Narrating Constitutional Dis/Order in Post-1994 South Africa: A Critical Response to Theunis Roux

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"The plot of her undoing begins with dispossession and the rule of law."[1]

A. Opening: towards a conversation

This comment takes up the invitation to critically engage Theunis Roux's paper "Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa", focusing only on the latter of his two subject countries.[2] Like Roux, I am interested in examining the impending collapse or fading of liberal constitutionalism as an emancipatory horizon for postcolonial futurity and regard this predicament as one of the major questions for legal, political and social theory today. As both the promises and premises of the South African constitution sustain deep fractures under the pressure of the intractable afterlife of colonial-apartheid and growing dissent against the founding myths of the post-apartheid legal order, we enter a problem-space that demands reckoning. Roux's approach to this question is to stage an interlocution between what he regards as the two prominent competing grand narratives of postcolonial transition and democratic constitutionalism, which he respectively names the "liberal progressive" (mainstream) narrative ("LPN") and the "culturalist" or "decolonial" (critical) narrative ("CGN").

With aid from Lyotard, he adopts this typology and insists on its stark polarity based on the radically divergent constitutional futures imagined and proposed by these two narratives. In short, according to Roux, the liberal progressivist narrative views the installation of postcolonial liberal democracy as the realisation of the telos of the anti-colonial struggle and as an exemplary instance of the "pluralisation", "adaptation" and "extension" of the Western liberal legal and political tradition beyond the West. In terms of this liberal progressivist narrative, post-colonial constitution-makers claimed and transformed the ostensibly universal and democratic virtues of liberal constitutionalism and Western jurisprudence and redirected them towards the construction of new polities in the wake of formal decolonisation. In this narrative, the Eurocentric colonial legal form came to be redeemed of its past imbrication in dispossession and dehumanisation in hands of

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1 *Saidiya Hartman*, The Plot of Her Undoing, in: Feminist Art Coalition (ed.), Notes on Feminism; https://static1.squarespace.com/static/5c805bf0d86cc90a02b81cdc/t/5db8b219a910fa05af05dbf4/1572385305368/NotesOnFeminism-2_SaidiyaHartman.pdf (last accessed on 23 July 2024).

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

"liberation movements" which creatively repurposed it to local postcolonial exigencies. On this view, so the narrative goes, they became an indigenous part of the legal heritage of the new polity, no longer Western or colonial, and thus part of the emancipatory and democratic fabric of the new society.

In contrast, Roux explains, the "culturalist" or "decolonial" critical posture views the postcolonial entrenchment of liberal democracy principally as a mark of defeat, a symbol of continuing colonial domination at both the political and juridical as well as cultural and epistemic levels. According to this narrative, the liberal anti-colonial actors who constructed these postcolonial constitutions operated from a fatally defective understanding of the colonial situation and were in thrall to a colonial mentality which led them to posit integration into the settler-created legal order and adoption of Western logics of law, statecraft, and political economy as the definitive marker of liberation. This resulted in the reproduction of colonial-apartheid power relations and the preservation, through rights discourse, of the historical results of settler-colonial white supremacy. According to this narrative then, far from marking a triumph, postcolonial liberal constitutionalism signifies the perfection of conquest in its continued suppression of indigenous knowledge and indigenous sovereignty. Against liberal constitutionalism then, Roux's culturalists are said to argue for fundamental constitutional change that would address the problem of historical justice more directly and seriously.

This precis above attests to Roux's commendable ambition and coverage of a wide array of literature in what I appreciate as a genuine attempt to surface a critical tension in postcolonial constitutional theory and to make sense of the perils and prospects of what he sees as an overriding aspiration towards "Southern democratic constitutionalism". Indeed, Roux's project stands out as the most intellectually sensible, rigorous and thoughtful engagement with contemporary black legal scholarship in South Africa and provides refreshing reprieve from the anxious and hostile anti-intellectualism of other scholars in the public law academy.[3] Yet, the stylistic choices and the rhetorical and argumentative devices through which Roux presents his paper also reveal the subterranean presence of psycho-intellectual and political investments, afflictions and silences – especially around race, whiteness, settler-colonialism and power – which I find troubling.

The immediate problem inheres in seeking to present and then also adjudicate - however "charitably" - interpretations of two competing positions by one deeply and ardently committed to one of those positions. Roux is an important protagonist in the scholarly development of the position he refers to as the liberal progressivist narrative in South Africa and has in previous publications made clear his allegiance to defenders of this narrative and

3 See in particular the recent writings of Dennis Davis and the offensive invective he directs to several black scholars: *Dennis Davis*, Judicial Education in a Transformative Context, Judicial Education Journal 1 (2018), p. 30.; Authoritarian Constitutionalism: The South African Experience, Journal for Judicial Science 45 (2020), p. 15.

his incredulity towards what he now describes as the "culturalist" position.[4] This ruse of perspectivelessness and the conceit of dispassionate assessment is foreign to me. Indeed, much of the language and worldview of Roux's pre-critical constitutional theoretical grammar is foreign to me: the deployment of contested terms such as tolerance and inclusivity divorced from an analytics of hierarchy and domination;[5] the lack of appreciation of the constitutive, subject-producing and order-creating violence of colonial-apartheid;[6] the elision of the deep weight of the past on and into the present;[7] the misapprehension of colonial racism as a matter of structural power and not simply identity;[8] the blithe disregard of the epistemic limits imposed by one's racial and social positioning;[9] and the overall sanguine adoption of liberal political common-sense and unquestioning adherence to the dominant discourse.[10] These are all foreign to me not only because they have all been exposed and destabilised by wave upon wave of critical scholarship but also because they hobble Roux's attempt to make sense of the political disorders now confronting constitutional discourse and practice in the postcolonial conjuncture.

In delineating my critique of Roux's paper, let me then situate my own approach to the theory and politics of constitutions: I locate my work within critical race theory, African philosophy, and black radical thought and have in previous works elaborated their relevance to South African political and legal history and constitutionalism respectively under the umbrellas of "Azanian political thought" and "constitutional abolitionism". My own contribution to the enterprise of decolonising constitutional theory and my response to the "Southern turn" in constitutional theory and African constitutionalism is shaped by a reading of African and black liberation philosophies and resistance movements as intellectual traditions germane to constitutional theory insofar as the question of how to constitute a new political and social order on the ruins of colonial and imperial regimes was their principal concern. Thus, my central concern is to reinterpret and reconfigure constitutional theory from the perspective of continuing black unfreedom in its intersecting South African and global contexts. The broad idea of critical theory and the key device of ideology critique also informs my work in its Hegelian-Marxist philosophical heritage,

4 See *Theunis R. Roux*, The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?, Constitutional Court Review 10 (2020), pp. 1-42.

5 On the politics of tolerance as a term of civilization discourse and social hierarchy, see *Wendy Brown*, Regulating Aversion: Tolerance in the Age of Identity and Empire, Princeton 2006.

6 See *Bernard Magubane*, The Making of a Racist State, Asmara 1996 as well as *Charles Mills*, The Racial Contract, Ithaca 1997.

7 See *Berber Bevernage*, History, Memory and State-Sponsored Violence: Time and Justice, London 2012.

8 *Linda Marín Alcoff*, Visible Identities: Race, Gender and the Self, New York 2005.

9 See *Charles Mills*, White Ignorance in: S Sullivan and N Tuana (ed.), Race and Epistemologies of Ignorance, Albany 2007, pp. 11 -38.

10 See *Domenico Losurdo*, Liberalism: A Counter-History, Bologna 2005 (Translation to English, London 2011).

its French and psychoanalytical vernaculars, and in its expansion and explosion by Black registers of critique. It is not hard to see from these keywords where Roux and I part ways, which is not of course to discount the possibility of a productive dialogue across our substantive ideological and political differences.

The limits of space however permit a focus on only three of the most contentious areas of Roux's paper, namely (1) the misnaming of my work and that of several others as "culturalist" and "decolonial", designations which are laden with reductive assumptions and lead to several interpretative errors, omissions and rushed interpretations; (2) the presentation of the African National Congress (ANC) as a "liberation movement" and the attendant claim that they were architects of an indigenous constitutional order free of the signatures of Western and colonial power; and (3) the misrepresentation of the intellectual history of the Pan-Africanist and Black Consciousness movements, and the failure to grasp the distinct social and political theory they propounded and its contemporary valence in the present post-1994 South African (constitutional) context. My treatment of these will be necessarily brief, selective and pointed, albeit aided by a trail of instructive references to fill out the fuller picture of the argument. But first a note on the style and silences of Roux's paper.

B. On style and silences

> *"The liberal and democratic State has found in constitutionalism a way to rationalize (and to forget) the original violence."*[11]

The tension between the two narratives Roux describes also marks an interval between different conceptual, methodological and political universes. These are not only competing interpretations of the state of constitutionalism in the postcolony but altogether different paradigms of constitutional theory with their own analytic itinerary, founding assumptions and ensemble of questions. The legal progressivist narrative is grounded in a primarily normativist, institutionalist and procedural vision of constitutionalism and constitutional law. In this vision, constitutions are approached as legal texts given meaning by courts and interpretive communities towards the aims of law reform and legal development. Underlying this liberal progressivist narrative is an optimistic view of constitutions as superordinate legal instruments that authorise and channel the will and identity of the people and give expression to them through its textual and institutional articulations. What is overlooked in this narrative is the role of constituionalism, in its South African historicity, as a political and ideological project which underwrites *specific* interests and values. As a regime of power/knowledge, constitutionalism not only describes or intervenes in a given political reality but constructs it, carrying a very specific image of justice and social ordering, and rivalling other imaginaries of freedom and liberation. By its failure to apprehend con-

11 *Héctor López Bofill*, Law, Violence and Constituent Power – The Law, Politics and History of Constitution-Making, London 2021, p. 1.

stituionalism as ruling moral-political rationality, the liberal progressive narrative similarly cannot confront the intimacies between constitutionalism and superpower imperialism, its alignment with a capitalist market economy and its inability to address racialised overconcentrations of wealth and power.

This liberal constitutional narrative is posed against and challenged by politically-engaged, materialist and critical constitutional theorisations – a discourse drawing from a wide array of sources including Republican, Marxist, feminist and anti-colonial theoretical discourses developed not only in law and legal studies but across the human and social sciences.[12] In the cognitive map of political or critical constitutionalism, the rule of law is not the only mode of rule at work in the social order: race, class, and gender antagonisms, political economy, land, culture and epistemology, and contestations over sovereignty are taken to be historical-constitutional questions, concerning the makeup of the political order; constituting, and constituted by the extant material conditions in society. At base what this means is that several key terms in Roux's analytic topography – imperialism, culture, democracy – are politically, ideologically, and historically protean, have no settled meaning and carry different entailments depending on one's historical vantage point. For instance, his account of the philosophical differences between the liberal anti-colonialism of the ANC and the radical anticolonialism of the Pan-Africanist and Black Consciousness movements fails to properly appreciate their most fundamental constitutional implications. Whereas the ANC conceived of the liberation struggle as a conflict within the same society and hence maintained a legal and constitutional continuity with the old order, the Africanists and Black radicals conceived of the liberation struggle as a conflict between two societies (with different interests and different ordering principles), instantiated by an unjust settler-colonial usurpsation, dispossession and subjugation. For this latter group, legal continuity and reconciliation between these two societies cannot result in a rupture with the old order and thus cannot bring about a new society. It would have served this conversation well if Roux had unpacked his definition of these concepts as part of his demarcation of the tension between the two constitutional narratives.

Such ideological clarity is of course rendered largely impossible by Roux's assumption of the position of Omniscient Narrator in a debate in which Roux imports his own subject position and investments. Add to this the problem that Roux does not account for the differential epistemic and institutional authority of the two narratives. The liberal progressive narrative of course coheres with Global North constitutional ideas, has mainstream provenance, and is supported locally and internationally by a powerful well-funded network of academics, civil society and non-governmental organisations, judges, senior politicians, media houses and publishers all united by a commitment to the dissemination

12 See for example *Aziz Rana*, The Constitutional Bind: How Americans Came to Idolize a Document That Fails Them, Chicago 2024; *Marco Goldoni / Michael A. Wilkinson,* "The Material Constitution", Modern Law Review 81 (2018), 593; *Claude Ake*, Social Science as Imperialism: The Theory of Political Development, Ibadan 1982; *Denise Ferreira da Silva*, Unpayable Debt*,* Sternberg 2022.

and exaltation of the status of the South African constitution. In the South African context, it developed over three decades in a legal academy which was shaped by overwhelming white demographic and conceptual overrepresentation and in the absence of serious Black interlocutors.

The group he incorrectly refers to as culturalists or decolonial critics are a multigenerational group of mainly Black scholars working in generally underrepresented, and suppressed areas of scholarly inquiry and have only recently entered the picture largely as a result of modest changes in the demographic makeup of universities in response to employment equity demands. Although still in its infancy in terms of a comprehensive elaboration of its philopraxis, it has waged a challenge provocative enough to threaten and destabilise the liberal consensus around the South African constitutional transition – especially in relation to the problem of outstanding historical justice, reparations and a genuine reckoning with the past. These narratives therefore do not carry equivalent discursive status. It is both premature and ill-conceived to demand practical policy and institutional prescriptions from an emergent body of philosophical and academic critique. It is also no small part of the problem that the construction of constitutional knowledge in South Africa has, since the inception of constitutional democracy, been defined and controlled not by the historical experience and imagination of the victim-survivors of colonial domination but by its beneficiaries. This recalls Grada Kilomba's crucial insight that "concepts of knowledge, scholarship and science are intrinsically linked to power and racial authority".[13]

While the article form can never provide a total account of its object of analysis, several omissions in Roux's summation of what he calls the culturalist/decolonial position are inexcusable – more so given his reliance on podcast discussions and even a private discussion between us on a pleasant drive from Cape Town international to Stellenbosch. In terms of the elder voices excluded, I would mention two. The first is Makau Mutua, who has dedicated a sustained body of work questioning the application of Western liberal approaches and interpretations in the African context, pointing to their reproduction of colonial dynamics in local communities and their failure to address economic despotism as a key vector of powerlessness in the African postcolonial context. Turning to specifically to South Africa, Mutua argued in 1997 already that the reliance on unreconstructed ideas of human rights and rule of law as engines of social change would ultimately freeze the hierarchies generated by colonial-apartheid by preserving the social and economic status quo.[14] The second is Mabogo More, who has deployed a powerful Fanonian analytic to diagnose the South African constitutional transition as a paradigmatic instance of "flag freedom" (pseudo-independence) in terms of which the master-slave relation that characterises colonial-apartheid is not dismantled but rather dissimulated and reconfigured by way of a constitutional continuity with the colonial order. This then is More's Fanonian critique

13 *Grada Kilomba*, Plantation Memories: Episodes of Everyday Racism, Münster 2010, p. 27.

14 *Makau W. Mutua*, Hope and Despair for a New South Africa: The Limits of Rights Discourse, Harvard Human Rights Journal 10 (1997), p. 68.

of the constitutional transition: political freedom and democratisation acquired without a liberation struggle to confront and dismantle the colonial-apartheid power structure and its values and institutions rooted in white supremacy and racial capitalism can only result in an inauthentic and hollow experience of freedom and democracy.[15] Both of these writers are central at least to my own work, and clearly defy Roux's description of this position as a culturalist grievance derived from Latin American literature. More on this will follow in the next section.

Most indispensable to the current formation of the critical constitutional narrative are Ndumiso Dladla, Anjuli Webster and Sanele Sibanda, three Pretoria-based Africanist scholars working via disparate channels of liberation philosophy. Dladla and Webster's respective and joint projects have shown by way of a critique of the disciplines of history, anthropology and philosophy that the South African post-1994 constitutional order remains historically and symbolically bound to the will of the conqueror. Insisting on understanding colonial conquest as an interminable process, structure and relation, they trace the non-realisation of historical justice in the form of economic, political and intellectual sovereignty to the fact that the constitutional transition of 1994 upheld rather than terminated the right of conquest that the conquerors and colonial architects of South Africa have consistently asserted as their unlawful prerogative.[16] Sibanda, who Roux rightly counts but also misnames as a culturalist, has continued to develop his critique of court-centric articulations of transformative constitutionalism. Building on his earlier work on the pitfalls of transformative constitutionalism in the context of poverty eradication, Sibanda together with Ngwako Raboshakga have painstakingly documented how the accumulation and preservation of white economic interests was the central motor of the 1910 and 1994 South African constitution-making moments.[17]

I also suspect that Roux's description of the "culturalist" narrative would also be severely undermined if he had recourse to at least a more representative sample of the writings of some of the authors he places in that position: (1) Mogobe Ramose's work on an ubuntu conception of law and its relationship to economic and social justice; his clear rejection of colonial racial logics in favour of the principle of African humanness, and his concern with overcoming economic bondage and reviving popular sovereignty as twin

15 *Mabogo P. More*, Fanon and the Land Question in (Post)Apartheid South Africa in: Nigel C. Gibson (ed.) Living Fanon: Global Perspectives, New York 2011, p. 175.

16 See *Ndumiso Dladla* / *Anjuli Webster*, Who Conquered South Africa? Neocolonialism and Economic Sovereignty, African Economic History 52 (2024), pp. 7-38.

17 *Sanele Sibanda* / *Ngwako Raboshakga*, A Question of Underlying Interests: Economic Justice, Constitutional History and the capture of South African State by White Economic Interests, Law, Democracy and Development 27 (2023), p. 539.

exigencies of an anticolonal constitutional praxis;[18] and (2) Tshepo Madlingozi's critique of the material, symbolic and discursive violence inherent in top-down transitional justice discourses alongside his insistence on social movements as sources fort he development of radical legal and constitutional visions of justice and repair from below.[19] A close survey of this literature would leave one rather bewildered, if not slightly offended, by Roux's description of these two scholars' work as a conservative plea for ethnonationalist or nativist balkanisation. If Roux is to accuse these scholars of avoiding "reasonable questions" regarding alternative principles of social and political re-ordering, he would need to read more widely, more carefully, and indeed in his own parlance, more charitably.

The ventriloquist style of Roux's paper betrays the obvious impression that Roux himself is best read in the position of "LPN". In that dialogue, we see LPN appearing as the rational inquisitor, surgical in analysis and generous in interpretive capacities, demanding concessions and instructing his interlocutor in the arts of persuasive argument. CGN, for their part, plays the role of paranoid litigant, prone to excitability and cynicism – "melodramatic", and even "silly" by LPN's standards. It is difficult to understand how such a style enables rather than frustrates charitable dialogue. Dialogue is after all best left to two actually living people. Roux twice refers to the culturalist / decolonial narrative using the term "dangerous", signalling some anxiety and distress over the waning purchase and legitimacy of liberal democracy and the disintegration of its unqualified veneration. Why would an ardent liberal democrat such as Roux be troubled by the fact that liberal constitutionalism must contend with the hard social and political questions of the present and come to terms with its own long-ongoing historical entanglement with slavery, colonialism, racism and imperialism? It seems apt to recall an observation Wendy Brown made nearly two decades ago:

Anxiety about critique, reduction of it to dismissal or mere negativity is ubiquitous in contemporary political and legal theoretical culture today; it is as if we fear losing any object that we scrutinize too closely or whose ambivalent or corrugated character we expose to the light.[20]

18 See among others *Mogobe B. Ramose*, African Perspective on Justice and Race, https://them.polylog.org/3/frm-en.htm (last accessed on 23 July 2024); Philosophy and Africa's Struggle for Economic Independence, Politeia 25 (2006) 25; Reconciliation and Reconfiliation in South Africa, Journal of African Philospohy (2012), p. 23.; *Motho ke Motho ka Batho*, An African Perspective on Popular Sovereignty and Democracy in: Leigh K. Jenco et al. (eds.), The Oxford Handbook of Comparative Political Theory, New York 2020, p. 262.

19 *Tshepo Madlingozi*, On Transitional Justice and the Production of Victims, Journal of Human Rights Practice 2 (2010), pp. 208-228; *Tshepo Madlingozi*, Post-apartheid Social Movements and the Quest for the Elusive "New" South Africa, Journal of Law and Society 34 (2007), p. 77.

20 *Wendy Brown*, Revaluing Critique: A Response to Kenneth Baynes, Political Theory 28 (2000), p. 471.

C. "The first attack is an attack on culture"[21]: culture, materiality and decolonisation

> *"What is serious is that "Europe" is morally, spiritually indefensible."*[22]
> *"And I say that between colonization and civilization there is an infinite distance; that out of all the colonial expeditions that have been undertaken, out of all the colonial statutes that have been drawn up, out of all the memoranda that have been dispatched by all the ministries, there could not come a single human value."*[23]

Let us now come to Roux's curious election of the terms "culturalist" and "decolonial" to describe the antagonists of the liberal progressive narrative. In his account, the appropriateness of the term stems from the fact that this counter-narrative defines the colonial problem in terms of a struggle by a culturally homogenous colonised community to terminate colonialism and re-institute an autochthonous legal and political order. It is presumably culturalist also because it isolates "culture" as the key locus of anti-colonial struggle. It is by now inarguable that cultural domination and epistemicide are central features of the colonial and settler-colonial procedure. To secure their unlawful sovereignty, colonial regimes seek to dominate not only the lands and bodies of colonised worlds but also the being, consciousness and memory of its subjects, assembling systems – of law, religion, education, psychology, and socialisation – that violently incorporate the colonised into an alien life-world. In pithy terms, we might say that the "colonial state" is coterminous with a "state of colonisation".[24]

This historical fact makes the pejorative label "culturalist" all the more discomfiting in both its dismissal of the powerful cultural dimension of the colonial project but also in its mischaracterisation of anticolonial critique as concerned with the "merely cultural". The term "culturalist" borrows from several strands of thought. First, it derives from a liberal civilisational conceit that views Western culture as the normative benchmark, as the unmarked master-culture, against which other cultures come to be positioned as backward, savage and underdeveloped and hence dubious sources of modern social organisation. In this way liberalism presents itself as the source of universal enlightenment values and seeks to defend these against the particularistic and "ethnonationalist" impulses of inferiorised cultural traditions. In this formulation, culturalism is usually paired with its defamed siblings, "nativism" and "ethnophilosophy", as the names for African and black scholarship's alleged nostalgic aspiration to closure. Second it draws from a class-reductionist Marxist conceit positing especially Pan-Africanist and black radical ideologies as "identitarian",

21 *Cedric Robinson*, Notes Towards a 'Native' Theory of History, Review (Fernand Braudel Center) 4 (1980), p. 45.

22 *Aimé Césaire*, Discourse on Colonialism, New York 1972, p. 32.

23 Ibid., p. 34.

24 See *Robin D.G. Kelley*, The Rest of Us: Rethinking Settler and Native, American Quarterly 69 (2017), pp. 267-276; *John L. Comaroff*, Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions, Social Identities 4 (1998), pp. 321-361.

concerned with the symbolic, cultural, linguistic and epistemic dimensions of social reality to the exclusion of the material, economic and political formations subtending systems of domination. In a clumsy rehearsal of the famous Marxian base-superstructure metaphor, culture denotes the superstructural and ideational derelictions of power, distracting the "culturalist" from the real, material issue of economics, politics, and institutions. Inherent to this particular line of argument is the inexplicable erasure of the extensive thematic significance of concepts such as racial capitalism, the slave trade, underdevelopment and dependency, the land question, economic sovereignty, neocolonialism and neoliberalism in the anti-colonial archive.

Both of these conceits are present in Roux's paper and have the effect, intended or not, of denying the cultural situatedness of both liberalism and Marxism, which is to say a denial of the fact that they are premised on a social ontology and philosophical anthropology formed in a particular European time and space, shaped by the particular Occidential predicaments and priorities, and formed against racial Others.[25] This then leads to a second error of presenting anticolonial critiques of Eurocentric universalism as holding a "dogmatically rejectionist attitude to foreign influence". This is simply a reductive caricature. What the anticolonial tradition rejects is foreign *domination* not simply foreign *influence*. Collective self-determination as the telos of the anti-colonial struggle denotes the right and ability of a community or demos to govern itself according to norms, institutions and values decided by and for itself and not imposed by their historical oppressors.

In the case of Anton Lembede's African Nationalism, he is emphatic that the work of building a liberated African future would be intercultural, borrowing as needed from the best of Western and Eastern cultures suitably adapted to the African context.[26] What Lembede does decry and renounce is "superficial or artificial mimicry [of other cultures] with no social roots",[27] the wholesale "importing of foreign ideologies into Africa"[28] and the "one-way absorption" of Western and 'white' cultural standards.[29] Further afield in the black world, Aime Cesaire for his part admits that "it is a good thing to place different civilisations in contact with each another" (what he also calls the blending of different worlds), warning that a "civilisation that withdraws into itself atrophies".[30] Yet his point is precisely that colonisation does not bring cultures and civilisations into contact but rather, through its "sordid racism", brutally destroys this possibility.

In the same breath, the accounts of political ontology and political subjectivity in Robert Sobukwe's Pan-Africanism and Steve Biko's black consciousness are structured

25 See *Tsenay Serequeberhan*, Contested Memory: The Icons of the Occidental Tradition, Trenton 2007.

26 *Gail M. Gerhart*, Black Power in South Africa: The Evolution of An Ideology, Berkeley 1978, p. 64.

27 Ibid., p. 64.

28 Ibid., p. 65.

29 Ibid., p. 66.

30 *Cesaire*, note 22, p. 33.

by historical-material-political forces and not some Absolute Cultural Spirit. Sobukwe's Africans are constituted by the fact of national oppression arising from conquest and dispossession and thus in relation to their relative claims of title to territory. Similarly, Biko's Blacks are, in his own words:

> *[T]hose who are by law or tradition politically, economically and socially discriminated against as a group in the South African society and identifying themselves as a unit in the struggle towards the realization of their aspirations.*[31]

Might the problem here lie in Roux's collapsing of several anti-colonial traditions – African philosophy, African Nationalism, Pan-Africanism, Black Consciousness – under the protocols of the Latin American decoloniality tradition? And might this be related to Roux's desire to signal a warning about what he observes as the ethnonationalist and fascist reversal of decoloniality literature in India as a cautionary tale for South Africa? Is this a case of comparative constitutional theory by hyperbole? Is it the case again that where all forms of anti-racist dissent among Black people were once derided as "communism", they are now labelled as "decolonial"? Both Ramose[32] and Suren Pillay's[33] critiques of the adoption of decoloniality in South Africa and Africa are instructive correctives to Roux's hasty categorisation.

D. Charterism and the redemption of settler-colonial law and order

> *[W]henever colonialism sets in with its dominant culture, it devours the native culture and leaves behind a bastardized culture that can only thrive at the rate and pace allowed it by the dominant culture.*[34]

In his account of the liberal progressive narrative, Roux joins writers such as Tembeka Ngcukaitobi[35] and Andre Odendaal[36] in claiming that contrary to its "culturalist" depiction as a Western and colonial import, the post-1994 South African constitution owes its heritage to the anti-colonial legal praxis of the African National Congress. In terms of this praxis, the African turn to constitution-making was the product of a singularly African agency that generated an indigenous democratic tradition of constitutional justice and human rights. Roux is however refreshingly forthright in accepting that constitutionalism

31 *Steve Biko*, I Write What I Like, Johannesburg 1978, p. 52.

32 *Mogobe B. Ramose*, Critique of Ramon Grosfoguel's 'The Epistemic Decolonial Turn', Alternation 27 (2020), p. 271.

33 *Suren Pillay*, The Problem of Colonialism: Assimilation, Difference, and Decolonial Theory in Africa, Critical Times 4 (2021), pp. 389-416.

34 *Biko*, note 31, p. 46.

35 *Tembeka Ngcukaitobi*, The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism, Cape Town 2018.

36 *André Odendaal*, Comrade President: Oliver Tambo and the Foundations of South Africa's Constitution, Cape Town 2022.

as we know it belongs to the Western legal tradition and thus bears the birthmark of Western colonialism and imperialism. We therefore do not need to rehearse the conceptual unfoldment of constitutionalism from its Greco-Roman roots, through its medieval inflections through the idea of "mixed government" on the way to its French and American revolutionary and Enlightenment apotheosis in the world-historical dramas of Europe's "long nineteenth century".[37] Nor do we need to list the principal cast of European jurists and Western philosophers under whose pen the idea of constitutionalism was forged and refined.

What Roux claims however is that this Western birthmark of constitutionalism was dramatically faded by the creative and authentic adaptation of Western liberal constitution to the local postcolonial context. Through this indigenous political alchemy, Roux insists, an autochthonous tradition of constitutionalism emerged as the basis for a rich body of Southern constitutional jurisprudence profoundly disalienated and deprovincialized from its colonial roots. This achievement, Roux implies, is both a credit to the imaginative emancipatory force of the anti-colonial struggle waged by the ANC and a vindication of the putatively universal and progressive power of the Western liberal tradition.

From the view of the blood-soaked history of Western modernity, this argument is confounding for several reasons. First, it fails to explain the specific indigenous African political and cultural epistemological sources drawn upon by these African constitution-makers – and most importantly how their legal strategies undermined the colonial assertion of the superiority of the Western legal paradigm and its attendant denigration of African law. Second, it is awkwardly silent on the well-recorded fact that the nuts-and-bolts legal drafting and technical expertise that crafted the present constitutional text and jurisprudence was largely dominated by an influential coterie of left-liberal human rights lawyers hailing mainly from the English-speaking law schools with strong leanings to Euro-American schools of legal thought.[38] Third and most devastatingly, these arguments simply bypass the fact that the founders of the ANC were not simply ambivalent about Western jurisprudence and the colonial state but in important respects acceded to their status as colonial subjects under the historical, political and psychic constraints imposed by the colonial reality. Indeed, the history of the ANC exhibits an unbroken commitment to the valorisation of the law of the conqueror and a belief that colonial institutions could serve as vehicles of freedom. This is because what they protested were the excesses of colonial laws and institutions (discrimination and exclusion) and not their legitimacy (right of conquest) as such.

Consider in this regard the petition of 20 July 1914 to the British monarch George V, wherein the leaders of the SANNC, the forerunner to the ANC, interpellated themselves as: "Your Majesty's most loyal and humble subjects, who have always been loyal to Your

37 *Martin Loughin*, Against Constitutionalism, London 2022, pp. 27 – 37; 95.

38 *Timothy Gibbs*, Mandela, Human Rights and the Making of South Africa's Transformative Constitution, Journal of Southern African Studies (2019), pp. 1138, 1146-1147.

Majesty's throne and person and still desire to continue being loyal to Your Majesty's throne and person."[39] Indeed the central lament of the petitioners (who openly self-identify as "*former* owners of the land" in their petition) is the betrayal of the promise of colonial citizenship. They unequivocally concede that "when their forebears were conquered by Your Majesty's might…", they "loyally and cheerfully submitted to Your Majesty's sway in the full belief that they would be allowed to possess their land as British Subjects."[40] Half a century later in his famous opening statement from the dock in the Rivonia Trial, the greatest son of this tradition echoed the petitioner's admiration for colonial legal systems: "I have great respect for British political institutions, and for the country's system of justice. I regard the British Parliament as the most democratic institution in the world…"[41] For all of its "creativity" and "agency", this much-lauded African constitutional heritage of the ANC was not geared towards the abolition of the colonial state or the material dismantling of white supremacy - or the revitalisation of African cosmologies or philosophies of law for that matter. It signalled instead the defeat and subjugation of African law and indigenous sovereignty – a tragic fate and living injustice shared by indigenous peoples across the world.

This picture becomes even more damning when one takes stock of the intersection of the liberal values of domestic constitutional polities with a global market-based neoliberal order in reinforcing power relationships established through the long history of Western expansion. In this particular frame, a growing body of scholarship has been tracking how rule-of-law constitutionalism became an instrument for safeguarding private property and the market economy both locally and globally, centrally through constraining the revolutionary potential of popular sovereignty – resulting in formal political decolonisation without economic or cultural self-determination in the former colonies.[42] By reducing African anti-colonial thought and practice to the redemption, extension, realisation, and application of existing settler-colonial and imperial legal traditions, to cleaning up the coloniser's mess,

39 Document 35. Petition to King George V, from the South African Native National Congress, July 20, 1914, in: Thomas Karis and Gail M. Carter (eds.), From Protest to Challenge: A Documentary History of African Politics in South Africa 1882 – 1964, Volume 1: Protest and Hope 1882 – 1934, Stanford 1972, p. 125.

40 Ibid, p. 126.

41 Nelson Mandela's Statement from the Dock at the Opening of the Defence Case in the Rivonia Trial https://www.un.org/en/events/mandeladay/court_statement_1964.shtml (last accessed on 23 July 2024).

42 See in this regard: *Quinn Slobodian*, Globalists: The End of Empire and the Birth of Neoliberalism, Cambridge 2018, p.81; *James Tully*, The Imperialism of Modern Constitutional Democracy in Martin Loughlin / Neil Walker (eds.), The Paradox of Constitutionalism, Oxford 2007, p. 327; *Mahommed Sesay*, Domination Through Law: The Internalization of Legal Norms in Postcolonial Africa, London 2021; *Lars Cornelissen*, Neoliberalism and the Racialized Critique of Democracy, Constellations 27 (2020), pp. 350-353; *John S. Saul*, Global Recolonization and the Paradox of Liberation in Southern Africa in: Arianna Lissoni et al. (eds.), One Hundred Years of the ANC: Debating Liberation Histories Today, Johannesburg 2012, pp. 347 – 365.

does Roux's liberal progressive narrative not simply instantiate a Eurocentric self-referentiality in which Euro-modern jurisprudence is once again the starting and end point of political and legal knowledge?[43]

E. Coda: Who's afraid of constitutional abolitionism?

> *Law's complicity with political oppression, violence and racism has to be faced before it is possible to speak of a new beginning for legal thought, which in turn is the necessary precondition for a theory of justice.*[44]

I have in earlier writings engaged the problem of the political constitution of South Africa under the title of Azanian political thought, following the Pan-Africanist and Black Consciousness tradition's adoption of Azania as the name for a liberated and reconstituted "South Africa".[45] In the context of jurisprudence in the afterlife of colonial-apartheid, the challenge posed by the Azanian tradition has been articulated in terms of an abolitionist critique of the present constitution. This critique itself is an attempt to grapple with the continuity and persistence of racially-determined social divisions and power relations which bring into question the political temporality that designates the present "South Africa" as substantively "post-apartheid". Constitutional abolitionism is also a response to the prevailing discourse of constitutional optimism and its monumentalising celebration of the democratic transition as well as its casting of the constitutional text as the supreme juridical rationality, moral lodestar and political blueprint of and for "South Africa". Scholars associated with the decolonisation or abolitionist critique have drawn on the Azanian tradition to issue a three-fold challenge to this position, arguing instead that the post-1994 constitution (1) is an evolutionary legal, political and epistemic re-arrangement of "white South Africa" – an adjustment or "makeover" (democratisation) rather than a fundamental rupture (decolonisation); (2) sustains colonial logics of state formation, political economy and racialisation and upholds the erasure of African cosmologies, legalities and epistemologies and (3) ultimately naturalises and normalises the settler-created world (or the conqueror's South Africa) as the only possible world.

As one line of critical constitutional theory has argued, constitutionalism does not in the first place have a natural or organic relationship to democracy (qua popular sovereignty).[46] If the tension between constituted power and constituent power in constitutional theory is to be taken seriously, we see that constitutions actually aim to contain and translate popular

43 See *Adom Getachew*, Universalism after the Postcolonial Turn, Political Theory 44 (2016), p. 821-845.; *Adom Getachew* / *Karuna Mantena*, Anticolonialism and the Decolonization of Political Theory, Critical Times 4 (2021), pp. 359-388.

44 *Costas Douzinas* / *Adam Gearey*, Critical Jurisprudence: The Political Philosophy of Justice, Oxford 2005.

45 *Joel Modiri*, Azanian Political Thought and the Undoing of South African Knowledges, Theoria 62 (2021), pp. 42-85.

46 See *Roberto Gargarella*, The Law as a Conversation Among Equals, Cambridge 2022, p. 51.

political visions and aspirations into the institutional and discursive parameters of liberal democracy. As a result of that containment and translation, what we get is an ostensibly ordered and institutionally stable society but not a just and liberated one. This interval or opposition between justice and democracy, which has brought post-1994 South Africa into conceptual and political crisis, is precisely what the emancipatory political-constitutional visions of the Africanist and Black Consciousness insurgents sought to address and overcome. These radical anti-colonialists for their part predicted with disturbing prescience that a liberal-reformist reconfiguration of the political order without a *reconstitution* of socio-economic relations and identities would necessarily fail to terminate the multi-century historical contradictions of colonial-apartheid. This in turn would result in the core problem that is the proper scene of Roux's debate: the radical lack of a substantive material, social and yes, cultural basis on which the legitimacy and coherence of South Africa's postcolonial constitutional order can rest. To malign as "populism" renewed attempts across Black intellectual and political spaces to re-articulate historical justice and self-determination as essential *preconditions* (and not simply deferred aspirations) for democratic constitutionalism only reinforces the view of constitutionalism as an ideological impediment to black majority political power and freedom.

What Roux misses is that the object of critique is not primarily the constitutional text in its administrative and juridical facticity, but rather the entire enterprise of a constitutional transition premised on democratisation without decolonisation and reconciliation without justice. What Roux does get right however is exactly that this abolitionist horizon stretches well beyond the mere replacement of the constitutional text but demands a more fundamental reconstitution of South Africa at the level of its historical structures, political and economic relations, and governing onto-epistemes. In this way, constitutional abolitionism is a radical and reparative democratic project that will not be possible without the remaking of South African subject positions and the re-education of political desire, knowledge, responsibility and agency towards a post-conquest future. This is far cry from the confusions presently playing out in the party-political arena in South Africa, and departs consciously from the simplistic diagnosis of South Africa as a model constituional democracy in the throes of a populist and kleptocratic regression. The logical conclusion of this abolitionist analytic is that the present dis-order and dis-ease of constitutionalism that rightly concerns both Roux and I emanates from the unresolved historical and structural contradictions of domination, violence, and hierarchy which in turn are *constitutive* of the prevailing social relations. It is these contradictions that inflict deep factures in the universalist, monological, abstract and idealist character of constitutions.[47] One inescapable conclusion from this

47 *Nimer Sultaney*, Marx and Critical Constitutional Theory in: Paul O'Connell and Umut Özsu (eds.) Research Handbook in Law and Marxism, Cheltenham, Northampton 2021, p. 213: "[T]he fundamental contradiction consists in the blockage of social emancipation, [and] constitutional incoherence and instability are better understood as emanating from the unresolved paradox of constitutionalism".

particular angle then is that resisting and altering these intractable social relations may indeed require a different constitutional text, culture and system altogether.

Roux's and my narratives *diverge* in that sense.