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

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