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

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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" (*Gayänëshä''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.