 (1997), p. 1; Bangladesh Legal Aid and Services Trust (BLAST) v. Government of Bangladesh, BLD (AD) 30 (2010), p. 194;

See also, *Jobair Alam / Ali Mashraf*, Fifty Years of Human Rights Enforcement in Legal and Political Systems in Bangladesh: Past Controversies and Future Challenges, Human Rights Review 24 (2003), p. 121; *Ridwanul Hoque*, Judicial Activism in Bangladesh: A Golden Mean Approach, Newcastle upon Tyne 2011, p. 139.

24 ADC (AD) 7 (2010), p. 310.

guaranteed under Article 36 of the Constitution. The AD confirmed the HCD judgment, especially emphasizing the following quote from the HCD's judgment:

> *'If the Government wants to stop the Petitioner from leaving the country [,] then it must start a specific criminal case against him and get a custodial order by a court of law under the laws of the land. If the Government is allowed to restrict a person from going abroad at its discretion simply because he is going to make propaganda against Government policy or because he may be required to stand trial at a future date, then Article 36 will become nugatory. This Court [,] being the Guardian of the Constitution [,] cannot condone such practice.'*[25] *(Emphasis added)*

In *Banu v Bangladesh and Ors*,[26] the HCD dealt with a petition challenging the imprisonment of the petitioner's innocent son. The petitioner's son was imprisoned instead of a fugitive due to the negligence of the concerned police officers. While ordering the police to pay 20 lakh taka as monetary compensation and withdraw the concerned police officers from their designated duties, the HCD held:

> *'Article 102 of the Constitution has mandated this court to direct the concerned authority to dig-out the truth basing on the materials on record, so that none howsoever he/she mighty be [,] cannot play ducks and drakes with the life and liberty of any citizen of this country to serve their petty interest. Our Constitution guarantees enjoying the fundamental right to every citizen of this country and this court [,] as a guardian of the Constitution [,] is oath bound to protect that inalienable right.'*[27] *(Emphasis added)*

In the above-discussed cases, the power exercised by the Court was well within the ambit of the power granted to it by Article 102(1) of the Constitution. The Court in these two cases found direct violations of fundamental rights and gave orders to enforce the infringed fundamental rights. The Court's role as the bulwark of fundamental rights is common and well-accepted in the common law jurisdictions possessing a written constitution (like Bangladesh).[28] Even those who argue strongly in favour of restricting judicial power (especially that of judicial review) must concede that the courts have the power to enforce fundamental rights in cases of clear violations. Even Jeremy Waldron, one of the most influential advocates against judicial review would concede that the court is the appropriate body to enforce individual rights when a society fails to meet its 'four assumptions.'[29]

25 Ibid. at [13].

26 DLR (HCD) 73 (2021), p. 123.

27 Ibid at [32].

28 *John Laws*, Is the High Court the Guardian of fundamental Constitutional Rights?, Commonwealth Law Bulletin 18 (1992), p. 1385; *Margit Cohn / Mordechai Kremnitzer*, Judicial Activism: A Multidimensional Model, Canadian Journal of Law & Jurisprudence 18 (2005), p. 335.

29 *Jeremy Waldron*, The Core of the Case Against Judicial Review, Yale Law Journal 115 (2006), p. 1360. Waldron's four assumptions are:

The exercises of power in the two cases discussed in this section fit the nature of adjudication. The determinations made in the cases discussed above were objective and based on clear facts that were beyond controversy. In both cases, the facts were undisputed, and the rights enforced were pre-established. No judge would disagree that a citizen has the right to leave and re-enter the country if no prosecution was pending against her. Similarly, no judge would claim that a person can be held in custody for negligence on the part of the police. Judges are trained to decide cases and controversies before them. It is largely believed that even for a court that shows the utmost respect for judicial restraint, deciding on the constitutionally protected rights of individuals would be uncontroversial and common.[30] When litigants seek remedy from the courts for violation of their fundamental rights, for the most part, these litigations are similar to private rights litigations. In both types of cases, the judiciary's task is to judge whether the impugned actions of the respondents violated the rights of the applicants and provide appropriate remedies.

Traditional lawsuits that courts ordinarily deal with have sharply defined issues that are capable of judicial remedies.[31] The cases discussed in this part of the article were presented in adversarial forms and the courts had the jurisdiction to give remedies to enforce the rights that were claimed to have been encroached. Thus, the remedies granted to the petitioners of the two cases discussed above fall within the ambit of the power of the HCD granted in Article 102(1). The absence of claims of constitutional guardianship by the Court would not have affected the remedies granted to the litigants. The Court's power in the above-mentioned cases did not derive from claims of constitutional guardianship. Instead, the powers exercised by the Court came from the text of the Constitution.

We then must seek to understand the rationale behind the Court's use of assertation of constitutional guardianship in the cases of *Delawar Hossain Sayedee* and *Banu*. One possible answer can be that the court made the claims of constitutional guardianship as an effort to justify and add extra weight to its positions. In the *Delawar Hossain Sayedee* case, the petitioner, whose right the court enforced, was a known war criminal, and allowing

> democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage;
>
> a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law;
>
> a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and
>
> persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.

30 *Henry P. Monaghan*, Constitutional Adjudication: The Who and When, Yale Law Journal 82 (1973), pp. 1365-66.

31 Ibid., p. 1371. Monaghan refers to the Supreme Court of the United States of America's decision in Flast v Cohen*,* US (SC) 392 (1968), p. 83, where the Court held that the standing of a case is related to the question of whether the issue before the court is presented in an adversary context and in a form that is historically viewed as capable of judicial resolution.

him to leave the country when the government was publicly planning to prosecute him had a severe political impact. Similarly, since awarding compensation to victims of police negligence is still a rare action in Bangladesh, awarding monetary compensation in *Banu* also was a strong move from the judiciary.[32] Since the Court in both cases took strong positions against the government, it might have felt the necessity to add extra weight to its justification of using its power.[33]

D. Guardian of Constitutional Balance

In addition to cases where the Court enforced constitutionally guaranteed rights, the Court also made claims of constitutional guardianship in cases concerning the distribution of powers among the organs of the state. This Part discusses three cases in which the SCOB has made claims of constitutional guardianship, not to enforce rights but to justify its positions regarding the distribution of legal power. In these cases, the SCOB held itself to be the guardian of the constitution to justify using its power to conserve or implement its preferred versions of political order.

I. Government of Bangladesh and Ors. v Advocate Asaduzzaman Siddiqui and Ors

The SCOB's use of the claim of guardianship is not limited to cases where it enforces fundamental rights. An example of it would be the AD's judgment in the *Government of Bangladesh and Ors. v Advocate Asaduzzaman Siddiqui and Ors*.,[34] in which the AD declared the sixteenth amendment of the Constitution unconstitutional. *Assaduzzaman* challenged the sixteenth constitutional amendment, which gave the Bangladeshi Parliament the power to impeach judges. The power to impeach judges was previously vested in the Supreme Judicial Council.[35] The Constitution originally vested the power to remove Judges of the Supreme Court on the Parliament, which was changed through constitutional amendments.[36] Thus, the sixteenth constitutional amendment restored the judge removal procedure that was provided in the original Constitution. However, the Court struck down

32 For more on public law compensation in Bangladesh, see, *Nafiz Ahmed*, The Scope of Claiming Monetary Compensation under Public Law by Victims of Police Brutality, Public Law (2020), p. 210; *Taqbir Huda*, Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh, Australian Journal of Asian Law 21 (2021), p. 27.

33 There is similarity between the function of such justification and what Ronald Dworkin argued the functions of legal principles are. *Ronald M. Dworkin*, The Model of Rules, University of Chicago Law Review 35 (1967), pp. 23-29.

34 (2019) 71 DLR (AD) 52.

35 See *Kawser Ahmed*, Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine, Israel Law Review 56 (2023), pp. 263-264.

36 Ibid.

the sixteenth amendment based on the notion that it violated the basic structure of the Constitution.[37] The AD held:

> *'[I]t leaves no room for doubt that the task of administration of justice is entrusted to the Judges who are unelected people and thus the Judges exercise sovereign judicial power of the people and by the authority of the constitution; that being the guardian of the constitution, the Supreme Court is empowered to interpret and expound the constitution.'*[38]

The judiciary's power to interpret the Constitution and other laws is not heavily contested.[39] Due to the open texture of language, which is the primary mode of communication of laws, laws may suffer from indeterminacy.[40] This is especially true for constitutional law, which is a mixture of text-based rules, practice, history, precedence, scholarly work, and many more.[41] Since the Court applies constitutional law, it must have the power to interpret it. The Constitution of Bangladesh expressly notes the Supreme Court's power to interpret the Constitution.[42] Thus, even if the Court did not claim to be the guardian of the Constitution, it would have been able to exercise its power to interpret the Constitution.

Controversy may arise when the interpretation provided by the Court causes severe political tension or crosses into the boundaries of judicial invention.[43] As discussed before, the sixteenth amendment introduced the process of impeaching judges by the legislature by restoring a provision that was present in the original Constitution. It was held unconstitutional by using the doctrine of basic structure. The doctrine of basic structure was adopted by SCOB in *Anwar Hossain Chowdhury v Government of the People's Republic of Bangladesh*,[44] a judgment that was heavily influenced by the Supreme Court of India's judgment in *Kesavananda Bharati Sripadagalvaru and Ors v. State of Kerala and Anr*.[45] Unsuprisingly, the guardianship rhetoric was invoked multiple times in *Kesavananda*.[46] The

37 *Ahmed*, note 18, p. 329.

38 Asaduzzaman, note 34 at [99]. [Emphasis added)

39 *Henry P. Monaghan*, Constitutional Common Law, Harvard Law Review 89 (1975), p. 2.

40 *HLA Hart*, The Concept of Law, Joseph Raz / Penelope A. Bulloch (eds.), Oxford 2012, pp. 124-136.

41 *Pitkin*, note 3.

42 Art. 103 and art 110 of the Constitution of People's Republic of Bangladesh,

43 Scholars have criticised the doctrine of basic structure for being a judicial invention. For instance, see, *Monika Polzin*, The Basic-structure Doctrine and its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting, Indian Law Review 5 (2021), p. 45.

44 DLR (AD) 41 (1989), p. 165.

45 AIR (SC) (1973), p. 1461. For more on the influence of the Kesavananda judgment on the SCOB, see *Ahmed*, note 18, pp 326-29.

46 For instance, see Ibid. at [1829] and [1830].

same rhetoric was witnessed in other cases concerning the doctrine of basic structure.[47] The basic structure doctrine connotes that the Parliament cannot change the Constitution in a way that destroys its basic structure.[48] Thus, scholars have rightly been critical of using the doctrine of basic structure to strike down a provision present in the original Constitution.[49] It is not hard to follow why the use of a principle created to preserve the original basic structure of a constitution to strike down a provision present in the original constitution would raise eyebrows. The controversy called for additional justification from the Court for the use of its extraordinary power. To add justificatory value to its decision, the Court made claims of constitutional guardianship.

Another obvious point of controversy was the natural justice concern surrounding the case. As noted, the Court in *Asaduzzaman* dealt with the constitutionality of the procedure of impeaching judges. This begged the question of whether the Court could decide a case that was clearly related to its institutional interest. Readers of common law would be familiar with the rule against bias, one of the principles of natural justice. The rule against bias connotes, '*nemo debet esse judex in propria causa*,' which roughly translates to 'no person can be a judge of her own case.' The AD has in several cases remarked that the two principles of natural justice are part of the legal system of Bangladesh.[50] According to the rule against bias, a person cannot judge a case where she may have any interest, since it may lead to a biased decision. The alleged bias does not have to be actual; it can simply be apprehended bias.[51] Since in *Asaduzzaman,* the Judges were deciding the constitutionality of the procedure through which they may be removed from office, they were clearly judging a matter concerning their own interest. It was even pointed out by Ajmalul Hossain, in his amicus curie opinion.[52] To address the amicus curie's concern, Justice Miah held,

47 For instance, in Supreme Court Advocates-on-Record-Association and Ors. v Union of India (UOI), SSC (SC) (2016), p. 1, the Supreme Court of India remarked, 'As guardian of the Constitution, this Court should vigilantly protect the pristine purity and integrity of the basic structure of the Constitution.', at [1141].

48 *Ahmed*, note 18, p. 309.

49 *Kawser Ahmed*, note 36, pp. 283-84.

50 For instance, in Abdul Latif Mirza v Govt. of Bangladesh and others, DLR (AD) 31 (1979), p. 1, the AD held 'It is now well settled that whenever any person or an authority is empowered by law to take an action or make a decision which may operate to the prejudice of another person, such person or authority is under an obligation to act judicially in taking such action or making such decision. That is to say, such person or authority is to take such an action or make such a decision on the basis of certain materials and observe the principle of natural justice unless otherwise provided by the enactment creating such a power' ([13]).

51 *Matthew Groves*, The Rule Against Bias, in Matthew Groves / H.P. Lee (eds.), Australian Administrative Law: Fundamentals, Principles and Doctrine, Melbourne 2007, p. 316. Groves writes '[a] court that upholds a claim of apprehended bias is not required to make an adverse finding against the decision maker. It can make the more palatable finding that a reasonable observer, but not necessarily the court, might conclude that the decision maker was not impartial and go no further.'

52 *Asaduzzaman*, note 34, at [399].

> *'I feel constrained to deal with a point raised by Mr. Ajmalul Hossain under the bold head 'A CAUTION' [...] can the Judiciary be a Judge in his own case applying the rule against bias or 'nemo iudex in causa sua'. Since the Judiciary has an interest in this case, it should be extremely careful in deciding this case. […] In submitting so, Mr. Ajmalul Hossain has, in fact, tried to dissociate us from hearing the appeal. In making the submission quoted, Mr. Ajmalul Hossain totally failed to comprehend the constitutional scheme that the Supreme Court is the guardian of the Constitution […] I failed to understand the purport to put forward such an opinion in the form of 'CAUTION' by Mr. Ajmalul Hossain. The Judges of the Supreme Court (including this Division) do never have and can never have any personal interest in a particular matter[,] including the instant one; they hear and dispose of a matter in accordance with law and in case, constitutionality of an act or an amendment to the Constitution is challenged in a writ petition, it is decided in accordance with the constitutional scheme of separation of power and that such amendment to the Constitution does not impair or destroy the fundamental or the basic structures of the Constitution.'*[53]

In Justice Miah's holding, we again witness the use of the claim of constitutional guardianship to address a controversial situation. There can be little doubt that the rule against bias applies to decision-makers of all judicial bodies.[54] However, the Court here used the claim of constitutional guardianship as an effort to bypass the hurdle of the rule against bias. A reader of Justice Miah's opinion may reasonably conclude that his position is that as the guardian of the constitution, the SCOB is immune from the rule against bias. In Asaduzzaman, the AD also held

> *'The Supreme Court being the guardian of the constitution any interpretation of the relevant provision of the constitution by this court prevails as a law, there is no doubt about it. The interpretation placed on the constitution by this court thus becomes part of the constitution. This interpretation gets inbuilt in the provisions interpreted.'*[55]

As discussed before, the Court's power to interpret the Constitution is rather uncontroversial in Bangladesh. However, in the above-quoted paragraph, the AD held that the Court has the final say regarding constitutional issues and hailed itself to be a legitimate creator of constitutional law. The judiciary's role as one of the creators of constitutional law is generally accepted by constitutional law scholars. For instance, David A. Strauss wrote, '[…] when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed*, mostly through judicial decisions*, over the years.'[56] However, although the judiciary occupying the authority to have the final say regarding constitutional issues is not an uncommon claim in jurisdictions with a supreme

53 Ibid.

54 As previously held by the AD in *Abdul Latif Mirza*, note 51.

55 *Asaduzzaman*, note 38, at [346].

56 *Strauss*, note 2 (emphasis added).

constitution, it poses a separation of powers concern. Previously, the AD held that in Bangladesh separation of powers means that 'the sovereign authority is equally distributed among the three [o]rgans and as such one [o]rgan cannot destroy the others [sic].'[57] The Constitution is not only the most important legal document of the land but also the most important political document. Thus, it can be argued that having the final say over constitutional issues may amount to the same as having the final say over political issues. The judiciary alone having the final say over political questions may create separation of powers concerns.[58] Here too, the court referred to its role as the guardian of the Constitution to add justificatory value to its decision.

Lastly, in Asaduzzaman, the Court used constitutional guardianship claims to hold that its role as the guardian of the Constitution also creates obligations on the other organs of the state. It held, 'It is the duty of all organs of the State to allow the Supreme Court functioning [sic] as *guardian of the Constitution and running the Judiciary smoothly, otherwise, the doomsday will not be far of*…'[59]

II. Tayeeb and Ors. v Government of the People's Republic of Bangladesh and Ors

Another interesting case where the SCOB made claims of constitutional guardianship was the *Tayeeb and Ors. v Government of the People's Republic of Bangladesh and Ors.*[60] The case decided by the AD. The appeal before the AD arose after the HCD issued a *suo moto* rule declaring fatwas[61] as unlawful. Apart from the legality of fatwas, the question before the AD was whether the HCD had the power to issue *suo moto* rules using its writ jurisdiction under Article 102. Since the writs, apart from the habeas corpus and quo warranto, require applications by 'an aggrieved person',[62] the question before the Court was whether the HCD had the power to issue a writ without an application from the aggrieved person. While writing for the majority judgment, Justice Syed Mahmud Hossain justified the HCD's power to issue *suo moto* rule by holding, inter alia, that:

> *'The Supreme Court of Bangladesh [,] as the guardian of the Constitution [,] is the protector of rights, freedoms and liberties of the people. Using tools of innovative and creative interpretation of the constitutional provisions, the Supreme Court of Bangladesh has consistently endeavored to further extend the horizon of rights and*

57 Anwar Hossain Chowdhury v Govt. of the People's Republic of Bangladesh, DLR (AD) 41 (1989), p. 165, at [416].

58 For more, see, *Ahmed*, note 18, p. 337.

59 Asaduzzaman, note 34, at [777].

60 DLR (AD) 67 (2015), p. 57.

61 Fatwa can be defined as 'an answer by a mufti [Islamic jurist] to the question regarding sharia laws.' *Wan Mohd Khairul Firdaus Wan Khairuldin et al.,* Ethics of Mufti in the Declaration of Fatwa According to Islam, Journal of Legal, Ethical and Regulatory Issues 22 (2019), p. 2.

62 Art. 102 of the Constitution of People's Republic of Bangladesh.

> *liberties and administered quality justice to the justice-seekers…. There is no gainsaying the fact that the majority of the people of Bangladesh cannot afford to come to the High Court Division to seek redressed of their grievances. If the fundamental rights of an indigent citizen is violated and if he does not have the means, should he be allowed to suffer only because of his inability to come before the High Court Division with an application […]. As a result, various Non-Governmental Organizations are coming forward to help the indigent people for redressal of their grievances; but it is not always expected that such Organizations will come forward to assist such people in each and every case. In such a situation, the Court cannot sit idle.'*[63]

Before the *Tayeeb* judgment, the settled position in Bangladesh was that the HCD can entertain a writ petition once an aggrieved party (including citizens and indigenous organisations in public interest litigations)[64] has filed an application seeking redress.[65] One of the main arguments against the Court's use of suo-moto power was that it lacked any textual or precedential justification. Since neither the text of the Constitution nor any past cases expressly provide such a power, the Court used the claim of constitutional guardianship to justify its use of this *new* power. In his dissenting opinion, Justice Wahab Miah also held that the Court is the guardian of the Constitution but argued that it is not enough to justify issuing suo-moto writs.[66] Justice Miah held,

> *'It is true that the Supreme Court[,] as the Guardian of the Constitution[,] is the protector of the rights, freedom and liberty of the People as enshrined in Part III of the Constitution, but when the framers of the Constitution, namely, the Constituent Assembly, in plain and unambiguous language/wordings stated that the High Court Division "on the application of any person" may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the Constitution, so also in respect of the other remedies as mentioned in clauses (a) and (b) of sub-Article (2) thereto how then it can be read that such power would include a power of issuance of a suo motu Rule in the absence of any application.'*[67]

63 *Tayeeb*, note 61, at [319]-[320]

64 Dr. Mohiuddin Farooque v Bangladesh and others, DLR (AD) 49 (1997), p. 1, at [48]; For more, see, *Md. Rizwanul Islam and Md. Tayeb-Ul-Islam Showrov*, Sifting through the Maze of 'Person Aggrieved' in Constitutional Public Interest Litigation: Has Abu Saeed Case Ushered a New Dawn?, Dhaka University Law Journal 28 (2017), pp. 155-67.

65 *Tayeeb,* note 61, at [2] and [314].

66 Ibid, at [172].

67 ibid.

III. Omer Ali v Government of Bangladesh

In the recent case of *Omer Ali v Government of Bangladesh*,[68] the HCD had to deal with a judicial review submitted by a private contractor that challenged the government's order to encash a security deposit of the petitioner. The government entered into a contract of sale with the petitioner for importing high-power fog lights to be installed on ferries. Unfortunately, the lights that were bought were not effective despite the government officials testing the lights before the sale was made. While dealing with the case, the HCD noticed that the fog lights were tested in New York during the summer. Needless to say, New York in summer is not an appropriate situation to test fog lights. The Court in *Omer Ali* held,

> *'As Guardian of the Constitution, this Court has a duty and obligation to ensure that the tax-payers' money is not wasted. The case in hand is a classic example where Government officials have not only abused their official position and authority to undertake the trip to USA, but they also failed to perform their duty.'*[69]

If the proposition made in the above-quoted paragraph is taken to be true, then the HCD has the power to judge how the government spends its money. The SCOB previously held that the HCD only has the power to judge the legality of government actions and cannot perform proportionality tests in judicial reviews.[70] When the Court reviews how the government is spending its money, it must compare the government's action with other possible actions, which would be a test similar to the proportionality test.[71] The Court previously denied performing merit reviews of government actions while observing that

> *'It [proportionality test] involves the exercise of balancing relevant considerations like, the balancing test, the necessity test and the suitability test. This concept involves the Court to evaluate whether proportionate weight has been attached to one or other consideration relevant to the decision. As a ground for judicial review it is absolutely a new concept to our jurisprudence. And in accepting it this Court shall have to accord different weights to different ends or purposes and different means [,] which cannot be allowed in a review.'*[72]

Thus, the power that the HCD is held to have in *Omer Ali* is unprecedented in Bangladesh. Even though *Omer Ali* dealt with a clear misuse of public money, the principle set by the judiciary in this case can create a new dimension of judicial review in Bangladesh. Need-

68 BLT (HCD) 30 (2022), p. 377; LEX/BDHC/0156/2020.

69 Ibid at [18]. (Emphasis added)

70 *Nafiz Ahmed*, Bangladesh One Step Closer to Adopting the Doctrine of Proportionality?, International Journal of Constitutional Law Blog, 8 March 2023, iconnectblog.com/2023/03/bangladesh-one-step-closer-to-adopting-the-doctrine-of-proportionality/ (last accessed 17 August 2023).

71 Ibid.

72 Ekushey Television Ltd. and another v Dr. Chowdhury Mahmood Hasan and ors., DLR (AD) 55 (2003), p. 26, at [33].

less to say, the judiciary's decision to suddenly conduct a merit review of administrative decisions may cause tension between the judiciary and the executive. Here too we see the use of constitutional guardianship claims to justify the use of an unconventional power by the Court. The Court went on to hold in *Omer Ali*,

> *'As Guardian of the Constitution, this Court is concerned about the manner in which official matters are being conducted. Such conduct on the part of irresponsible, not to mention incompetent, Government officials cannot be allowed to continue unabated. This guardianship… is exercised through the principle of reasonableness.'*[73]

Here, the Court is connecting constitutional guardianship with the principle of reasonableness. The SCOB adopted the principle of reasonableness (also known as Wednesbury reasonableness) from Lord Green's opinion in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[74] and applied it in several cases.[75] Generally seen as a principle of administrative law rather than constitutional law, the reasonableness principle notes that if a decision is so unreasonable that no reasonable person applying her mind could have taken it, it lacks legality. It is unclear how the HCD is connecting constitutional guardianship with the principle of reasonableness. However, it is another example of the Court using claims of constitutional guardianship vaguely to add justificatory value to a possibly controversial decision.

In the three cases discussed in this Part of the article, we can see a observed pattern of the SCOB using constitutional guardianship rhetoric to justify using extraordinary powers. In *Asaduzzaman*, the SCOB used it to justify holding itself to be the final decision maker regarding the distribution of powers among the organs of the state and the accountability mechanism of these organs. It also used the same claim to justify not applying the rule against bias against itself. In *Tayeeb*, the SCOB used its position as the guardian of the Constitution to justify using its power to entertain judicial review on its own motion, a power that it previously did not use. In *Omer Ali*, the SCOB used the same rhetoric to justify deciding that it had the duty and power to judge the merit of official decisions. The SCOB's power affirmed in *Omer Ali* was also a power that the SCOB previously did not use. In all three of these cases, the SCOB lacked textual and precedential support and used the claim of being the guardian of the Constitution to fill up the justificatory void.

E. Conclusion

The most attractive feature of a written constitution is the limitation of powers it imposes on all organs of the state. One of the foundations of judicial review in jurisdictions with

73 *Omer Ali*, note 66, at [24].

74 KB 1 (1948), p. 223.

75 Bobby Hajjaj v Bangladesh Election Commission and Ors., DLR (HCD) 71 (2019), p. 89; Hafizur Rahman Nafor v Bangladesh and Ors., BLD (HCD) 35 (2015), p.307; Abul Asad (Md.) and Ors. v Secretary, Ministry of Education and Ors., ALR (HCD) 18 (2020), p. 65.

written supreme constitutions is that since the Constitution is written, the power it grants to its organs is limited. Although the judiciary is often considered the least dangerous branch,[76] it also can go beyond its allocated power. The SCOB occupies the position in Bangladesh's polity to decide its own competence. If the SCOB can use any new power it wishes just by using constitutional guardianship rhetoric, a future Court may misuse this power or get embroiled in avoidable controversies. As discussed above, the SCOB has previously held that the separation of powers in Bangladesh demands that no organ of the state would become more powerful than the others. If the SCOB can justify introducing new powers by simply claiming to be the guardian of the Constitution, it could disturb the existing equilibrium of the distribution of powers among the organs.

Although the use of constitutional guardianship rhetoric in cases involving the enforcement of constitutional rights is comparatively uncontroversial, the same cannot be said for cases in which the rhetoric is used to preserve or enforce a political order. Not all disputes are fit for adjudication as some judges may not always be well-equipped in adjudication to foresee all the possible consequences of the decision.[77] As Lon L Fuller rightly remarked, 'decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter.'[78] In an adversarial system like the one Bangladesh has, the outcome of a judgment heavily depends on the arguments that the litigants present. It may not be possible to predict the possible outcomes of upholding a political setting over another just by hearing the litigants. Enforcing a version of a particular political order in adjudication thus may be problematic.

As this article tries to illustrate, using its role as the guardian of the Constitution, the SCOB asserted its power to enforce rights, give authoritative constitutional interpretation (at times inventions), make constitutional law, unmake constitutional amendments, create constitutional duties for other organs, avoid trappings of natural justice, issue suo-moto rules, and perform merit review of administrative actions. However, this list is far from an exhaustive one. If all that stands between the judiciary and the assumption of a new power is a constitutional guardianship rhetoric, the list of powers of the guardian of Bangladesh's constitution is almost bound to grow. It is theoretically and empirically impossible to assume the constant benevolence of one of the organs of the state. If one of the organs of the state gets a license to expand its own powers, the constitutional balance and ethos may be under threat. We must then ask if a constitution can really have a guardian.

76 *Alexander M. Bickel*, The Least Dangerous Branch, New Haven 1986, p. 1.

77 *Allison*, note 8, p. 369.

78 *Lon L. Fuller and Kenneth I. Wintson*, The Forms and Limits of Adjudication, Harvard Law Review 92 (1978), p. 397.

BUCHBESPRECHUNGEN / BOOK REVIEWS

Ruth Rubio-Marin, **Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion**, Cambridge University Press, 2022, 404 pages, £21.99 (25,69 EUR), 978-1-107-1772-4

Women's struggle for equal citizenship and transformative inclusion was and is a fight for and against the gender roles entrenched in the constitution. Rubio-Marin shows the spectrum of these constitutional gender regimes on a global scale from the revolutions in France and the USA in the late 18th century to the leaked US Supreme Court decision to overturn Roe v Wade in May 2022. Building on citizenship literature focusing on individual countries, as well as her own individual[1], as well as collaborative contributions[2] to this field, this book adds a macro-scale overview highlighting parallel and contradicting developments around the world. Rubio-Marin analyses these developments as four different forms of gender constitutionalism (exclusionary, inclusive, participatory, and transformative). These should not be understood as linearly progressing stages, but as forms that have been fought for and against in different jurisdictions at different times.

The forms, as Rubio-Marin describes them in an idealized typology, are: "(1) *exclusionary gender constitutionalism*, where constitutional law significantly fails to consider sex equality a constitutional concern; (2) *inclusive gender constitutionalism*, which seeks to grant women rights equal to those of men, redeeming women from their otherwise decimated citizenship status (often shaped by their marital status), yet without fundamentally challenging the structure of the underlying gender order conceptually built around traditional and patriarchal family schemes; (3) *participatory gender constitutionalism*, which is receptive to the idea that gender justice requires going beyond equal rights and calls for facilitating women's equal participation in the male-dominated public sphere, including in the world of constitution-making, […] (4) *transformative gender constitutionalism*, which expects constitutional law to advance the agenda of radically subverting the original constitutional gender order by taking the domestic sphere and the types of activities centrally associated with it as a relevant domain of citizenship contribution and by defending the need to fully expand the constitutional ethos of democratic equality and individual autonomy to the various "private spheres," ultimately contributing to the full disestablishment of gender roles and fixed gender identities and concepts" (p. 18).

1 Among others *Ruth Rubio-Marin*, Immigration as a Democratic Challenge, Cambridge 2000; *Ruth Rubio-Marin,* The (Dis)Establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter, International Journal of Constitutional Law (2015), p. 787.

2 For example, *Berverly Baines / Ruth Rubio-Marin*, The Gender of Constitutional Jurisprudence, Cambridge 2004; *Ruth Rubio-Marin / Helen Irving*, Women as Constitution-Makers, Cambridge 2019.

The Chapters 1 to 4 follow the identified forms through their historical development. Chapter 5 is concerned with newer developments "Towards a Constitutional Gender Erasure or a Constitutional Gender Reaffirmation", denoting progress made by women's movements, as well as for sexual and gender minorities, and the conservative reactionary push back in the last decade. The Conclusion revisits the four forms and their impact on women's equality.

The Introduction "The When, Why, What, and How of the Book and How the Personal Becomes Political" requires a special mention, as it highlights Rubio-Marin's positionality within scholarship and the broader gendered society of today as a (fairly) white, middle-class, employed woman. She uses the journey of developing this book as a focal point for women's struggles persisting today, especially combining employment with motherhood and care work, which is an important thread throughout the book. Her nuanced intersectional understanding of the double burden of reproductive labour and the privileges allowing her to follow her research, is an evocative entry point into this book. Allocating this space to it is also a compelling challenge to the (mostly) silent ubiquity of male-centred scholarship. Additionally, the introduction is exemplary for Rubio-Marin's talent for weaving a compelling narrative, without sacrificing the insistence on the non-linearity of progress. This apparent talent gains further importance, as Rubio-Marin succeeds in her goal of including failed attempts to further gender equality throughout the centuries (p. 19) to counter the hegemonic narratives of liberal constitutionalism as emancipatory for all. This book highlights liberalism's implicit reliance on the heteronormative traditional family ideal "as a foundational unit of society" (p. 329) and the public/private divide sustaining women's dependence on men and the gendered division of labour throughout the centuries.

Rubio-Marin's central argument focuses on the hypothesis that the public-private divide was and is integral to modern constitutionalism and hindered women's participation in the public sphere, including constitution-making, and the recognition and protection of women as equal citizens. Her political impetus seems to be the disestablishment of the foundational gender order (cf. p. 17), especially through a challenge of normative motherhood, the constitutionally entrenched conception of women primarily as care-givers and as primary care-givers. Understanding this as her goal should not discourage readers from using her framework, nor does it devalue her insights, as the transparency over an author's positionality reveals biases that often remain undetected.

The insistence on forms, rather than stages, compels readers to see the different gender regimes in their non-linearity. This is important to Rubio-Marin's aim to tell a global story, a promise mostly fulfilled in the later chapters. The inclusion of several jurisdictions from Europe, North and South America, Asia, Africa, Oceania and Australia, shows the simultaneity of parallel and contradictory developments across the world. For example, how the USA and Germany (paradigmatic for Western Europe) follow contradictory approaches to sex equality standards in the 1970s till 1990s (see Chapter 2), or how the degree of the gender responsiveness of constitutions influence the road to women's suffrage in Australia vs the USA (see Chapter 1). Chapter 3 itself is the strongest reminder that the different

gender regimes are not mutually exclusive, as the stories from South Africa, Nicaragua and Colombia (among others) show that demands for equal participation can coincide and further transformative gender constitutionalism (see Chapter 4).

The main confusion for me as a German constitutional and citizenship law scholar is the lack of clear definitions of the central terminology or their underlying theories in this book. Neither the distinction between written constitutions and constitutionalism itself, nor between citizenship, citizenship rights and fundamental human rights is clear from the onset. A definition would help distinguish whether rights were conferred or denied to women in their status as (equal) citizens or as human beings entitled to dignity and autonomy. Especially the lack of a definition of "gender" in contrast to "sex" is confusing. Most of the book is concerned with women's rights. It references the understanding of different actors in different time periods without a clear template. Only one sentence in the introduction and chapter 5 including a section about trans rights indicate an understanding of gender as socially constructed category utilised and entrenched in law (p.18). A more detailed engagement with the terminology and its underlying theories, as well as practical impact, would have benefited an audience more unfamiliar with these topics, as Rubio-Marin attempts to bridge a gap between different disciplines, as well as jurisdictions.

Despite this unclarity, the forms and narratives presented in this book bring an important focus on the gendered nature of citizenship, understood in the broad terms dominant in citizenship studies since T.H. Marshall's 1950 essay "Citizenship and Social Class"[3]. Rubio-Marin also succeeds in weaving an increasingly global story, highlighting success stories as well as failed attempts to further gender justice. This global aspect presents a valuable addition to existing scholarship, and I would recommend this book to citizenship scholars interested in entry points to global developments, as well as to constitutional lawyers interested in the gendered nature of constitutionalism, as Rubio-Marin's forms of gender regimes provide a compelling framework for understanding the intersection of gender and citizenship. Especially young law academics can use this book as an inspiration what a feminist engagement with the law can accomplish, one of the goal's Rubio-Marin sought to achieve with this book (p. 10).

Meret Trapp
Research Fellow and Ph.D. candidate
Chair for Public Law and Comparative Law, Humboldt University Berlin

3 *T.H. Marshall*, Citizenship and Social Class: And other essays, London 1950.

Pier Giuseppe Monateri / *Mauro Balestrieri*, **Quantitative Methods in Comparative Law**, Edward Elger, Cheltenham 2023, 200 pages, $120, ISBN: 9781802204445

Researchers who wish to use quantitative methods to study law are inevitably confronted with conceptual and methodological questions: How can law be quantified? What is a good model of law to use for empirical research? What assumptions need to be made? This book addresses all these questions while covering a wide range of topics. It begins with the history of ideas of mathematical thinking about law, discusses the origins of modern empirical legal research, assesses the challenges of model building in comparative law, and presents a new model. This model takes an efficiency approach to law and introduces friction as a central criterion for comparing legal systems. Finally, it is applied to an empirical case study of the Italian legal system.

The book consists of four chapters, two written by Mauro Balestrieri and two by Pier Giuseppe Monateri. In the first two chapters, Balestrieri examines the history of mathematical thinking about law and legal research. Monateri then proceeds to discuss model building and empirical analysis. The conclusion, written by both Balestrieri and Monateri, summarizes the model introduced.

The first chapter undertakes a genealogical project and sheds light on the role that mathematical thinking about law has played since the 16th century. Beginning with a review of the intellectual contributions of several authors, such as Leibniz and Bernoulli, the chapter concludes with a brief look at the French Civil Code and Savigny. This is fruitful in two respects: First, it impressively demonstrates the numerous ways in which geometry and algebra have been present in legal thought over the centuries. Accordingly, the topic of quantification of and in law can by no means be regarded as new (p. 4). Secondly, this finding challenges the strict separation of qualitative and quantitative methods in legal research (p. 14).

The second chapter continues the historical perspective and analyzes the origins of modern quantitative legal research. It explores research paradigms since the late 19th century, beginning with Langdell and his casebook method and subsequently addressing legal realism, jurimetrics, judicial behavior, among others. In contrast to the previous chapter, many of the paradigms discussed have shaped and continue to shape legal research projects to this day. The chapter does not tell a simplistic success story of empirical research but instead points out the variety of research paradigms without concealing critical voices. This is particularly true of the question of how to develop metrics and indicators for comparing legal systems, which is examined by using the World Bank indicators as an example (pp. 69-75).

With the third chapter, the perspective of the book changes: It now focuses on model building for quantitative legal research. The guiding interest lies in measuring the performance of legal systems. On the one hand, the chapter deals with the premises of models on an abstract level, the challenges of quantification, and the relationship to qualitative and doctrinal legal research. On the other hand, the chapter also introduces a new model.

The central assumption of this model is that the purpose of law is to prevent conflicts and disputes (p. 91). The notion of an Input-Output system comes into play (p. 90), and friction, i.e. the resistance of the system, is identified as the key problem (pp. 117-121). Law and regulation are thus seen as obstacles to economic activity and growth (p. 118-119). This provides a criterion for measuring the performance of legal systems and makes it possible to compare them.

The fourth chapter provides a comparative analysis, with a focus on assessing the Italian system. The chapter does not follow the typical steps of hypothesis-testing empirical research but draws its conclusions from descriptive statistics and the findings of other studies. The first step is the comparison of different electoral and governmental systems. Political institutions are assessed in terms of the transaction costs they generate. Compared to institutions in the US, France, and the UK, the Italian institutional system is described as inefficient, thereby generating significant friction (pp. 134-135, 138). In a second step, the chapter evaluates the effectiveness of the judicial systems in Italy, France and Germany. The Italian system is judged based on a series of descriptive statistics, including the duration of proceedings and the caseload, all of which are over 20 years old (pp. 139-147). Again, the Italian system is given a disastrous diagnosis (pp. 141, 145, 147-148).

The conclusion synthesizes the book's considerations into a cohesive model (p. 156). The model's core is the assumption of a clash between the social demand for justice and the social supply of justice. Against this background, a system that is more effective in satisfying the demand, i.e. has less friction, is better. The model is described as conceptually open, so that further research with other perspectives on the legal system can follow.

The number of questions and material covered in just under 170 pages of text makes the book more of a prerequisite reading, for which some basic knowledge of quantitative legal research is useful. To this effect, it is certainly not an introduction for new readers. Nor is it a methods book in the strict sense, in that it does not deal with the technical aspects of measurement, data analysis, or statistical methods.

However, reading the first two chapters is particularly rewarding for those conducting their own empirical legal research. The awareness of the historical origins of mathematical thinking about law is remarkable. The book provides a convincing account of the ambivalence of quantitative approaches. It even discusses fundamental criticisms in order to advocate for a wider understanding of the relationship between quantitative and qualitative research (p. x).

The second part of the book focuses strongly on an economic version of empirical legal research. It will interest those who share a similar functional understanding of law and are interested in the effectiveness of legal systems and output-oriented comparative law. Others, however, might be irritated that so much effort has been put into arguing that law can be studied quantitatively, but surprisingly little effort has been put into arguing for the use of an economic model of law, that narrows down on system-outputs and efficiency. It is not immediately apparent, and does not necessarily follow from quantitative legal research, that law and regulation should be understood as frictions because they may constrain

economic action. Consequently, the book remains less in need of justification *that* law is analyzed with numbers; it remains in need of justification *how* law is analyzed with numbers.

Kilian Lüders
Universität Regensburg, Germany

Call for Papers

»VRÜ/World Comparative Law« analyses developments in constitutional and public law in states and regions outside Europe and North America (in what used be called the 'Third World') as well as their regional and international integration. Founded in 1968 and inspired by the ideals of 'decolonization' and fair cooperation, the Journal also has a special interest in the entanglements between 'Global South' and 'Global North', including the presence of the 'South in the North'. Looking beyond the surface of globalization, 'VRÜ/World Comparative Law' promotes scholarship that uncovers the particularities of legal configurations as well as their interdependencies in an interconnected world.

The journal seeks to publish theoretically and historically informed studies of law in context, but is equally open to contributions from social sciences and from practitioners. It has a particular interest in analyses that compare several legal orders but is equally attentive to studies in international law and its impact on Asia, Africa and Latin America as well as comparative international law.

»VRÜ/World Comparative Law« addresses authors and readers on all world regions and aims to serve as a forum of mutual exchange. It publishes research articles, shorter reports about current events or conferences as well as book reviews.

All manuscripts undergo a double-blind peer-review. The journal is published quarterly and welcomes contributions in English, and exceptionally in German, Spanish and French.

Manuscripts may be submitted as an e-mail attachment and under the condition that they have not been published elsewhere in any form. A short abstract and some details about the author (both in English) should be added. We regret that no remuneration can be offered for publication. Contributions must be saved in a simple editable format (no PDF files please), i.e. without automatic hyphenation, with a consistent font, and NO activated hyperlinks or other macros. The length of an article should not exceed 10,000 words using 12 pt Times New Roman, line space 1,5. Please refrain from using bold type or underlining in the text, italics only sparingly. Footnotes (font 10 pt Times New Roman, line space single) should use tab after standard auto number and keep to the following scheme, including typeface as indicated:

(a) books: author's full name, title, place, year of publication, page number;
(b) journals: author's full name, title, name of journal volume (year), page number; do not cite the publishing company;
(c) book reviews: should contain a head-line citing author(s)/editor(s), full title of book (in bold font), publishing company, place and year of publication, page numbers, price and ISBN-number.

Titles of works cited in languages using non-Latin script should be given in an established transliteration, and a translation of the title should follow in [ ]. For detailed submission guidelines see our website: www.vrue.nomos.de

Impressum

Verfassung und Recht in Übersee (VRÜ)
World Comparative Law (WCL)
ISSN 0506-7286

Editor in Chief: Prof. Dr. Philipp Dann (V.i.S.d.P.)

Please send submissions to: Prof. Michael Riegner – Universität Erfurt – Juniorprofessur für internationales Verwaltungsrecht und Völkerrecht – Nordhäuser Str. 63 – 99089 Erfurt
Telefon: +49 (0) – 361 737-4761
E-Mail: vrue@nomos-journals.de | www.vrue.nomos.de

Advertisments: Verlag C.H.Beck GmbH & Co. KG – Media Sales – Dr. Jiri Pavelka – Wilhelmstraße 9 – 80801 München

Media-Sales: Tel: (089) 381 89-687 – mediasales@beck.de

Publisher and overall responsibility for printing and production: Nomos Verlagsgesellschaft mbH & Co. KG – Waldseestr. 3-5 – D-76530 Baden-Baden. Telefon +49 – 7221 – 2104-0 / Fax 49 – 7221 – 2104-27 – www.nomos.de

Geschäftsführer/CEO: Thomas Gottlöber – HRA 200026, Mannheim
Stadtsparkasse Baden-Baden, IBAN DE05662500300005002266 (BIC SOLADES1BAD).

Frequency of publication: quarterly

Annual subscription prices for the print edition: Individual customers: € 118,- Institutions: subscription € 319,-. Single issue: € 34,- All prices include VAT and are subject to a distribution fee (domestic € 18,-/foreign € 33,-) or direct order fee € 3,50. Invoices will be issued after publication of the first issue of the year.

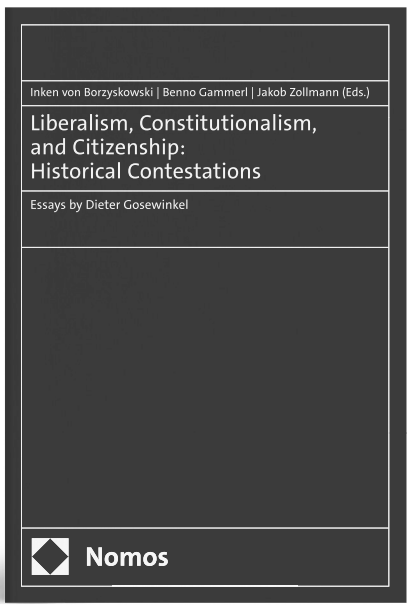
Orders: Orders can be placed at local bookstores or directly at Nomos Verlagsgesellschaft Baden-Baden

Customer Service: Phone: +49-7221-2104-280 – Telefax: +49-7221-2104-285 – E-Mail: zeitschriften@nomos.de

Cancellations: Cancellation of the subscription is possible with a notice period of six weeks to the end of the calendar year.

Change of Address: Please notify us of any changes in address as soon as possible. When doing so, please indicate the new and old address next to the title of the magazine. Note in accordance with Art. 21 (1) EU-GDPR: In the event of a change of address, Deutsche Post AG may notify the publisher of the new address even if no forwarding order has been placed. An objection to this can be lodged with Post AG at any time with effect for the future.

Knowing History to Shape the Future



Inken von Borzyskowski | Benno Gammerl | Jakob Zollmann [Eds.]

Liberalism, Constitutionalism, and Citizenship: Historical Contestations

Essays by Dieter Gosewinkel

2025, 318 pp., pb., € 104.00
ISBN 978-3-7560-2445-2
E-Book 978-3-7489-5190-2

In his writing, Dieter Gosewinkel skillfully combines legal expertise with meticulous historical analysis. He examines liberal, conservative, and social-democratic schools of thought and then devises new conceptual frameworks that open up fresh perspectives on important actors, on debates about property, on intricate socio-legal phenomena like citizenship, as well as on constitutionalism between past failures and future opportunities. The broad social histories Gosewinkel writes about reach far beyond the narrow confines of the law. They echo various voices from the past and allow readers to understand how things could always have developed otherwise. The texts, assembled here for the first time in English, thus enable a much needed multi-perspective conversation between various liberal-democratic positions of the present.