ARTICLE

CONSTITUTIONAL COLONIALISM AND DECOLONIZATION: MOVING TOWARD A DECOLONIAL AFRICAN CONSTITUTIONAL FUTURE

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ABSTRACT

This Article is an attempt at theorizing Africa's colonial constitutional legacies and post-colonial constitutionalism. The central argument of this article is that constitutional law in Africa is a colonial tool that was used to legalize the subjugation of Africans and Africa, and a post-colonial necessity for the "self-determination and statehood" of newly-minted African states, while at the same time, it remains a decolonial battlefield of epistemic colonization. This Article adopts a broader conception of colonialism that extends beyond the 19th-century understanding of European colonialism and interrogates constitutional law as both a colonial tool and an act of self-determination in the experiences of Third World and Settler colonialism. In building the central argument, this Article will demonstrate that the call for decolonized African constitutions and the current dissatisfaction with African constitutions stem from the colonists' erasure of what I refer to as the precolonial laws and epistemologies of precolonial societies. Furthermore, this Article

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suggests that what is needed is not a dialectical, comparative North-South approach to comparative constitutional law, but rather, a multifocal and inward-looking methodology that evaluates the past, present, and future of Africans by Africans, for Africans.

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I. INTRODUCTION

The need for a decolonial constitution and its role as an essential step in the decolonization process have recently garnered the attention of activists and scholars of constitutional and legal history. This increased interest and engagement in decolonial constitutionalism result from renewed local and global social

movements. For instance, the #RhodesMustFall movement criticizes South Africa's contemporary constitution as a tool that "has systematically been used to deter irrepressible urges by black South Africans to challenge racism and violence."[1] The Ufungamano Initiative in Kenya, also known as the social movement of movements, is another example of social movements challenging the constitutional order.[2] The Ufungamano Initiative galvanized multi-ethnic, multi-religious, multi-generational, and multi-class social movements, widening the discourses of participation in the constitutional order.[3] Thirdly, the 2010 Arab Spring in Tunisia is an example of a social movement that led to the 2014 Tunisian Constitution that some scholars, such as Tofigh Maboudi, refer to as the "most progressive constitution of the Arab world."[4]

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1. Rhodes Must Fall UCT: Mission Statement, THE POOR PRINT (Apr. 28, 2017), https://thepoorprint.com/2017/04/28/rhodes-must-fall-uct-mission-statement/ [https://perma.cc/AM2C-MWZ6] (For the #RhodesMustFall activists, the end of Apartheid in South Africa led to a formal equality of all South Africans with equal civil and political rights. However, the #RhodesMustFall activists criticize the underdevelopment of black and brown South-African societies and the South-African constitution for failing to introduce redistribution mechanisms to reduce the ever-increasing gap between the economic capabilities of black and brown South Africans on the one hand and white South Africans on the other.).

2. J.M. Mati, *Social Movements and Socio-Political Change in Africa: The Ufungamano Initiative and Kenyan Constitutional Reform Struggles (1999–2005)*, 23 VOLUNTAS 63, 65 (2012) ("Arguably, no single movement in Kenya's recent history achieved as much success in the constitution reform project, as did the Ufungamano Initiative"); *see generally* Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 SUFFOLK U.L. REV. 27 (2005) (Balkin discusses how social movements tend to have a more gradual approach to constitutional change. According to Balkin, social movements shape constitutional change by influencing public opinion and the party system, which in turn influences the appointment of judges who are sympathetic to the social movement. Although Balkin's study was based in the United States, his theory can provide an alternative explanation for the dissolution of the Ufungamano Initiative.).

3. Jacob Mwathi, The Power and Limits of Social Movements in Promoting Political and Constitutional Change: The Case of the Ufungamano Initiative in Kenya (1999-2005) (May 23, 2012) (thesis, University of Witwatersrand, Johannesburg, South Africa) (on file with CODESRIA), https://publication.codesria.org/index.php/pub/catalog/view/891/1934/5669 [https://perma.cc/J8HU-JEWL].

4. Tofigh Maboudi, *Reconstituting Tunisia: Participation, Deliberation, and the Content of Constitution*, 73 POL. RES. Q. 774, 774 (2020). For a background on the Arab Spring in Tunisia, see Thessa Lageman, *Remembering Mohamed Bouazizi: The Man Who Sparked the Arab Spring*, AL JAZEERA (Dec. 17, 2020), https://www.aljazeera.com/features/2020/12/17/remembering-mohamed-bouazizi-his-death-triggered-the-arab [https://perma.cc/X94H-K4FE].

These social movements are unique not because the decolonization movement is new to Africa, but because they employ contemporary liberatory and decolonial language in the pursuit of a decolonized constitution. Without defining what a decolonized constitution would look like, these social movements signify the need for constitutions rooted in emancipation, redistribution, and participation. Despite their call for constitutional change and decolonizing the South African constitution, some of these movements—for instance, the #RhodesMustFall movement—have immediate and long-term demands that do not include constitutional changes or redistributive goals that extend beyond the walls of the University of Cape Town.[5] Others, like the Arab Spring in Tunisia, despite leading to constitutional reform through ratification of the 2014 Tunisian Constitution, as Olivia Rosenzweig has shown, fail to achieve a lasting change and have led to a 2021 consolidation of power by the Tunisian president.[6] Despite the current dissatisfaction that these social movements have not brought about grand and lasting change, what is evident is that Africans are dissatisfied with their current constitutional framework and seek decolonized constitutions.[7]

An analysis of Africa's decolonization movement, in general, and decolonial constitutionalism, in particular, must be contextualized through the various phases of oppression and their corresponding periodization. The 1960s anti-European decolonial constitutionalism, although not articulated in the same manner as the three social movements listed above, approaches decolonial constitutionalism in a distinctly different manner. One of the

5. Rhodes Must Fall UCT, *supra* note 1. The #RhodesMustFall movement sought an immediate short-term goal: "removal of the [Cecil John Rhodes] statue from [University of Cape Town] campus grounds, and that the university investigation of student protestors be withdrawn." *Id.* Similarly, their long-term goals also emphasized actions that the University of Cape Town should take rather than constitutional or policy changes at the governmental level. *Id.*

6. Olivia Rosenzweig, *The Current Reality of Post-Arab Spring Constitutional Reforms in Morocco and Tunisia*, CORNELL INT'L L.J. (Dec. 29, 2023), https://publications.lawschool.cornell.edu/cilj/2023/12/29/the-current-reality-of-post-arab-spring-constitutional-reforms-in-morocco-and-tunisia/ [https://perma.cc/688W-ZYF5].

7. Chidi M. Amaechi & Obinna U. Muoh, *Constitution Building as a Panacea to Identity Conflicts in Africa: The Case of Nigeria*, 8 MEDITERRANEAN J. SOC. SCI. 17, 17 (2017) (discussing how citizenry dissatisfaction with African Constitutions leads to identity-based conflicts in Nigeria).

approaches it took was to decry the division of Africa into North Africa and Sub-Saharan Africa.[8] For instance, the first Libyan Constitution noted that the "Kingdom of Libya is . . . a portion of the African continent."[9] This seemingly obvious provision, as His Royal Highness Hassan Rida of Libya noted, was included in the Libyan Constitution to counter what he called an "imperialistic attempt to split Africa by using tendentious designations such as 'Africa south of the Sahara.'"[10] His Royal Highness Hassan Rida further noted that the designation of "Africa south of the Sahara" is a colonial construct that aims to separate Africa from its northern territories and overlooks trans-Saharan connections.[11] Similarly, Leopold Sedar Senghor, the first President of Senegal, criticized the colonial division of Africa into North and South of the Sahara, and argued for a continental unity based on the symbiotic identities of African-ness and Arab-ness.[12] Despite these efforts, the division of Africa into North Africa and Sub-Saharan Africa remains a persistent feature in the policies of international organizations today.[13]

The other approach taken in the 1960s and continuing to the present has involved renouncing colonial names and promoting spatial and linguistic decolonization. For instance, H.E. David Dacko celebrated the renaming of his country from the Territory of

8. For a discussion of what North Africa and Sub-Saharan Africa mean from a geographical sense, see Mohamed Amer Meziane, *The Invention of North-Africa*, 26 SYMPOSIUM: CAN. J. CONTINENTAL PHIL. 189 (2022).

9. LIBYA CONST., 1951, art. 3, https://constitutionnet.org/sites/default/files/1951_-_libyan_constitution_english.pdf [https://perma.cc/CX24-U6WC].

10. His Royal Highness Hassan Rida, Libya, Address at the 1963 African Summit (May 23, 1963), *in* U.N. ECON. COMM'N FOR AFR., CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS, 1963–2013, at 73 (2013).

11. *Id*.

12. Léopold Sédar Senghor, *The Foundations of "Africanité": or "Négritude" and "Arabité" (1967)*, 3 CRITICAL INTERVENTIONS 166, 166 (2009) (claiming that Africanness is not a distinct identity but rather "a symbiosis of the values of Arabism and the values of Negritude").

13. *See* Country Insights, U.N. Development Programme, https://hdr.undp.org/data-center/country-insights#/ranks [https://perma.cc/78XR-BGQ5] (last visited July 6, 2025) (listing 46 African states as belonging to sub-Saharan Africa); *see also* Zainab Usman, *Africa Matters to the World Bank's Global Role and Here's How*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 2023), https://carnegieendowment.org/posts/2023/04/africa-matters-to-the-world-banks-global-role-and-heres-how?lang=en ("Today, there are twenty-three middle-income countries in sub-Saharan Africa (and five countries in North Africa) that are able to borrow from IBRD.").

Ubangi-Chari to the Central African Republic.[14] For Dacko, the renaming of his country was not just about changing the name but also about creating a sense of belonging to the Central African Republic citizens, who "did not belong to the natural basin of the Ubangi River."[15] However, post-colonial renaming, as a decolonization process, was at times a source of controversy.[16] For instance, in Zimbabwe, the renaming of public spaces failed to create equality and tended to emphasize Shona, the ethnic group of the post-independence presidents of Zimbabwe.[17]

The other prominent approach of the 1960s, as well as the sentiment of various contemporary African social movements and decolonization scholars, is rooted in the belief that Africa's liberation is not yet complete. Sekou Toure noted that most African countries still struggle to "eradicate from their present condition the consequences of foreign domination."[18] This raises the existential question of whether decolonization is entirely possible, and what role we, as comparative constitutional legal scholars, ought to play in decolonizing African constitutionalism.

What is also common among social movements of the present and the past is a lack of consensus on the conceptualization of colonialism. Hence, the four taxonomies of colonization emanate from the lack of a coherent understanding of what colonialism is and its different manifestations across African societies.[19] Colonization is commonly defined as subjugating people, nations, and territories to foreign domination, exploitation, and denial of fundamental human rights.[20] Scholars and practitioners created

14. H.E. David Dacko, President of the Central African Republic, Address at the 1963 African Summit (May 23, 1963), *in* U.N. ECON. COMM'N FOR AFR., CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, at 25, (2013).

15. *Id.*

16. *See* Caili Forrest, *What's in a Name? A Feminist Reflection on Street Name Changes in Durban*, 32 AGENDA 53 (2018) (exploring the contestation of street renaming in Durban through a feminist lens).

17. *See* Sambulo Ndlovu, *Decolonisation of the Zimbabwean Linguistic Landscape Through Renaming: A Quantitative and Linguistic Landscaping Analysis*, 21 AFR. IDENTITIES 324 (2021) (discussing renaming of public spaces in Zimbabwe).

18. H.E. Sekou Toure, President of the Republic of Guinea, Address at the 1963 African Summit (May 23, 1963), *in* U.N. ECON. COMM'N FOR AFR., CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, at 56, (2013).

19. *Id.*

20. *See generally* Erin Blakemore, *What is Colonialism?*, NAT'L GEOGRAPHIC (Oct. 6, 2023), https://www.nationalgeographic.com/culture/article/colonialism [https://perma.cc/C34Y-7CUV]; Edward McWhinney, *Declaration on the Granting of Independence to*

four taxonomies of colonization: (1) Western Colonialism, (2) Settler Colonialism, (3) Ideological colonialism or Neo-Colonialism, and (4) Third World or Non-Western Colonialism.[21] Western Colonialism is when European colonists subjugate people and territories separated by oceans and seas.[22] For the colonial powers, this process of subjugation typically culminated in the enactment or amendment of the constitution to extend the powers of the colonists over the subjugated African people and territories. Settler Colonialism refers to the process by which colonists create a stratification between settler colonists and Africans, with the latter violently made invisible and dehumanized.[23] The third taxonomy of the African colonial experience is what Kwame Nkrumah coined as neo-colonialism, which refers to the process by which former European colonial powers retain significant political, economic, social, and cultural control over their former territories to achieve their imperialistic extractive goals.[24] Third World or Non-Western Colonialism refers to non-Western powers' subjugation of people and territories, which is often used to describe the experience of Eritrean society under Ethiopian rule.[25]

What is typical of these taxonomies of colonialism is that colonization was a form of subjugation that took legal form both domestically through constitutions, and internationally through treaties such as the Berlin Conference or UN resolutions in the case of Third World Colonialism.[26] This Article will focus on the

Colonial Countries and Peoples, AUDIOVISUAL LIBR. INT'L L. (Dec. 14, 1960), https://legal.un.org/avl/ha/dicc/dicc.html [https://perma.cc/G7SR-ZGDD].

21. *See generally* Rupert Emerson, *Colonialism*, 4 J. CONTEMP. HIST. 3 (1969); Joel M. Modiri, *Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence*, 34 S. AFR. J. ON HUM. RTS. 300 (2018); Shelton U. Kodikara & Kashi Prasad Misra, *Documents on Sri Lanka's Foreign Policy, 1947-1965*, at 38–39 (Amal Jayawardane ed., 2004); Lydia Walker, *Decolonization in the 1960s: On Legitimate and Illegitimate Nationalist Claims-Making*, 242 PAST & PRESENT 227, 252–53 (2019).

22. *See* Emerson, *supra* note 21.

23. *See* Modiri, *supra* note 21, at 303.

24. *See* KWAME NKRUMAH, NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM (1965).

25. *See* Walker, *supra* note 21.

26. *See* Kenneth J. Twitchett, *The Colonial Powers and the United Nations*, 4 J. CONTEMP. HIST. 167, 168 (1969) (discussing how international regulation of colonialism predates the United Nations and extends back to 1815 when eight European Powers under the rubric of Vienna Congress decided that colonial ambitions are determined by consensus among the eight powers); *see also* A. Arthur Schiller, *Eritrea: Constitution and Federation with Ethiopia*, 2 AM. J. COMP. L. 375 (1953) (discussing the role of the United Nations post-the end of Italian colonization and its chronological federation to Ethiopia); Okbazghi

former—the link between domestic constitutions and colonization. Constitutions symbolized and realized the degradation of Africans from citizens to subjects and their land to the colonial territory. This Article subscribes to a broader definition of colonization as a form of domination and subjugation that transcended the nineteenth century experience of European colonization.[27] Despite the vast scholarly debate on the conception, racial, and geographical origins of colonialism, the text of contemporary constitutions either directly or indirectly ascribes colonization exclusively to European colonists, ruling out the ontological possibility that colonialism could be otherwise articulated.[28] That is not to say that the existing African constitutions have a limited understanding of the causes of colonialism. But the nineteenth century experience of European colonialism and racial domination is the most recent memory of post-colonial constitutionalism that shaped constitution-making.

Just as colonialism is conceptually complex, the process of decolonization and its relationship to constitutional law are also complex. Sabelo J. Ndlovu-Gatsheni differentiates between decolonization and decoloniality.[29] For Ndlovu-Gatsheni, decolonization resulted from the twentieth century anti-colonial movement, which led to decolonization but not necessarily to decoloniality.[30] I agree with Ndlovu-Gatsheni's dissatisfaction with

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Yohannes, *The Eritrean Question: A Colonial Case?*, 25 J. MOD. AFR. STUD. 643, 643 (1987) (discussing the lack of international recognition of Eritrean colonialism as a colonial experience).

27. Jörn Axel Kämmerer, *Colonialism*, MAX PLANCK ENCYCLOPEDIA INT'L L. (Jan. 2018), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e690?prd=MPIL [https://perma.cc/BV55-PF77].

28. For instance, the Constitution of Cuba states that the Cuban people thrived against the colonial conquest of Spanish imperialism, but it fails to acknowledge different forms of oppression that exist in Cuban society. *See* CONSTITUTION OF THE REPUBLIC OF CUBA, pmbl., 1976 (amended 2002); J. L. Guach-Estévez, *Manifestaciones de discriminación y racismo en la sociedad cubana actual* [Manifestations of Discrimination and Racism in Contemporary Cuban Society], 1 REV. TRANSDISCIPLINARIA DE ESTUD. SOC. Y TECNOLÓGICOS 41 (2021) (discussing racism and discrimination in contemporary Cuban society).

29. Sabelo J. Ndlovu-Gatsheni, *Decoloniality as the Future of Africa*, 13 HIST. COMPASS 485, 485 (2015).

30. *Id.* at 487 (claiming that African coloniality disguised as modernity continued beyond the 20th-century decolonization). Ndlovu-Gatsheni stated that "[w]hat happened as a consequence of decolonization is that the dismantling of direct colonial administrations did not give rise to a 'postcolonial world,' rather as noted by Ramon Grosfoguel, global coloniality ensued." *Id.*

decolonization as a periodic episode that concluded with the end of European colonization and Apartheid.[31] However, in this Article, I will use decolonization to encompass not only the end of the twentieth century European colonization and Apartheid rule in Africa, but rather to encompass epistemological, political, social, and economic end to oppression and domination in Africa's past and present. Therefore, in this Article, my engagement with colonization and decolonization is holistic and extends beyond the political decolonization of the 1960s to contemporary movements for decolonial constitutionalism in Africa.

This Article criticizes attempts to correlate decolonization with constitutionalizing. While the latter constitutionalism tends to inquire about how legal reform or constitutionalism might contribute to a democratic, rule-based, and just society, it has failed to capture the need for decolonization adequately.[32] If constitutional law attempted to capture the decolonizing effect of constitutionalism, it tended to center on two prongs: First, and simplistically, a new, post-colonial constitution would be the Constitution of Eritrea or South Sudan, for example, rather than the constitution of their colonizers. Therefore, by that mere fact, it is decolonial. Second, and erroneously correlating successful constitutionalism with broad and high statistics of public participation, the second prong fails to inquire if public participation is tantamount to a decolonized constitution.[33] In this

31. According to the International Convention on the Suppression and Punishment of the Crime of Apartheid (the "Apartheid Convention"), Apartheid is "a crime against humanity" and the term Apartheid includes "similar policies and practices of racial segregation and discrimination as practised in [pre-1991] southern Africa, shall apply to . . . inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them." United Nations, International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

32. *See, e.g.*, Duncan Ivison, *Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism*, 17 OXFORD J. LEGAL STUD. 253, 253 (1997) (discussing how Indigenous claims for self-government are not necessarily about secession but rather about rethinking the constitutions that establish regulatory norms); *see also* Firoz Cachalia, *Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal*, 34 S. AFR. J. HUM. RTS. 375 (2018) (analyzing the post-Apartheid South African constitution & noting that post-Apartheid constitutionalism does not necessarily mean decolonization in all its senses).

33. *See* Alfonso Renato Vargas-Murillo, *From Design to Practice in Deliberative Constitutionalism: Lessons and Challenges from the Chilean Constitutional Process (2021–2022)*, 7 FRONT. POL. SCI. 1 (2025), https://doi.org/10.3389/fpos.2025.1581326

process, comparative constitutional law justifies the "goodness" of participatory constitutionalism, while evading the ideational crisis of so-called comparative constitutional law experts without fully considering the impact of colonization on African constitutions and what a decolonial constitution is or ought to be.[34] Therefore, one could argue that the contemporary relationship between colonization and comparative constitutional law is likely a consequence of the crisis of constitutional law experts, specifically constitutional comparativists and comparative constitutional law methodologies, which fail to capture, recognize, and rectify the colonial impact of comparative constitutional methods. These two prongs, in combination, unequivocally reveal the long road ahead for a decolonized African constitution that ends all forms of colonial subjugation.

Given the complexity of the topic, this Article does not claim to be an exhaustive account of the relationship between colonization, decolonization, and constitutions. Rather, this Article proposes four core ways of thinking about colonization in comparative constitutional law. The first way attempts to understand how constitutional law legalized and justified African colonization. The second way aims to understand how contemporary African constitutions engage with and incorporate the concept of colonization in their constitutional text. The third way seeks to understand how comparative constitutional law may possess internal methodological biases that promote Eurocentric and Anglo-Saxon constitutional epistemologies. The fourth way, which at times proffers the same answers as the second way, attempts to understand how contemporary African constitutions engage with the concept of decolonization in their constitutional text.

[https://perma.cc/TCA8-7D2A] (discussing how public participation does not necessarily mean deliberative constitutionalism); *see also* Ran Hirschl & Alexander Hudson, *A Fair Process Matters: The Relationship Between Public Participation and Constitutional Legitimacy*, 49 L. & SOC. INQUIRY 2074 (2024) (arguing how there is no correlation between public participation and the normative contents of a constitution).

34. *See, e.g.*, Jan Amilcar Schmidt, *Mission Impossible?: Opportunities and Limitations of Public Participation in Constitution-Making in a Failed State—the Case of Somalia*, *in* PUBLIC PARTICIPATION IN AFRICAN CONSTITUTIONALISM 194 (Tania Abbiate, Markus Böckenförde & Veronica Federico eds., 2017) (lamenting the lack of public participation in the Somali constitutional process without analyzing the impact of colonialism in Somalia's constitutionalism).

These four core ways of thinking about the link between colonization, decolonization, and constitutionalism in Africa lead one to understand not only the different and varied experiences of subjugation on the continent, but also to uncover contemporary dissatisfaction with African constitutions. The central argument of this Article is that constitutional law in Africa is a colonial tool that was used to legalize the subjugation of Africans and Africa, and a post-colonial necessity for the "self-determination and statehood" of newly minted African states, while at the same time remaining a decolonial battlefield of epistemic colonization. In building the central argument, this Article will show that the call for decolonized African constitutions and current dissatisfaction with African constitutions is the result of how colonists wiped out what I call the precolonial Basic Law[35] and relegated it to the chthonic and static "customary law status." The post-colonial African legal order, like the colonial legal system, continued to relegate the laws, customs, and norms of Africans to the domain of the "customary," alternative, and backward systems. Even in the post-colonial constitutional reform efforts, the precolonial legal orders and institutions were marginalized and sterilized to conform to the colonial legal order. Therefore, the persistence of epistemic colonization in African constitutions remains a battleground for the decolonization movement, both practically in the constitution-making process, and methodologically in the selection and borrowing of normative and aspirational constitutional textual content; as well as epistemologically in centering African experiences. Again, this Article does not claim to proffer a holistic understanding of decolonizing African constitutions. Nor does it aim to be an exhaustive account of the epistemic colonization of African constitutions, which is further exacerbated by the decoupling of the precolonial Basic Laws of Africans from their post-colonial constitutions.

However, this Article is a modest attempt to examine how constitutional law served as a colonizing tool by exploring how colonists utilized their constitutions to subjugate Africans and expand their territorial reach. This Article is equally a modest

35. In this Article, I use the term "Basic Law" to refer to the laws and norms that governed precolonial African societies. At times, despite the negative connotations, customary law, indigenous law, or native laws are interchangeably used to refer to the Basic Laws of precolonial African societies.

attempt to examine how constitutional law served as a tool of self-determination and membership in "civilized nations." This Article has four parts. Following this Introduction, Part II examines the process of constitutionalizing colonialism, focusing on the diverse experiences of colonists and how they incorporated colonialism into their constitutions or as part of their extra-constitutional legislation. Specifically, it examines the practices of Italian, French, and British colonial powers in Africa. It briefly touches on settler colonialism, third-world colonialism, and instances where the constitutionalizing of colonialism was influenced by the UN, such as the case of Eritrea. Part III analyzes contemporary texts to demonstrate how colonialism is portrayed in modern African constitutions and evaluates the universality of rights provisions within these texts. Part III also explores how comparative constitutional law scholars engage with the concept of decolonization. Part IV includes the conclusions and way forward.

II. COLONIST CIVILIZING MISSION: CONSTITUTIONALIZING COLONIALIZATION

Constitutional law was at the core of imperialist ambitions and signified superiority over the colonized.[36] From the colonizers' perspective, the constitutionalizing of colonization was about marking territories and racial supremacy. The constitutionalizing of colonization was derived from ideas of European and white supremacy, disguised in the name of the civilizing mission. The constitutions of so-called "civilized" nations were entirely comfortable with the most barbaric manifestations of colonialism, slavery, and genocide. Therefore, constitutional law was a tool of the "civilizing mission" predating the Berlin Conference of 1885 and the scramble for Africa.

Although not specifically applicable to the African continent, the 1812 Constitution of Cádiz was one of the oldest, if not the oldest, written records of the constitutionalizing of colonialism. It is a constitution that applied to Spanish colonies across the Atlantic Ocean.[37] Article 10 of the Constitution of Cádiz notes that the

36. Sally Engle Merry, *Law and Colonialism*, 25 L. & SOC'Y REV. 889, 890 (1991).

37. Constitución De Cádiz, 1812. The Constitution of Cádiz is considered one of the oldest constitutions in Europe and America. For constitutionalists, the Constitution of Cádiz was the first constitution in the history of Spain that conferred sovereignty to the

Spanish territory included New Spain, New Galicia, the Yucatán, Guatemala, the provinces of the East, New Granada, Venezuela, Peru, Chile, and the Rio de la Plata.[38] Despite its attempt to equalize Spaniards on both sides of the Atlantic Ocean, one of this Constitution's significant weaknesses was that it failed to define the status of the Americas clearly.[39] For instance, it referred to all persons under the empire as Spaniards, irrespective of on which side of the Atlantic they resided.[40] Yet, despite its rhetoric of equality of all Spaniards on both sides of the Atlantic, it excluded people of African descent.[41] To add further contradiction, despite proclaiming that all Spaniards are equal, it refers to the American territories as colonies, which shows the inherent ambiguity in the constitutional text.[42] This inconsistency came to a head when Napoleon occupied Spain, sparking constitutional debates on the status of the Americas.[43] Subsequent constitutional texts of colonialism, as will be shown in this Part of the Article, took a more straightforward approach towards overseas territories and the subjugation of colonial victims.

This Part of the Article will analyze the nineteenth century constitutionalizing of colonialism in Africa. This Part will first explore the Italian, French, and British colonial ambitions and their relationship with constitutional law. This Part will demonstrate how law, in general and domestic constitutional law, served as a tool to legitimize colonialism domestically as a "civilizing" duty of the colonist, albeit in competition with other colonists.[44] For

Spanish nation and not the King. It imposed significant restrictions on the powers of the King (Article 172) and included several fundamental rights to due process of law, property, elections, and representative governance. *See generally* M. C. Mirow, *Pre-Constitutional Law and Constitutions: Spanish Colonial Law and the Constitution of Cadiz*, 12 WASH. U. GLOB. STUD. L. REV. 313 (2013) (discussing a detailed study of the Constitution of Cádiz).

38. Constitución De Cádiz, art. 10 (1812).

39. *See* Mirow, *supra* note 37, at 324 (discussing how the constitution excluded people of African descent and included native Americans, despite its rhetoric of equality of all Spaniards on both sides of the Atlantic).

40. *Id.*

41. *Id.*

42. *See* Constitución De Cádiz pmbl. (1812) (referring to Spanish America as *ultramar*); *see also* Mirow, *supra* note 37, at 324.

43. Mirow, *supra* note 37, at 326.

44. *See* Roger Merino, *The Land of Nations: Indigenous Struggles for Property and Territory in International Law*, 115 AJIL UNBOUND 129 (2021) (discussing how laws of colonists was central to the civilizing mission); *see also* General Act of the Berlin

instance, during Italy's first colonial venture in Africa in the early 1880s, Italy's then-foreign minister, Pasquale Stanislao Mancini, is credited with formulating Italy's colonial policies and establishing legal distinctions between the colonial territories and Italy. Mancini justified Italian colonial ambition as a necessary *gara* (contest) that Italy ought to join, as other European countries have done.[45] Mancini argued in his parliamentary speeches how Italy had a duty to "civilize" Africa from its "barbaric nature" while noting that the concept of Italian citizenship did not apply to its African subjects.[46] In its so-called "civilizing" duty, Italy's colonial ambition used different means to subjugate Africans. Italy used treaties like the Berlin Conference, land purchase through the Rubattino steamship company, legislative proclamations, missionaries, and the deployment of military power to subjugate and colonize its subjects.

Italy's colonial ambitions, compared to those of the French and British, were short-lived. Officially, Italy's colonization of Africa dates to 1882, with Mancini solidifying the acquisition of the port of Assab with the blessing of the British government.[47] Italy's colonial ambition ended officially in the 1940s, with the overthrow of its fascist government in 1943, and the subsequent defeat of Italy and the Axis powers in World War II.[48] In 1947, Italy officially renounced its claim to the territories and people it had

Conference on West Africa art. 6, Feb. 26, 1885, 165 Consol. T.S. 485 (noting the duty the colonists to civilize Africa).

45. E. Fiocchi Malaspina, *Toil of the Noble World: Pasquale Stanislao Mancini, Augusto Pierantoni and the International Legal Discourse of 19th Century Italy*, 18 CLIO THEMIS, at 13 (2020) (quoting Pasquale Stanislao Mancini's statement where he said "chiudere gli occhi a questa gara generosa, che ormai si manifesta tra tutte le grandi nazioni di Europa.").

46. *Id.* at 14 (quoting Pasquale Stanislao Mancini's parliamentary speech where he said "[v]oi dovete pertanto convenire che siamo in presenza di un bisogno vero degli Stati moderni. Sarebbe dunque, nonché inglorioso, molto difficile che l'Italia, grande potenza, potesse non partecipare a questa, dirò così, generale e benemerita crociata della civiltà contro la barbarie."); *see* Tullio Scovazzi, *The Italian Approach to Colonialism: The First Experiences in Eritrea and Somalia*, *in* A HISTORY OF INTERNATIONAL LAW IN ITALY 125 (Giulio Bartolini ed., 2020) (discussing how Mancini's views of Italian citizenship shifted from a broader conception of Italian citizenship that is applicable to citizens of Italian colonies to limit it from applying to the citizens of Italy's African colonies).

47. Agatha Ramm, *Short Notices*, 75 ENG. HIST. REV. 739 (1960) (discussing how Italy needed British blessing to start and continue its colonial ambition in Africa).

48. *Italian Collapse*, N.Y. TIMES, Sep. 12, 1943, at A1.

subjugated.[49] Despite its short-lived existence, Italian colonization in Africa does not mean it was less brutal than that of the British or French.

The French and British colonial experience was a more extensive history of subjugating non-European territories and people. As will be discussed in Sections II.B and II.C, before colonizing Africa and its inhabitants, both the French and the British had colonies across the Atlantic Ocean in the 1700s. This vast experience with colonization led some scholars, including Derwent Whittlesey, to argue that the Italians must learn from the French and British colonial governance.[50] Additionally, both the British and the French, as a result of the triumph of the Allied powers in World War I and World War II, not only managed to hold onto their African colonies but also expanded their territories to include those of Germany and Italy. Although the defeat of Italy in World War II and Germany in World War I ended Italian and German colonization, respectively, the French and British continued to exert significant influence over Africa.

A. Italian Colonialism of Africa and Constitutional Law

Italian colonization in Africa dates to the mid-nineteenth century—post-Italian reunification.[51] Italy took the approach that its colonies shall never form an integral part of the colonial State.[52] For Italy, its colonies became territories under its sovereign control but not an integral part of its sovereignty.[53] Taking this approach meant that Italian law did not have direct application to its colonies, and more specifically, for its colonial subjects. One might inquire how the Italian Constitution of 1848 addressed the issue of the Italian parliament's legislative authority over Italy's

49. Treaty of Peace with Italy, Feb. 10, 1947, 49 U.N.T.S. 3. Article 23(1) of the 1947 Treaty of Peace with Italy states that "Italy renounces all right and title to the Italian territorial possessions in Africa, i.e. Libya, Eritrea and Italian Somaliland." *Id.*

50. Derwent Whittlesey, *British and French Colonial Technique in West Africa*, 15 FOREIGN AFF. 362 (1937) (discussing how the Italians ought to learn from the French and British colonization tactics).

51. Scovazzi, *supra* note 46 (tracing the Italian first colonial experience in Africa to the 1860s).

52. Aldobrandino Malvezzi, *Italian Colonies and Colonial Policy*, 6 J. ROYAL INST. INT'L AFF. 233, 235 (1927) (discussing that Italy colonized Eritrea, Somaliland and Libya).

53. Malvezzi, *supra* note 52 (discussing how Italy chose not to incorporate its colonies as part of its sovereign territory).

colonies. For that, we look to *Statuto Albertino,* which was Italy's first post-reunification Constitution of 1848.[54] This Constitution established a constitutional monarchy with a bicameral parliamentary system of government.[55] Article 3 of the Constitution states that "[t]he legislative power shall be exercised collectively by the King and two Chambers, the Senate and Chamber of Deputies." The Constitution empowers the King with the ultimate power to promulgate the laws.[56] The Italian Constitution of 1848 was silent about Italy's African colonies or its African colonial ambition. However, the Italian colonial parliament enacted laws over a territory that was not integral to the colonial state.[57] For instance, the bicameral parliament of the Italian colonial state approved the annexation of Libya via a domestic Italian law.[58] The Italian parliament passed Royal Decree No. 1247 and later Law No. 83 of 1912 to declare Libya an Italian colony.[59] Despite the heated debates in both houses of the Italian colonial parliament, it is astounding that the parliament never doubted its competence to enact laws governing Libyan society.[60]

Subsequently, the Italian colonial government established the Ministry of Colonies that had the authority to enact legislation applicable in Italy's colonies.[61] The Ministry of Colonies passed

54. *Statuto Albertino* was Italy's first post-reunification Constitution of 1848. STATUTO ALBERTINO, 1848 [CONSTITUTION] (It.). It established a constitutional monarchy with a bicameral parliamentary system of government. *Id.* Article 3 of the Constitution states that "[t]he legislative power shall be exercised collectively by the King and two Chambers, the Senate and Chamber of Deputies." *Id.* Furthermore, under Article 7, the Constitution empowers the King with the ultimate power to promulgate the laws. Charles Albert, S.M. Lindsay & Leo S. Rowe, *Supplement: Constitution of the Kingdom of Italy*, 5 ANNALS AM. ACAD. POL. & SOC. SCI. 257, 257 (1894).

55. STATUTO ALBERTINO, 1848 [Constitution] (It.).

56. Albert et al., *supra* note 54, at 277 (Article 7 of the Constitution vests the sole power to approve or reject a law on the King).

57. Malvezzi, *supra* note 52.

58. Alessia Maria Di Stefano, *Italian Judges and Judicial Practice in Libya: A Legal Experiment in Multinormativity*, 58 AM. J. LEGAL HIST. 425, 435, 437 (2018) (discussing how Law no. 83 of 1912 "had been unanimously approved by the Senate and by a very large majority of the Chamber (423 votes in favour, 9 against and one abstention."); *see also* Regio Decreto, Nov. 5, 1911, no. 1247 (It.) (placing Tripolitania and Cyrenaica under the full sovereignty of the Kingdom of Italy).

59. Di Stefano, *supra* note 58.

60. *See* Di Stefano, *supra* note 58, at 425–78.

61. Aldobrandino Malvezzi, *Italian Colonies and Colonial Policy*, 6 J. ROYAL INST. INT'L AFF. 233, 235 (1927) (discussing the establishment of the Ministry of Colonies).

laws that applied to subjugated people (natives) in its colonies.[62] The idea was that the colonial laws were to be supplemented by the pre-colonial laws of the natives.[63] For disputes between natives, the Italian colonial state envisaged that native laws would coexist in parallel with the Italian colonial legal system.[64] However, it also sought a symbiotic co-existence between native laws and the colonial legal system.[65] For that effort, the Italian colonial state collected, documented, and sterilized native laws.[66] This allowed the Italian colonial state to apply segregated judicial space both institutionally and legally and impose racial hierarchy over its subjects.[67] With Italy's accession to the Axis powers and the domestic rise of fascism, Italy's anti-Semitic and racist laws were unequivocally exported to its colonies.[68] In Libya, the Italian colonial state enacted several anti-Semitic, racist laws to persecute and discriminate against the Libyan Jewish minority.[69] Similarly, through the 1938 *Le Leggi Razziali* (Racial Laws), Italian colonists claimed racial superiority over indigenous communities in what was then called "Italian East-Africa" and criminalized interaction with natives with penalties up to three months imprisonment and fines.[70]

The most significant assault on the native legal system stemmed from the Italian state's decision to categorize the native

62. *See* Di Stefano, *supra* note 58, at 425–78.

63. The conception of native laws in this section is to be understood as all the legal system, including religious laws, the natives used to resolve disputes. The Italians maintained the chieftaincy of the Islamic Sultan (chief) over spiritual matters. Furthermore, there was extensive rhetoric of Italian colonial state aim to maintain the private law and Islamic traditions of the Libyan colony. For instance, the Proclamation by Lieutenant General Caneva of 1911 stated that "[t]he chiefs' action must have as its only aim your wellbeing and your peacefulness and thus must be inspired by the 'law' and the 'sunna.' Justice will be granted to you according to the 'sharia' by judges who are versed in this and have praiseworthy moral conduct. No vexation by the chiefs, no abuse of power by the judges shall be tolerated, only the 'book' and the 'law' and the 'sunna' will reign." Di Stefano, *supra* note 58, at 439.

64. Di Stefano, *supra* note 58, at 439.

65. *Id.*

66. Uoldelul Chelati Dirar, *Colonialism and the Construction of National Identities: The Case of Eritrea*, 1 J. E. AFR. STUD. 256 (2007) (discussing how, in 1897, the Italian colonial state issued a circular requesting the collection and codification of native laws).

67. *See generally* Olindo De Napoli, *Race and Empire: The Legitimation of Italian Colonialism in Juridical Thought*, 85 J. MOD. HIST. 801 (2013).

68. *See* De Napoli, *supra* note 67.

69. *See* Di Stefano, *supra* note 58, at 427 n.6.

70. *See* De Napoli, *supra* note 67, at 804–05.

legal system under the label of "customary law."[71] This labeling relegated the native legal system to a static system instead of what it was—a living legal tradition, albeit oral.[72] By relegating the native laws to the status of "customary laws," the Italian colonial state usurped "modernity, . . . as a dynamic and Western prerogative."[73] Secondly, by labelling native or precolonial law as "customary," the Italian legal system destroyed the constitutional or basic law nature of these native legal systems in favor of segregated and "hierarchically superior" colonial law. And that is why, despite Italy's end of territorial colonization with its defeat in World War II, its influence on the epistemic colonization of African societies continues.[74] For instance, in the Eritrean and Somali legal systems, as in the Italian colonial period, the status of the laws and norms of Eritrean and Somali societies is relegated to a parallel legal system inferior to the 'modern' or 'state' law.[75]

B. French Colonialism of Africa and Constitutional Law

Like Italy, France kept its colonies at bay and did not consider them to be an integral part of the French Empire.[76] In its addendum, the 1791 Constitution of France authorized colonial assemblies to determine the status of people (free or unfree) within colonial territories.[77] Furthermore, colonial assemblies enacted laws that governed internal matters of the colonies.[78] Unlike the 1791 French Constitution, the French Constitution of

71. Habteab Y. Ogubazghi & Senai W. Andemariam, *Eritrean Customary Laws: 'Old-Modern' Treasures for Introducing an Effective Sentencing Regime – the "Just Desert" System*, 7 AFR. J. CRIMINOLOGY & JUST. STUD. 1, 1 n.2 (2013) (discussing one of the customary laws of Eritrea, *Higgi Adgna – Tegelba*, and noting that this law was last revised in 1938 during the Italian colonial period).

72. *See generally* A. N. Allott, *Methods of Legal Research into Customary Law*, 5 J. AFR. ADMIN. 172 (1953) (discussing the oral nature of customary laws and the challenges it brings to researchers).

73. *See* Dirar, *supra* note 66, at 260; *see also* Walter D. Mignolo, *Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-coloniality*, 21 CULTURAL STUD. 449 (2007).

74. *See* Dirar, *supra* note 66.

75. *See* Dirar, *supra* note 66; *see also* Paolo Contini, *Integration of Legal Systems in the Somali Republic*, 16 INT'L & COMP. L.Q. 1088 (1967); *see also* Ogubazghi & Andemariam, *supra* note 71.

76. Miranda Frances Spieler, *The Legal Structure of Colonial Rule During the French Revolution*, 66 WM. & MARY Q. 365, 365 (2009).

77. *See id.* at 367.

78. *See id.* at 380.

1793 does not mention colonies directly or indirectly.[79] Instead, the drafters of the 1793 French Constitution and the French legislatures relied on extraconstitutional sovereign power to govern colonies.[80] The 1793 Constitution outlawed "ownership of bodies" in its preamble.[81] However, this did not affect the colonies because they were governed by extraconstitutional powers, and slavery was common. The legal status of colonial territories and their inhabitants underwent a dramatic shift during the French Revolution in the late eighteenth century.[82]

Under the 1795 Constitution, the colonies became an integral part of the French Republic and were subject to the same constitution.[83] The 1795 French Constitution abolished slavery and transformed French colonial subjects into French citizens.[84] However, the implementation of the emancipatory spirit of the 1795 French constitution was not positively embraced by colonial officials.[85] For instance, the colony was governed under military rule in Saint Domingue, despite the explicit integration and requirement to apply French laws domestically.[86] Furthermore, despite its emancipatory language, the 1795 French Constitution was a continuation of the 1791 French Constitution that legitimized the extra-constitutional status of colonies.[87] The 1795 French Constitution maintained the role of colonial commissioners to govern French colonies.[88] These Commissioners, such as Victor Hugues, declared that the colonies under their authority were not fit to be governed by the 1795 French Constitution.[89] Secondly, despite its emancipatory language in the 1795 French Constitution, the French Empire did not believe in or view Africans as people.[90] The constitutional progress of the French Revolution was reversed when Napoleon Bonaparte issued a new constitution in 1799,

79. *See* CONSTITUTION OF 1793 [Fr.].
80. *See* Spieler, *supra* note 76, at 389.
81. CONSTITUTION OF 1793 [Fr.] pmbl.
82. *See* Spieler, *supra* note 76.
83. *See* CONSTITUTION OF THE YEAR III, 1795 [Fr.].
84. *See* Martti Koskenniemi, *Colonial Laws: Sources, Strategies and Lessons?*, 18 J. HIST. INT'L L. 248 (2016).
85. *See* Spieler, *supra* note 76, at 396.
86. *See id.* at 396.
87. *See id.* at 365.
88. *See* CONSTITUTION OF THE YEAR III, 1795 [Fr.].
89. Spieler, *supra* note 76, at 398.
90. *Id.* at 406.

which excluded colonies from the French legal system and made a full circle to the 1791 French Constitution in its engagement with its colonies.[91]

France's treatment of and engagement with its colonies as extra-constitutional spaces continued during the French Restoration era.[92] It was at the end of the Restoration era, in 1830, that French colonial ambition in Africa materialized with the colonization of Algeria.[93] Between the post-restoration French Republic I (1830–1847) and Republic II (which began in 1848), the Algerian native population decreased by one-third, highlighting the devastation and subjugation that the Algerian population endured.[94] As the native Algerian population declined, the French residents of Algeria increased, partly due to the 1889 legislative change that extended French citizenship and, by extension, assimilation to children born to European migrants in French Algeria.[95] Despite the decrease in demographic numbers, Algerians' constant demand to end colonization and the domestic decolonization movements challenged French control over Algeria.[96] In response, the French increased the authority of the governor general of Algeria as the chief colonial official, granting the power to issue decrees and manage domestic affairs laws.[97]

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91. CONSTITUTION OF THE YEAR VIII, 1799 (Fr.).

92. The French Restoration era spans the years of 1815-1830. *Paris: Capital of the 19th Century – Chronology III: The Restoration (1815–1830)*, BROWN UNIV. LIBR., https://library.brown.edu/cds/paris/chronology3.html [https://perma.cc/7ZE3-ZCUU] (last visited Aug. 9, 2025).

93. Thomas Willing Balch, *French Colonization in North Africa*, 3 AM. POL. SCI. REV. 539 (1909).

94. Badrane Benlahcene, *Muslim-European Civilizational Encounters: French Colonization of Algeria; Its Framework and Impacts on Algerian Society and Culture*, 10 J. ISLAMIC THOUGHT & CIVILIZATION 24, 33–34 (2020) (discussing the human devastation in Algeria among the native population between 1830-1848).

95. Balch, *supra* note 93, at 544 (discussing how during this time most of the European residents of Algeria came from France, Italy, Spain, Germany and Malta). At times, the principle of assimilation extended, for instance, to Algerian Jews or some inhabitants of key economic hubs. In Senegal, some communities, the inhabitants of Goree and Saint Louis, were granted the right to elect representatives to the French National Assembly in 1848. *See* Tola Benjamin Kehinde, *French Colonial Policies in West Africa: Power Dynamics, Cultural Impositions and Economic Legacies*, 3 INT'L J. ADVANCES SOC. SCI. & HUMAN. 8, 11 (2024).

96. Hussein Ait Ahmad, *Algeria's Struggle for Independence*, 8 PAK. HORIZON 284 (1955).

97. Balch, *supra* note 93, at 546 (discussing how the powers of the governor of Algeria increased in 1900).

During the French III Republic (1848–1940s), the French recycled their colonial policies in Algeria to the rest of their colonies in North Africa, and later the rest of Africa. The French adopted similar policies of stratification, subjugation, and marginalization of Africans by marginalizing the norms, languages, and epistemes of African societies under the guise of an "assimilation" and "civilization" policy.[98] Like the Italians, the French undertook a colonial mission to collect and sanitize the Basic laws and customs of the colonized, which were consistent with their colonial objectives.[99] What the French considered customary law was a battlefield of negotiation over which customs and customary institutions would extend French colonialism. During the negotiation process in Mali, the French, under the guise of uniformizing the norms of Malian society, not only controlled the application of the Basic Law of Malian society but also, at times, engaged in the innovation of oppressive norms to restrict the rights of Malian women.[100] In other parts of Africa, Katherine Hoffman eloquently demonstrated how the French frequently sought to restrict tradition within Moroccan society to advance French colonialism.[101] It highlighted cultural, epistemic, and normative dominance and economic exploitation of the colonies by imposing the French language, laws, and policies on the Moroccans.[102] Through its linguistic, normative, and epistemic dominance, it depicted the colonies as an extension of the French

98. *See* Henri Labouret, *France's Colonial Policy in Africa*, 39 J. ROYAL AFR. SOC'Y 22 (1940) (discussing the French colonial policy of assimilation); *see also* Nadia Zerrouk, *French Assimilation in Algeria: Between Its Logical Aspects and the Racism of Colonialism*, 44 ART L. & ACCT. REP. 201, 203–04 (2025) (discussing the Algerian views on France's assimilation policy); Gordon Cumming, *Transposing the 'Republican' Model? A Critical Appraisal of France's Historic Mission in Africa*, 23 J. CONTEMP. AFR. STUD. 233, 233 (2005) (discussing the French colonial justification of a "civilizing mission," including statement from Jules Ferry, former Prime Minister of France, in 1885 that the French, as "superior races, have a duty to civilise inferior races.").

99. Katherine E. Hoffman, *Berber Law by French Means: Customary Courts in the Moroccan Hinterlands, 1930–1956*, 52 COMP. STUD. SOC'Y & HIST. 851 (2010).

100. *See generally* Marie Rodet, *Le Délit d'Abandon de Domicile Conjugal ou l'Invasion du Pénal Colonial dans les Jugements des Tribunaux Indigènes au Soudan Français, 1900-1947*, 10 FRENCH COLONIAL HIST. 151 (2009) (discussing how the French engaged in the process of sanitization of the customary laws of Mali and ended up imposing or revising norms of Malian society to limit women's liberty and mobility through criminalization of "desertion").

101. *See* Hoffman, *supra* note 99.

102. *Id.*

state, even though the profits from the so-called "assimilation" or "mission *civilisatrice*" (civilizing mission) were barely shared with the colonial victims.[103]

In short, the post-restoration French Republic (I, II, and III) engaged with its colonies under three main principles: The subjugation of the natives, limited assimilation, and autonomy over domestic affairs for the colonies.[104] When the French attempted to reform their engagement with their colonies, it was a response to domestic decolonization movements and native appraisal.[105] In March 1945, the French Minister of Colonies declared the formation of the French Union, which was later incorporated under the 1946 French Constitution.[106] It granted universal suffrage and equality to all people, similar to the 1789 French Revolutionary Constitution.[107] Unlike its earlier version (the 1945 draft), however, the 1946 French Constitution deleted consent-based union, which would have ultimately allowed French colonies an option for decolonization.[108] The 1946 French Constitution transferred colonial territories to departments within the French Union without providing a legal mechanism for their exit from the French Union.[109]

C. British Colonialism of Africa and Constitutional Law

British colonization in Africa began in the late eighteenth century with the establishment of settlements in Sierra Leone and continued until after World War II.[110] Like the French, the British colonial experience extends beyond Africa, and the British history of subjugating non-European peoples began before African

103. Kehinde, *supra* note 95, at 13 (explaining the process of economic subjugation Kehinde eloquently summed the exploitative nature of French monetary policy in west Africa as deliberate effort that "not only facilitated the streamlining of economic transactions but also reinforced the economic subordination of the colonies to the financial imperatives of the French colonial apparatus.").

104. Charles-André Julien, *From the French Empire to the French Union*, 26 INT'L AFF. 487, 487–88 (1950).

105. *Id.*

106. *Id.* at 494.

107. *Id.* at 496–97.

108. *Id.* at 496.

109. *Id.* at 498.

110. Ulrike Lindner, *Colonialism as a European Project in Africa Before 1914? British and German Concepts of Colonial Rule in Sub-Saharan Africa*, 19 COMPARATIV 88, 89 (2009) (discussing the German and British colonial experiences in Africa).

colonization. British colonization in Africa started much earlier than the French and Italian colonization, and propagated segregation and racial discrimination.[111]

The British Empire took the position that colonial territories were beyond the scope of the Empire's constitution.[112] That is to say, even before the British colonial ambition in Africa, by declaring colonial territories beyond the constitution or laws of the Empire, colonization was the legalization of violence against non-European people and territories.[113] In 1865, the British Parliament passed the Colonial Laws Validity Act, which denied the legislative autonomy of colonies and granted supremacy to the Parliament of the United Kingdom.[114]

The Constitution of the United Kingdom of 1215, as amended through 2013, unapologetically solidifies the United Kingdom's imperial ambition by constitutionalizing the Colonial Laws Validity Act of 1865 over any of the Channel Islands, the Isle of Man, and Gibraltar.[115] The United Kingdom's unabashed legalization of colonialism is also highlighted in the recent International Court of Justice advisory opinion over the question of the Chagos Islands.[116] The Court ruled that the decolonization of Mauritius was not complete, and the United Kingdom's administration of the Chagos

111. *See* Bright Alozie, *Space and Colonial Alterity: Interrogating British Residential Segregation in Nigeria, 1899–1919*, 41 UFAHAMU: J. AFR. STUD. 103 (2020) (discussing the policies and practices of the British colonists, segregation, and racial discrimination in Nigeria); Daniel Steinbach, *Between Intimacy and Violence: Imperial Encounters in East Africa During the First World War*, *in* COLONIAL ENCOUNTERS IN A TIME OF GLOBAL CONFLICT, 1914–1918, at 109 (Santanu Das ed., 2021) (discussing segregation and racial discrimination by British colonists in East Africa).

112. *See* Spieler, *supra* note 76, at 368.

113. With the execution of King Charles I on January 30, 1649, the British imperial parliament took a significant step and assumed legislative authority over the colonial people and territories. Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1161 (1976). With the reinstatement of monarch rule under King Charles II, the authority was re-vested as part of the monarch's prerogative. *See id.* at 1198–99.

114. Colonial Laws Validity Act 1865, 28 & 29 Vict., c. 63 (UK), https://www.legislation.gov.uk/ukpga/Vict/28-29/63/data.pdf [https://perma.cc/D48Z-SMB5].

115. *See* CONSTITUTION OF UNITED KINGDOM 1215 (rev. 2013), art. 2(6).

116. *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Summary of Advisory Opinion, 2019 I.C.J. 169, ¶ 11 (Feb. 2019), https://www.icj-cij.org/node/105779#:~:text=The%20Court%20concludes%20that%2C%20as,acceded%20to%20independence%20in%201968 [https://perma.cc/X4D9-A64J].

Islands violated the right to self-determination.[117] Although the dispute over the Chagos Islands was an international law issue, it raises an essential question about other territories and decolonization processes that remain incomplete. For instance, Western Sahara's sovereignty and independence are constantly contested by Morocco despite being a member of the independent states of the African Union.

The extra-constitutional existence promoted by British colonists created room for a discourse that challenged the legality of colonialism.[118] For instance, American colonists believed that the British Empire was imposing illegal taxes on them, which were passed by the British legislature without the latter having legislative authority over the colonies.[119] Therefore, the American legal historian Charles H. McIlwain argued that American independence was the result of the lack of legal incorporation of the American colony into the British constitutional order.[120] Parliament's failure to assert legislative jurisdiction over the American colonies would have meant that any legal challenges to the legitimacy of British rule over America would have resulted in a declaration of unconstitutionality of British colonial rule over America.[121]

In the African context, the extra-constitutional existence created space for British indirect rule.[122] Dr. Kalu Ezera, discussing and tracing the formation of Nigeria today and its constitutional history, noted that every new governor of Nigeria issued a colonial constitution or reformed the colonial constitution.[123] The 1946 Constitution, also known as Richards' Constitution, was introduced by the then-governor of Nigeria, Arthur Richards, without the participation of Nigerians, and introduced "ethno-regional federalism" by arbitrarily dividing Nigeria into three regions.[124] On the other hand, the Macpherson Constitution of 1951, named after

117. *Id.*
118. *See* Black, *supra* note 113.
119. *See id.*
120. *Id.* at 1158.
121. *Id*.
122. *See generally* Margery Perham, *A Re-Statement of Indirect Rule*, 7 AFRICA 321 (1934) (discussing indirect rule in British colonies).
123. Kalu Ezera, *Nigeria's Constitutional Road to Independence*, 30 POL. Q. 131, 131 (1959).
124. *Id.*

John Macpherson, the then-governor of Nigeria, had significant Nigerian participation, reflecting Nigerians' demand for constitutional delegation to London, which eventually negotiated the country's independence.[125] Despite the increased Nigerian participation and Nigeria's eventual independence, a brief examination of Nigeria's first post-independence constitution, in 1960, reveals that Nigeria was a constitutional monarchy headed by the Queen of England.[126] The 1960 Constitution, despite Nigerians' struggle for self-determination, is framed as the day of separation, whereby the British no longer had "responsibility for the government of Nigeria."[127] Therefore, even during the final stage of British colonization of Nigeria, what the Nigerians celebrated as independence, the British described as a relinquishment of "responsibility," employing paternalistic rhetoric rooted in the civilizing mission metaphor.[128]

D. Settler Colonialism and Constitutional Law: South African Experience

Several former British colonies share the experience of settler colonialism and have a longstanding history of legalized division between colonists and native peoples.[129] Aziz Rana argues that the United States Constitution is the product of settler colonialism masked behind powerful narratives based on principles of equality and freedom.[130] Unlike the South African settler-colonialism experience, where the colonists were confronted with a large

125. *Id.*

126. It was not until 1963, with the adoption of the First Republic Constitution of Nigeria, that the country was able to transition from a constitutional monarchy to a republic. Dr. Leena Koni Hoffmann & Jon Wallace, *Democracy in Nigeria*, CHATHAM HOUSE (June 29, 2022), https://www.chathamhouse.org/2022/06/democracy-nigeria [https://perma.cc/YUX2-YZ24].

127. Nigeria Independence Act (1960), c. 55, § 1(2)(a) [U.K.], https://www.legislation.gov.uk/ukpga/1960/55/pdfs/ukpga_19600055_en.pdf [https://perma.cc/2P98-UBJY].

128. *Id.*

129. Joseph M. Hodge, *Recent Comparative Approaches to Imperial History and Settler Colonialism*, 34 J. S. AFR. STUD. 451, 451 (2008) (discussing the settler colonial experience of former British colonies of Australia, New Zealand, Canada and South Africa); *see also* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387 (2006) (discussing the legalized division among colonists and colonized people).

130. *See* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 280 (2015).

number of natives, in the United States, colonists encountered a relatively smaller number of natives.[131] In both the United States and South Africa, colonists peripheralized the natives.[132] Despite their opposition to British colonial rule, American colonists, like colonists in South Africa, New Zealand, and Australia, envisaged their existence as part of the European imperial conquest.[133] The United States Constitution, at its founding, afforded self-government to the white insider colonists who, meanwhile, were extracting land from Native Americans and enslaving Africans as outsiders to that constitutional order.[134] And it is in this spirit of white insiders and Black and Native Americans as outsiders that the Apartheid South African state aimed to constitutionalize exclusion and subjugation.[135]

The 1961 and 1983 Constitutions of South Africa employ race as a primary organizing principle.[136] The 1961 Constitution of South Africa marked the end of the subordination of the British Crown and the formation of the Republic of South Africa, a textbook example of settler colonialism.[137] However, despite the break from the British Crown, the formation of the South African Republic did not alleviate the experiences of Black and Colored South Africans. On the contrary, it exacerbated and maintained racial segregation, discrimination, disenfranchisement, dispossession, and underdevelopment of Black and Colored South

131. James P. Collins, *The Indian Census Rolls, 1885–1940*, 38 PROLOGUE MAG., Summer 2006, https://www.archives.gov/publications/prologue/2006/summer/indian-census.html [https://perma.cc/8Z5G-QGGY] (discussing the Native American census in 1860); *see also Genocide of Indigenous Peoples*, HOLOCAUST MUSEUM HOUS., https://hmh.org/library/research/genocide-of-indigenous-peoples-guide/ [https://perma.cc/BRV2-LX29] (last visited Apr. 27, 2026) (discussing the decrease in native American population as a result of different policies). For comparison of South African black, colored and white population, see *South Africa's Population,* S. AFR. GATEWAY, https://southafrica-info.com/people/south-africa-population/ [https://perma.cc/8N8E-L9Z4] (last visited Apr. 27, 2026).

132. Rana, *supra* note 130, at 265.

133. *Id.*

134. *Id.* at 280.

135. *See* Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Powers*, 41 ST. LOUIS U. L.J. 1249 (1997).

136. *See* ACT NO. 32 OF 1961 [CONSTITUTION] (S. Afr.); *see also* ACT NO. 110 OF 1983 [CONSTITUTION] (S. Afr.).

137. *See* ACT NO. 32 OF 1961 [CONSTITUTION] (S. Afr.).

Africans.[138] For instance, Articles 8(4), 34, and 46 of the 1961 Constitution limit presidential and parliamentary eligibility to white South Africans.[139] Similarly, the 1983 Constitution of South Africa established a tri-cameral parliament that permitted limited participation at the lowest tier from Colored and Indian South Africans, with minimal influence on the other two tiers.[140] The 1983 Constitution of South Africa marginalized Colored and Indian South Africans, but entirely rejected the participation of Black South Africans, even on a nominal level.[141] This shows that the then South African state subscribed to long-held and erroneous white supremacist ideas of racial hierarchy—the 1913 and 1936 Land Acts segregated land as white and non-white territory.[142] By 1994, white people owned eighty-seven percent of South African land, and Black and Colored South Africans were squeezed to the smallest landmass—despite representing a substantial majority of the population.[143]

E. Third World Colonialism and Constitutional Law: Eritrean Example

At times, colonization's constitutionalizing resulted from the post-World War II peace negotiations between the Allied and Axis powers. The example of Eritrea and Ethiopia, along with the role of the United Nations in federating and eventually integrating Eritrea as part of Ethiopia, provides an excellent entry into the relationship between constitutional development and third-world colonialism.[144]

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138. *See* Sachs, *supra* note 135; ACT NO. 32 OF 1961 [CONSTITUTION] (S. Afr.); ACT NO. 110 OF 1983 [CONSTITUTION] (S. Afr.).

139. *See* ACT NO. 32 OF 1961 [CONSTITUTION], arts. 8(4), 34, 46 (S. Afr.).

140. *See* ACT NO. 110 OF 1983 [CONSTITUTION] (S. Afr.).

141. *See* ACT NO. 110 OF 1983 [CONSTITUTION] (S. Afr.).

142. *See generally* T.I. Fényes, C.J. Van Rooyen & Nick Vink, *Reassessment of the Land Acts of 1913 and 1936*, 7 DEV. S. AFR. 583 (1990) (discussing alternative solutions to the discriminatory Land Acts of South Africa); *The Natives Land Act of 1913*, S. AFR. HIST. ONLINE, https://sahistory.org.za/article/natives-land-act-1913 [https://perma.cc/DZ48-PE8V] (last visited Apr. 27, 2026) (discussing the white supremacist views of Cecil Rhodes who played key role in the drafting of these acts).

143. Mario Zamponi, *The South African Land Reform Since 1994: Policies, Debates, Achievements*, *in* SOUTH AFRICA AFTER APARTHEID: POLICIES AND CHALLENGES OF THE DEMOCRATIC TRANSITION 104, 105 (Arrigo Pallotti & Ulf Engel eds., 2016).

144. *See* G.A. Res. 390 A (V) (Dec. 2, 1950).

After the defeat of its colonial power, the United Nations (UN) debated the future of Eritrea and the question of Italy's former colonies. On December 2, 1950, the UN General Assembly voted to federate Eritrea with Ethiopia as an autonomous territory.[145] The Assembly called for an Eritrean Constitution and authorized Eritrea's autonomy over domestic affairs.[146] The Eritrean Constitution of 1952, drafted by UN-commissioned lawyers, incorporated many of the norms of the Universal Declaration of Human Rights and sought a democratic form of government.[147] Ethiopia criticized the 1952 Eritrean Constitution as being too democratic and claimed that it failed to provide what the Ethiopian government considered the Ethiopian Crown's prerogative.[148] Despite integrating Eritrea as an autonomous federated entity, the Ethiopian Crown took several measures to suspend the federal arrangement and eventually converted Eritrea to a province of Ethiopia under the full prerogative of the Crown.[149]

III. DECOLONIAL MISSION: CONTEMPORARY CONSTITUTIONS, CONSTITUTION DRAFTING & COMPARATIVE METHODOLOGIES

Decolonization transformed the African, who was a European subject, to an African citizen of the post-colonial state. Embedded within this transformation is the assumption that the post-colonial African state is somehow a reconstruction of pre-colonial African statehood. However, pre-colonial societies are complex political and non-political configurations that do not necessarily fit within the Western/European conception of the nation-state. Likewise, post-colonial African societies are complex and do not necessarily mirror their precolonial ancestors nor their colonists' aspirations. African states are the product of the colonists' territorial configuration, and their borders are drawn without due respect for

145. *Id.*

146. *Id.* ¶ 1.

147. *See* ERITREAN CONSTITUTION OF 1952.

148. Arthur A. Schiller, *Eritrea: Constitution and Federation with Ethiopia*, 2 AM. J. COMP. L. 375, 381 (1953).

149. Mesfin Araya, *The Eritrean Question: An Alternative Explanation*, 28 J. MOD. AFR. STUD. 79, 81 (1990).

socio-economic, legal, environmental, and political factors usually associated with border demarcation and delimitation.[150]

The complexity of the post-colonial African state, at least in terms of its territorial integrity, reflects the European states' division of Africa into colonial territories, combined with African nations' decision to accept colonial territories as their official boundaries.[151] Through the adoption of the Cairo Declaration of 1964, African states formalized the boundary demarcations of Berlin Conference of 1885 into post-colonial Africa.[152] Alternatively, the Cairo Declaration implicates post-colonial African states in perpetuating the colonial division without seeking consensus among the new African nation's citizens.[153] The long-term effects of a lack of internal consensus go beyond the formal end of colonialism and, as several scholars have noted, lead to ethnic conflict.[154] The idea is not to paint an idealized picture of the pre-colonial era, but rather, to highlight that the colonial period was marked by subjugation, deprivation, and division.[155] Sometimes, whether for practical or pragmatic reasons, the same colonial policies tend to persist and even flourish in the post-colonial era.

This Part of the Article explores three areas of inquiry to understand the post-colonial impact of colonialism on constitutional law in Africa. First, it begins by mapping how colonialism is depicted in contemporary African constitutions. This mapping is crucial not only for understanding how colonialism is conceptualized in African constitutional law, but also for highlighting how frequently and mistakenly African colonialism is viewed as a transient episode of the past. After this initial mapping, the second Section analyzes the relationship between the constitution-making process and debates surrounding the

150. Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

151. *Id.*

152. *See id.* at 1163 (discussing how the Cairo conference legitimized colonial boundaries).

153. *See id*. at 1163–64.

154. *See generally* Maheshwar Singh, *Ethnic Conflict and International Security: Theoretical Considerations*, 6 WORLD AFF. 72, 73–74 (2002); Joel D. Barkan, *Kenya: Lessons from a Flawed Election*, 4 J. DEMOCRACY 85, 88 (1993).

155. WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 149, 203–83 (1972) (discussing the impact of colonialism on Africa).

universality of fundamental rights in the constitutional text. The final Section examines the role of African and non-African comparative constitutional lawyers and their discussions on constitutionalism, constitution-making, and methodologies in comparative constitutional law.

A. Portrayal of Colonialism in Contemporary African Constitutional Text

Generally, the value of direct reference to colonization in contemporary African constitutions reflects the experience of colonial and racial domination. Seven African states (Algeria, Angola, Cape Verde, Guinea-Bissau, Mozambique, Namibia, and Zimbabwe) have explicit constitutional text denouncing colonization.[156] A reverse engineering of the contemporary constitutional text yields an understanding of colonization as a deprivation of fundamental rights to civil and political rights. For instance, the Namibian Constitution notes that the colonial experience denied dignity, equality, and other fundamental rights.[157] Similarly, but with a more colorized depiction, the Constitution of Mozambique implies that colonization led to the deprivation of the right to life and the bloodshed in the anti-colonial struggle, as expressed by the color red on the Mozambican flag.[158]

156. *See generally* CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA 1989 (amended 1996); CONSTITUTION OF THE REPUBLIC OF ANGOLA, 2010; CAPE VERDE [CONSTITUTION], 1980 (amended 1992); CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU, 1984; CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE, 2010; CONSTITUTION OF THE REPUBLIC OF NAMIBIA, 1990 (amended 2014); CONSTITUTION OF ZIMBABWE, 2013 (amended 2017).

157. *See* CONSTITUTION OF THE REPUBLIC OF NAMIBIA, 1990 (amended 2014) (stating "[w]hereas these rights [including the right to life, liberty, equality and non-discrimination] have for so long been denied to the people of Namibia by colonialism, racism and apartheid.").

158. CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE, 2010, art. 297(2(a)). The national flag of Mozambique has red, green, black, gold and white colors. Article 297(2(a)) of the Constitution of the Republic of Mozambique of 2010 states "[t]he significance of these colours shall be as follows: (a) red - the centuries of resistance to colonialism, the armed national liberation struggle and defence of sovereignty." *Id.; see also* Patrick Gathara, *Black, Red and Green: The Story Behind the Kenyan Flag*, THE ELEPHANT (Aug. 2, 2018), https://www.theelephant.info/analysis/2018/08/02/black-red-and-green-the-story-behind-the-kenyan-flag/ [https://perma.cc/H5JC-7TNZ] (providing broader analysis of the symbolism of different colors represented in African flags).

Colonization is also characterized by the deprivation of the right to property and colonists seizing land without due compensation for the affected individuals. The Constitution of Zimbabwe, as amended in 2017, attempts to engage with the concept of colonization as a process of dispossession.[159] To rectify the colonial dispossession and redistribute land to dispossessed Zimbabweans, the Zimbabwean Constitution legalizes the compulsory acquisition of agricultural land.[160] It notes that the people of Zimbabwe must reassert their rights and regain ownership of the land they lost during colonization.[161] Furthermore, the former colonial powers must compensate or face this compulsory acquisition of agricultural land.[162] Suppose the colonial powers refuse to pay compensation. If the colonial powers refuse to compensate and/or dispossess the land they acquired during colonization, then under the Constitution of Zimbabwe, the Zimbabwe government need not compensate white landowners.[163] The Constitution of Zimbabwe attempts to rectify the colonial injustices by transferring land away from white landowners with European ancestry who are Zimbabwean nationals.[164] The legality of the Zimbabwean Constitution's land-taking provision was challenged in *Mike Campbell (Pvt.) Ltd. et al. v. Republic of Zimbabwe* before the Southern African Development Community Tribunal.[165] The Tribunal ruled that the Zimbabwean government

159. *See* CONSTITUTION OF ZIMBABWE, 2013, art. 72 (amended 2017).

160. *See* CONSTITUTION OF ZIMBABWE, 2013, art. 72(7(a)) (amended 2017) (stating that "under colonial domination, the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation").

161. *See* CONSTITUTION OF ZIMBABWE, 2013, art. 72(7(c)) (amended 2017) (stating "[i]n regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors must be regarded as of ultimate and overriding importance . . . (c) the people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land."); *see also* CONSTITUTION OF ZIMBABWE, 2013, art. 72(7(b)) (stating that the people of Zimbabwe fought against colonial powers and were victorious in 1980).

162. *See* CONSTITUTION OF ZIMBABWE, 2013 art. 72(7(c(i))) (amended 2017).

163. *See* CONSTITUTION OF ZIMBABWE, 2013 (amended 2017).

164. *See* CONSTITUTION OF ZIMBABWE, 2013 (amended 2017); *Zimbabwe*, CITIZENSHIP RTS. AFR., https://citizenshiprightsafrica.org/en/region/zimbabwe/ [https://perma.cc/U23E-NPPF] (last visited Apr. 27, 2026); James Muzondidya, *Jambanja: Ideological Ambiguities in the Politics of Land and Resource Ownership in Zimbabwe*, 33 J. S. AFR. STUD. 325, 329 (2007) (discussing the post-2000 Zanu-PF discourse of referring to white Zimbabweans as foreigners).

165. Mike Campbell (Pvt) Limited et al. v. The Republic of Zimbabwe, SADC Tribunal Case No. 2/2007 (Nov. 28, 2008).

unlawfully engaged in reverse discrimination against its white citizens to rectify past injustices.[166] The Tribunal's decision was not enforced, and consequently, the Tribunal is currently defunct.[167] The dispute before the Tribunal raises questions of reparations in post-colonial societies and constitutionalism. The Zimbabwean Constitution is the only constitution that requires former colonists to compensate for the land appropriation from native communities, or otherwise risk expropriation without compensation for land owned by white farmers.[168] These debates show the growing discontent with the impact of colonialism on land ownership and the lack of redistribution in post-colonial states.

The post-colonial constitution-making process aimed to replace colonial rule with a radical anti-colonial instrument that signifies the end of the colonial relationship in favor of a more liberal order.[169] This liberal order, as stated in the preamble of the Algerian Constitution, was meant to restore pre-colonial identity.[170] These aspirations, however, were not consistently followed, and at times, the radical anti-colonial re-constitution became more of a rhetoric or a long-term aspiration.[171] For instance, similar to Nigeria, Ghana adopted its former colonizer's constitutional system of government.[172] In post-colonial Ghana, Queen Elizabeth II remained as the nominal head of state from 1957 to 1960.[173] As part of the negotiation for independence,

166. *See id.*

167. *See generally* Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 870 (2013).

168. *See* CONSTITUTION OF ZIMBABWE, 2013 (rev. 2017); Vusi Gumede, *Land Reform in Post-Apartheid South Africa: Should South Africa Follow Zimbabwe's Footsteps?*, 9 INT'L J. AFR. RENAISSANCE STUD. 50, 58 (2014) (discussing the similarities between the Zimbabwean and South African land issues and possible solutions).

169. *See* CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA, 1989, pmbl. (amended 1996).

170. *See* CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA, 1989, pmbl. (amended 1996).

171. *See generally Constitutional History of Ghana*, CONSTITUTION NET, https://constitutionnet.org/country/ghana [https://perma.cc/S7LM-AFJS] (last visited Oct. 31, 2023); GHANA INDEPENDENCE ACT, 1957, 5 & 6 Eliz. 2, c. 6 (U.K.).

172. *See generally Constitutional History of Ghana*, CONSTITUTION NET, https://constitutionnet.org/country/ghana [https://perma.cc/S7LM-AFJS] (last visited Oct. 31, 2023); GHANA INDEPENDENCE ACT, 1957, 5 & 6 Eliz. 2, c. 6 (U.K.).

173. GHANA INDEPENDENCE ACT, 1957, 5 & 6 Eliz. 2, c. 6 (U.K.); Egon Schwelb, *The Republican Constitution of Ghana*, 9 AM. J. COMP. L. 634, 636 (1960).

Parliament was required to approve and promulgate the post-colonial constitution.[174] That is to say that the first post-colonial constitution of several African states was a declaration by the colonizer rather than the colonized. For example, the timeline shows that Mauritius' first post-colonial constitution was issued on March 4, 1968, while the country gained independence on March 12, 1968, indicating that the constitution sometimes preceded independence.[175] This clearly demonstrates the colonists' role in shaping some of the post-colonial constitutions of African states.

Despite the discrepancy between aspiration and reality at the domestic level, what is certain is that post-colonial constitutionalism was a process of declaring a fellowship of opposition to colonization.[176] For instance, Article 18(2) of the Constitution of Guinea-Bissau recognizes anti-colonialism as the core principle of foreign relations.[177] However, the anti-colonial foreign policy metamorphosed into rhetoric at the Bandung Conference in 1955 and the first Conference of the Organization of African Unity in 1963.[178] The participants condemned colonialism and racial domination in both these conferences without addressing social oppression and Third World colonialism in Africa and Asia.[179] For instance, as a participant in both meetings, Ethiopia condemned European colonialism, whitewashed its oppressive practices against the Eritrean community, and denied the fundamental rights to the Beth Israel, Ethiopian Jewish community.[180] Then, one can conclude that contemporary African

174. S. A. De Smith, *The Independence of Ghana*, 20 MOD. L. REV. 347, 352 (1957).

175. *See* CONSTITUTION OF THE REPUBLIC OF MAURITIUS, 1968.

176. *See generally* CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU, 1984, art. 18(2).

177. CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU, 1984, art. 18(2). Similarly, article 255(II (2)) of the Constitution of Bolivia notes that opposition to colonization is a central principle of Bolivian foreign policy. CONSTITUTION OF 2009 OF THE PLURINATIONAL STATE OF BOLIVIA, art. 255(II(2)).

178. *See generally Bandung Conference: Asia-Africa [1955]*, BRITANNICA, https://www.britannica.com/event/Bandung-Conference (last visited Oct. 31, 2023) [hereinafter *Bandung Conference*]; *Speeches and Statements Made at the First Organisation of African Unity (OAU) Summit, 1963*, AFR. UNION (May 8, 1963), https://au.int/en/speeches/19630508/speeches-and-statements-made-first-organisation-african-unity-oau-summit-1963 [https://perma.cc/46GL-ZHBV] [hereinafter "*Speeches and Statements at the OAU Summit*"].

179. *See Bandung Conference*, *supra* note 178.

180. *See Speeches and Statements at the OAU Summit*, *supra* note 178; Luwam Dirar, *Rethinking the Concept of Colonialism in Bandung and Its African Union Aftermath*, *in*

constitutions' references to "colonization" in the constitutional text are limited to European colonialism, which ended in the 1960s. Hence, contemporary constitutional text engages with colonization as the end of a phase and the start of a new post-colonial era marked by a new constitution.[181]

B. Constitution Drafting

Constitution Drafting in Africa is a complex process of reflection, conflict resolution, and norm setting. It is influenced by multiple factors, including financial and time constraints, as well as political interference by domestic and foreign actors.[182] For some, constitution drafting is a craft, or a "neutral" expert-led process, or what Sara Kendall calls "constitutional technicity," where the constitutional drafters engage in compiling what they consider the best constitutional models for a given society.[183] Hanna Lerner, David Fustcher Pereira, and Nina Schlager conducted a study in which they particularly focused on forty-six international organizations, and found that, globally, between 1989 and 2017, there were 730 donor-funded constitution advising projects in 145 countries.[184] Lerner and colleagues show the magnitude and frequency of constitution-making projects.[185] In the African context, Zachary Elkins, Tom Ginsburg, and James Melton estimate that the life span of a post-colonial African constitution is less than

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BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 355 (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017).

181. The constitutions of Algeria and Namibia refer to colonialism as an era that has come to an end through the struggle (both armed and otherwise) of the people of these countries. CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA 1989 (amended 1996); CONSTITUTION OF THE REPUBLIC OF NAMIBIA, 1990 (amended 2014).

182. Zaid Al-Ali, *Constitutional Drafting and External Influence*, *in* COMPARATIVE CONSTITUTIONAL LAW 77 (Tom Ginsburg & Rosalind Dixon eds., 2011); *see also* Ugo Mattei, *Patterns of African Constitution in the Making (1999)*, CARDOZO LAW BULLETIN (Oct. 1, 2013), https://peacemaker.un.org/sites/default/files/document/files/2022/07/matteipatternsofafricanconstitutioninthemaking.pdf [https://perma.cc/9DHW-PMES].

183. *See* Sara Kendall, *Inscribing the State: Constitution Drafting Manuals as Textual Technologies*, 11 HUMANITY: INT'L J. HUM. RTS., HUMANITARIANISM & DEV. 101 (2020).

184. Hanna Lerner, David Fustcher Pereira & Nina Schlager, *International Constitutional Advising: Introducing a New Dataset*, REV. INT'L ORG. (2024), https://doi.org/10.1007/s11558-024-09530-x [https://perma.cc/2H6Q-NCZ7].

185. *See id.*

ten years.[186] The magnitude of contemporary constitutional drafting 'stakeholders' that has expanded beyond the citizens of the particular state affects not only the domestic legitimacy of the specific Constitution, but also raises ontological questions of constitution-making in Africa and its relationship with African norms. Secondly, Constitution-making in a decolonial sense would come into tension not only with the so-called "neutral" models that the experts provide, but also with perpetuating the colonial experience of epistemicide, Eurocentric constitutional hegemony, and erosion of the Basic Laws of Africans. Hence, it is necessary to rethink the way we draft constitutions; both the process and substantive clauses of a constitution-making need more rethinking to unravel their colonial ontologies.

This Part presents a modest attempt at analyzing the constitution-making processes of Eritrea and post-apartheid South Africa. Both the South African and the Eritrean constitutions mark the ushering of a new era of transformative existence for the Eritrean and South African people.[187] Although the Eritrean constitution did not come into force, it signifies a process that memorializes the end of colonization and Eritrea's membership as a sovereign member of the collective of "civilized nations."[188] Similarly, the South African constitution marks the end of the Apartheid government and the lifting of UN-sanctioned suspension from the fellowship of "civilized nations."[189] The South African

186. Zachary Elkins, Tom Ginsburg & James Melton, The Lifespan of Written Constitutions 10 (Oct. 8, 2006) (unpublished manuscript) (on file with USC Gould School of Law).

187. Mattei, *supra* note 182.

188. *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) (discussing how American constitutionalism was done with the goal of joining the membership of civilized nations); *see also* G.A. Res. 47/230, Admission of Eritrea to Membership in the United Nations (May 28, 1993), https://digitallibrary.un.org/record/197307 [https://perma.cc/X3WA-JWU7].

189. Department of International Relations & Cooperation, *Statement by the South African Government on the Occasion of the United Nations Day*, REPUBLIC OF S. AFR. (Oct. 24, 2019), https://dirco.gov.za/statement-by-the-south-african-government-on-the-occasion-of-the-united-nations-day/ [https://perma.cc/T287-7UJV] (last visited Aug. 29, 2025) (discussing how the United Nations General Assembly suspended South Africa on November 12, 1974); Kathleen Teltsch, *South Africa Is Suspended by U.N. Assembly, 91-22*, N.Y. TIMES (Nov. 13, 1974), at 1, https://timesmachine.nytimes.com/timesmachine/1974/11/13/79882263.pdf [https://perma.cc/TV4H-F7MS] (discussing how

constitution has been in force for over three decades; however, questions linger about whether it has led to greater egalitarianism and redistribution of power and resources.[190]

For some scholars, such as Bereket Habte Selassie, the chairman of the Eritrean Constitutional Commission and the lead drafter of the Eritrean Constitution,[191] the constitution-drafting process has historically been conducted through either the constitutional convention model or the Westminster model.[192] Selassie argued that the Eritrean Constitution-making process rejected what he calls the "Lancaster House model," in which British colonists drafted and negotiated constitutions for the colonized without public participation or deliberation.[193] For Selassie, the Eritrean constitution drafting process rejected traditional approaches and emphasized greater public participation. Therefore, one can conclude, for scholars such as Selassie, that the decolonial African constitution is rooted in the constitutionalism process.

On the South African experience, Hugh Corder, a member of the "Technical Committee on Fundamental Rights during the

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the United States, Britain, and France vetoed African states' efforts to expel South Africa from the United Nations).

190. *See generally* Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. HUM. RTS. 248, 249 (1998) (discussing the need for redistribution).

191. The Eritrean Constitutional Commission was established in 1994 and composed of 50 members. The Constitution Drafting process took three years and led to the eventual ratification of the Draft Constitution by the Constituent Assembly. According to Selassie, the Commission members were representative of the Eritrean society. Bereket Habte Selassie, *Creating a Constitution for Eritrea*, 9 J. DEMOCRACY 164, 165 (1998). He noted that the Constitutional Commission represented "a cross-section of Eritrean society, including 21 women, the majority of whom had been liberation fighters. Each of Eritrea's nine ethnic groups was represented, as were the business and professional communities." *Id.* However, Selassie contradicts this assertion in the same article by noting that majority of the members were veterans of the independence struggle. *Id.* at 169. In his words, "[t]he majority of the members shared a common background as veterans of the liberation fight, but also constituted a fair mix of Eritrea's ethnic groups, religious persuasions, and professions (including lawyers, social workers, teachers, and businesspeople)." *Id.*

192. In the Constitutional Convention model, a constitutional convention is typically held, as exemplified by the U.S. Constitution's drafting process in 1787, which was conducted in secret. The Westminster model is one where a specially appointed committee of legislators takes the task of the Constitution Drafting process. Selassie, *supra* note 191, at 167.

193. Selassie noted that the "reverse of this is the Lancaster House model, named for the site in London where British experts negotiated and wrote constitutions for some of Britain's former African colonies. The public had no voice in those deliberations." *Id*. at 172.

Transition," noted that the post-apartheid South African constitution followed a two-step process, whereby a transitional constitution preceded the 1996 final constitution—a process of constitutional compromise.[194] Corder argues that, except for the complete coverage of some public broadcasts and the Parliament's Hansard, the process of political negotiations on key constitutional issues was "abysmally opaque."[195] Despite Corder's criticism, the South African constitution is celebrated as a transformative and lasting solution to South Africa's racialized history.[196]

1. Eritrean Constitution Drafting Process

The drafters of the Eritrean Constitution did not rely on a model.[197] Selassie stated that "[t]he Commission reached a consensus at the outset that it should not rely on any ready-made model, but rather should take stock of Eritrea's own particular history and needs."[198] The Constitutional Commission relied on two sources for normative guidance.[199] First, as Selassie himself noted, "[t]he Constitutional Commission used [National] Charter as a benchmark of consensus and hence a point of departure for national debate on the constitution."[200] Secondly, Selassie himself noted that the Constitutional Commission aimed to involve the general public in the constitution-making process "while at the same time adopting and adapting universally applied institutions and values."[201] However, the question remains how much of the initial or final drafts were influenced by opinions gathered from public consultation, and how much was borrowed from the

194. Hugh Corder, *Towards a South African Constitution*, 57 MOD. L. REV. 491, 492 (1994).

195. *Id.*

196. Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351, 352 (2006) (quoting the Epilogue of the Constitution, Justice Langa noted that the Constitution aimed to provide "a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.").

197. Selassie, *supra* note 191, at 166 (Selassie asserts that "[t]he Commission reached a consensus at the outset that it should not rely on any ready-made model, but rather should take stock of Eritrea's own particular history and needs.").

198. *Id.*

199. *Id.* at 165–66.

200. *Id.* at 165.

201. *Id.* at 166.

National Charter, as well as what Selassie vaguely referenced as "universally applied institutions and values."[202]

Selassie further contradicts these assertions by noting that Eritrea is following the example of other African constitution-making processes, such as Ethiopia and Uganda, by rejecting the emulation of European Constitutions.[203] However, contradicting himself, Selassie also stated that there is no need to "reinvent the wheel," which implies borrowing from existing constitutional frameworks.[204] Furthermore, Selassie noted that to help guide public consultations and debates, the Constitutional Commission "prepared pamphlets and translated into local vernaculars several international legal instruments, including the Universal Declaration of Human Rights and the 1966 International Covenants on Civil and Political Rights and on Social, Economic, and Cultural Rights."[205] The Constitutional Commission also solicited comments and assistance from experts (both Eritreans and non-Eritreans).[206]

The post-colonial Eritrean constitution-drafting process emphasized Eritrea's self-determination and the values of the liberation struggle.[207] As the 1993 referendum results show, the choice to become an independent state and break all ties with Ethiopia was confirmed without question when 99.8 percent of the registered Eritrean population voted for independence from Ethiopia.[208] A question remains of what Selassie and the other drafters of the Eritrean Constitution would regard as the values of the independence struggle. The Eritrean independence movement, led by the Eritrean People's Liberation Front, is known for its socialist policies; however, the post-independence National

202. *Id.*

203. Selassie, *supra* note 191.

204. *Id.*

205. *Id.* at 168.

206. *Id.* at 169 (discussing how the commission solicited input of Eritrean and non-Eritrean experts).

207. *Id.* at 167 (Selassie noted that the "[v]alues acquired during the long armed struggle critically influenced the process of constitution making. As public debate made clear, Eritreans see the constitution as fulfilling their liberation struggle, and thus as helping to vindicate the enormous sacrifices involved.").

208. UNITED NATIONS, THE UNITED NATIONS AND THE INDEPENDENCE OF ERITREA, ST/DPI/1850, at 29 (1996).

Charter shifted toward a regulated market economy.[209] Similarly, scholars such as Victoria Bernal highlight contradictions in the values of the Eritrean independence struggle regarding gender equality.[210]

In addition to issues of what constitutes liberatory values of the Eritrean society, the biggest assault on the post-independence Eritrean constitution-making process is that, just like in colonial times, it rejected, confined, and relegated the Basic Law of Eritreans.[211] John Markakis noted how the National Charter rejected the traditional land tenure system in Eritrea in favor of state ownership of land, thereby continuing the colonial act that expropriated land from Eritreans and transferred it to the colonists.[212] The traditional land tenure system in Eritrea had denied land access to women.[213] Instead of reforming the system, the state took over land ownership, but it has not managed to address the social constraints and improve women's access to land.[214] In several Eritrean villages, despite formal equality and the provisions of the Eritrean Land Proclamation, women have less

209. John Markakis, *Eritrea's National Charter*, 22 REV. AFR. POL. ECON. 126, 128 (1995) (for instance, the 1994 Investment Law of Eritrea gives foreign investors a multitude of investment incentives, including "full repatriation of capital, profits, and interest on foreign loans, and no export taxation.").

210. *See* Victoria Bernal, *From Warriors to Wives: Contradictions of Liberation and Development in Eritrea*, 8 N.E. AFR. STUD. 129 (2001); *see also* Victoria Bernal, *Equality to Die For?: Women Guerrilla Fighters and Eritrea's Cultural Revolution*, 23 POL. & LEGAL ANTHROPOLOGY REV. 61 (2000).

211. *See* Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263, 289 n.120 (1999) (listing the twenty-two questions that Selassie—the chairperson of the Eritrean Constitutional Commission—outlined; none of which inquired on the status of Eritrean norms and pre-colonial laws in post-colonial Eritrean constitution making); CONSTITUTION OF ERITREA (1997) (no mention of Eritrea's precolonial laws or basic laws of the Eritrean society).

212. Markakis, *supra* note 209, at 127; *see also* L.G. Castellani, *Recent Developments in Land Tenure Law in Eritrea, Horn of Africa* 3–4 (Univ. of Wisconsin–Madison, Working Paper No. 37, 2000), https://ageconsearch.umn.edu/record/12800 [https://perma.cc/AB2Q-2GL4].

213. Futsum Tesfatsion Abbay, The Eritrean Land Tenure System from Historical and Legal Perspectives 53 (2001) (LL.M. thesis, McGill University) (on file with McGill University) (discussing initiatives by the Eritrean People's Liberation Front to change land tenure system in Eritrea. Abbay noted that "[e]ntitlement of women to land and recognition of their rights was the most radical change and revolutionary achievement of the armed struggle, though the majority of the peasantry did not support such reform since it was contrary to the traditional systems.").

214. Proclamation No. 58/1994; *see also* CONSTITUTION OF ERITREA art. 23, § 2 (1997) (stating that "[a]ll land . . . belongs to the State.").

access to land than their male counterparts.[215] The post-colonial Eritrean state, like the Italian and Ethiopian colonial policies over Eritreans, constrained customary law and approved only a limited application. The Ethiopian Civil Code of the 1960s, which governed civil law in Eritrea during Ethiopian colonization, repealed all customary law, except for limited application, for instance, in questions of family and succession law.[216] The post-colonial Eritrean state promulgated a law that renamed the Ethiopian Civil Code as the Transitional Civil Code of Eritrea, with some modifications, but maintained customary law's repeal except in certain circumstances.[217] Given these limitations, it is questionable whether Eritreans engaged in decolonial constitutional drafting.

2. South African Constitution Drafting Process

The post-apartheid South African constitution was a constitution of political settlement.[218] It was a process of "creating the procedures and structures for allowing fiercely combative opponents to compromise so as to move South Africa from autocracy to democracy."[219] Starting in 1930, until the end of apartheid, South African courts and laws disenfranchised, marginalized, and made invisible Black and Colored South Africans.[220] However, post-apartheid South African leaders and

215. Land Law Proclamation, Procl. No. 58 of 1994 (Eri.) (stating that both women and men have equal rights to land); Yordanos Tesfamariam & Margot Hurlbert, *Gendered Adaptation of Eritrean Dryland Farmers*, 9 INT'L J. CLIMATE CHANGE STRATEGIES & MGMT. 207 (2017) (discussing post-colonial land access for Eritrean women).

216. Ethiopian Civil Code of 1960, art. 3347 (1960) (stating that "[u]nless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."); *see* G. Krzeczunowicz, *A New Legislative Approach to Customary Law: The "Repeals" Provision of the Ethiopian Civil Code of 1960*, 1 J. ETHIOPIAN STUD. 57, 57–67 (1963) (discussing the relationship between customary law and the Ethiopian Civil Code).

217. Transitional Civil Code of Eritrea, Procl. No. 2 of 1991 (Sept. 15, 1991) (Eri.).

218. Erika Lemmer & Michele Olivier, *The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom*, 33 DE JURE 138, 138–39 (2000) (discussing how the interim constitution of South Africa was negotiated by the African National Congress and the Apartheid South African government to reach a negotiated settlement and end of the apartheid regime); *see also* Kristin Henrard, P*ost-Apartheid South Africa: Transformation and Reconciliation*, 166 WORLD AFFS. 37, 39 (2003).

219. *See* Corder, *supra* note 194.

220. *See* Corder, *supra* note 194, at 493. In regard to the African franchise, see R v. Ndobe 1930 A.D. 484 (S. Afr.); Ndlwana v. Hofmeyr, N.O. 1937 A.D. 229 (S. Afr.); Harris v. Minister of the Interior 1952 (2) S.A. 428 (A.D.) (S. Afr.); Collins v. Minister of the Interior 1957 (1) S.A. 552 (A.D.) (S. Afr.).

anti-apartheid movement leaders, such as Nelson Mandela, recognized the discourse of law and rights as a valuable tool to facilitate political change and bridge the racial divide within South African society.[221] The political change, which at times is characterized as "rainbow constitutionalism," aimed to capture the diverse racial identities of South Africa to replace the exclusive and racist apartheid constitution.[222] In this compromise, the post-apartheid South African constitution blended "Mandela's idea of non-racial society, [Desmond] Tutu's vision of reconciliation based on truth, and . . . the 'sunset clause' that protected the interests of the white minority and some privileges of the apartheid apparatus."[223]

Notably, the post-apartheid 1996 South African Constitution was the first constitution in South African history to provide equal rights to all South Africans irrespective of race.[224] However, when it came to resource redistribution, the "sunset clause" of the "willing buyer and willing seller" approach adopted by the South African Constitution failed to create an egalitarian and redistributive access to land for all South Africans.[225] In 2018, the South African left-wing party, the Economic Freedom Fighters (EFF), proposed an amendment to expedite the expropriation of land from white landowners, who account for eight percent of the South African population, but own approximately eighty percent of the country's land.[226] To date, the South African Constitution has

221. Corder, *supra* note 194 ("[L]aw and 'rights' can and should be used to ease the process of political change in intensely contested terrain.").

222. Patryk Wawrzyński, Joanna Marszałek Kawa & Neo Sithole, *Transformation of the Constitutional Identity in South Africa after the Fall of Apartheid*, 29 BIAŁOSTOCKIE STUD. PRAW. 307, 312 (2024).

223. *See id.*

224. CONSTITUTION OF SOUTH AFRICA, 1996, ch. 1, § 1 (noting that the founding values of the Republic of South Africa as human dignity, equality, human rights, non-racialism and non-sexism).

225. Cherryl Walker, *Finite Land: Challenges Institutionalising Land Restitution in South Africa, 1995–2000*, 38 J. S. AFR. STUD. 809, 811–12 (2012) (discussing the history of the "property or land" clause in the interim constitution of South Africa and 1996 Constitution of South Africa).

226. *See* Reuters, *Parliament Endorses Land Expropriation Without Compensation*, SOWETAN LIVE (Feb. 27, 2018), https://www.sowetanlive.co.za/news/south-africa/2018-02-27-parliament-endorses-land-expropriation-without-compensation/ [https://perma.cc/X7VY-9F3N]; Martin van Staden, *The Dangers of South Africa's Proposed Policy of Confiscating Property*, *in* ECONOMIC FREEDOM OF THE WORLD: 2021 ANNUAL REPORT 237 (2021).

undergone eighteen amendments, with attempts to break or reach a new constitutional settlement paving the way for a decolonized South African constitutionalism.[227]

The debate on decolonial constitutionalism in South Africa has primarily focused on the tangible impact of colonization—including land dispossession and the deprivation of civil, political, and economic rights.[228] However, the debate on decolonized South African constitutionalism rarely engages with epistemological decolonization and what Madlingozi calls "indigenous sovereignties."[229] Madlingozi noted that hodge-podge amendments would not lead to holistic constitutional decolonization, but rather, might lead to "mimetic constitutional theories and approaches (based as they are on theories and approaches emanating from the Global North)."[230] A decolonizing constitution is "bifocal in the sense of being both backward-looking and forward-looking."[231] One way that constitutionalism can look back is through its engagement with the Basic Laws of precolonial societies.[232]

The South African Constitution recognizes customary law and thereby takes steps to reconnect with precolonial norms.[233] It

227. *See generally* CONSTITUTION EIGHTEENTH AMENDMENT, Act 3 of 2023, July 27, 2023, Gov't Gaz. No. 49041 (S. Afr.).

228. *See* D.M. Davis & Karl Klare, *Two Cheers for Transformative Constitutionalism*, 35 LAW & CRITIQUE 487 (2024) (discussing the post-Apartheid South African constitution as a transformative constitution rooted on egalitarian and redistributive principles); Ntando Sindane, *Decolonial Musings About Constitutionalism, the Constitution, and Democratic Future(s)*, 35 LAW & CRITIQUE 553, 558 (2024) (critiques the work of Davis and Klare and what he calls "normative valorization" of the South African constitution and emphasizes political racial equality of all South Africans without analyzing the constitution's failure at redistribution and economic justice).

229. *See* Tshepo Madlingozi, *The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonization?*, CRITICAL LEGAL THINKING (Apr. 6, 2018), https://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/ [https://perma.cc/63M3-MKJF].

230. *See id.*

231. *See id.*

232. *See* Anthony C. Diala & Bethsheba Kangwa, *Rethinking the Interface Between Customary Law and Constitutionalism in Sub-Saharan Africa*, 52 DE JURE L.J. 189, 205 (2019) (making a distinction between "customary law"—the distillation of interaction between indigenous law and colonialism—and "indigenous law"—the unaltered pre-colonial laws of African societies— and proposing that African constitutions should adopt "the foundational values of indigenous laws as constitutional principles").

233. *See* Anthony C. Diala & Bethsheba Kangwa, *Rethinking the Interface Between Customary Law and Constitutionalism in Sub-Saharan Africa*, 52 DE JURE L.J. 189, 202 (2019)

states that the "courts must apply customary law . . . subject to the Constitution."[234] However, as Thandabantu Nhlapo has demonstrated, the drafters of the South African Constitution engaged with existing tension between customary law and women's rights, mindful of this complexity, the drafters integrated customary law in the South African Constitution, and subjected it to the Constitution represents a compromise or settlement between women's rights activists and traditional leaders during the constitution-making process.[235] However, this very compromise of subjecting customary law to the Constitution could have a sensitizing effect on what constitutes custom and customary law in the Southern African context.[236] Furthermore, over time, as Nhlapo rightfully noted, legislative drafters and courts became reluctant to engage with customary law.[237] For Nhlapo, this reluctance is a result of a pragmatic decision to look and try to ascertain what constitutes customary law, which could be oral, when they could easily engage with the well-documented and written state-enacted legislation and constitutional text, could limit the application of customary law to limited spaces.[238] Then, the question for future researchers would be how post-colonial constitutions engage with pre-colonial laws to create a decolonial African constitution.

C. Universalism and Constitution Making

Despite several constitutional reforms, the realities of contemporary African states often do not align with the constitutional text. Contemporary African constitutional law, as the supreme and normative body of law, aims to regulate the

(discussing South Africa's approach toward precolonial norms); *see also* S. AFR. CONST., 1996, § 211(3).

234. S. AFR. CONST., 1996, § 211(3).

235. Thandabantu Nhlapo, *Customary Law in Post-Apartheid South Africa: Constitutional Confrontations in Culture, Gender and Living Law*, 33 S. AFR. J. ON HUM. RTS. 1, 1–2 (2017).

236. *See id.* at 4–7 (discussing a South African court's approach towards customary law, noting that South African courts showed sensitivity towards customary law). Between 2005 and 2013, the Constitutional Court of South Africa took a harsher stance on customary law and struck down traditional norms of succession, chieftainship, and polygamy. *Id.*

237. *See id.* at 12–13.

238. *See id.*

behavior of the African state, its governmental organs, and its citizens.[239] African constitutional law seeks to maintain a prosperous and normative relationship between the post-colonial state and its citizens.[240] Furthermore, a scan of African constitutions reveals significant similarities between and among existing African constitutional texts and those of other constitutions globally.[241] Then the question that lingers is dualistic. On the one hand, are constitutional rights and institutional design necessarily common to all political societies? How do we build a decolonial constitution given the fact that the colonist bequeathed the first post-colonial African constitution? To construct a decolonial post-colonial constitution, must the colonial constitution be destroyed before writing or rewriting the post-colonial constitution?

Why do most constitutions look the same? The phrase "we the people" is prevalent in many preambles of African constitutions.[242] Tom Ginsburg, Nick Foti, and Daniel Rockmore argue that these words signify that domestic constitutions are about national values and global influences.[243] For instance, a survey of contemporary African constitutions shows that twenty African constitutions use the phrase "we the people" literally to declare what Adeno Addis calls the legitimate source of authority or common national identity—not just in legislating or enacting constitutional text, but also in ordering their political, economic, and social life.[244]

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239. For an example of an exception, see SOMALI CONSTITUTION, art. 4 (1) (2012) ("After the Shari'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all departments of government.").

240. *See generally* Peggy Cooper Davis, *Post-Colonial Constitutionalism*, 44 N.Y.U. REV. L. & SOC. CHANGE 1 (2019) (discussing the normative relationship of the post-colonial/post-apartheid state-citizen dynamics).

241. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1243 (2011) (discussing how constitutions share similar content).

242. *See, e.g.,* CONSTITUTION OF ANGOLA pmbl. (2010); CONSTITUTION OF ERITREA pmbl. (1997) (both starting with the phrase "we the people").

243. *See* Tom Ginsburg, Nick Foti & Daniel Rockmore, *We the Peoples: The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT'L L. REV. 305, 305 (2014).

244. *See* Adeno Addis, *Constitutional Preambles as Narratives of Peoplehood*, 12 VIENNA J. ON INT'L CONST. L. 125, 125 (2018). I surveyed contemporary African Constitutions and searched for literal use of the phrase "we the people" and found matching constitutional text in twenty African Constitutions: the Constitutions of Angola, Burundi, Cameroon, Egypt, Equatorial Guinea, Eritrea, Eswatini, Gambia, Ghana, Kenya, Liberia,

Similarly, Tom Ginsburg, Zachary Elkins, and Beth Simmons have demonstrated that the Universal Declaration of Human Rights significantly influenced the drafting of constitutions and the rights established in many post-World War II constitutions.[245] Ginsburg, Elkins, and Simmons demonstrate the positive correlation between a state's participation in international human rights treaties and its influence on the rights embedded in its constitutional text.[246] For instance, a survey of contemporary African constitutions reveals that the right to equality and non-discrimination is incorporated in one form or another in all African constitutions.[247] This prompted some scholars to criticize the incorporation of international human rights treaty provisions into constitutional law as an extension of the hegemonic and Eurocentric spread of norms and epistemologies in Africa.[248] However, a holistic rejection of human rights as a Eurocentric hegemonic project at times is a hasty move that overlooks the roots of these human rights principles, for instance, within African

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Namibia, Nigeria, Rwanda, Seychelles, South Africa, South Sudan, Uganda, Zambia and Zimbabwe. *See* CONSTITUTION OF ANGOLA, 2010; CONSTITUTION OF BURUNDI, 2018; CONSTITUTION OF CAMEROON, 2008; CONSTITUTION OF EGYPT, 2012 (amended 2019); EQUATORIAL GUINEA OF 1991 [CONSTITUTION] (revised 2012); CONSTITUTION OF ERITREA, 1997; CONSTITUTION OF ESWATINI, 2005; GAMBIAN CONSTITUTION, 1996 (amended 2018); CONSTITUTION OF GHANA, 1992 (revised 1996); KENYAN CONSTITUTION, 2010; CONSTITUTION OF LIBERIA, 1986; CONSTITUTION OF NAMIBIA, 1990 (revised 2014); CONSTITUTION OF NIGERIA, 1999 (amended 2011); CONSTITUTION OF RWANDA, 2003 (revised 2015); CONSTITUTION OF SEYCHELLES, 1993 (revised 2017); CONSTITUTION OF SOUTH AFRICA, 1996 (revised 2012); CONSTITUTION OF SOUTH SUDAN, 2011 (revised 2013); CONSTITUTION OF UGANDA, 1995 (revised 2017); CONSTITUTION OF ZAMBIA, 1991 (amended 2016); CONSTITUTION OF ZIMBABWE, 2013 (revised 2017). The Draft Constitution of Libya of 2016 uses the phrase "we the people." The Constitution of Sudan of 2005, before its amendment in 2019, also used the phrase "we the people" to denote national identity and authority to enact the Constitution. The Ethiopian Constitution of 1995 revises the phrase "we the people" and expands it to explicitly recognize the diverse nations and nationalities that exist within Ethiopia.

245. Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013).

246. *See id.*

247. Christof Heyns & Waruguru Kaguongo, *Constitutional Human Rights Law in Africa*, 22 S. AFR. J. ON HUM. RTS. 673, 683 (2006) (discussing the different iterations of the right to equality and non-discrimination in contemporary African constitutions).

248. Makau Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, 51 AFR. STUD. REV. 17, 18 (2008) (noting that "[n]either human rights, nor liberalism, has been germinated in the African garden.").

societies.[249] Conversely, scholars such as Amartya Sen have argued and convincingly demonstrated the hypocrisy and fallacy of claiming human rights as a Western hegemonic concept.[250] For Sen, human rights are erroneously narrated as ancient norms of Europe and the United States.[251] On the contrary, Sen argues that authoritarian states often use the claim of human rights as a Western value to justify depriving their citizens of those rights.[252] Indeed, claiming that human rights are Western seems to erase the anti-colonial, anti-apartheid, and anti-slavery movements and advocacy by non-Western states, as well as how that contributed to the fall of, for example, the apartheid regime in South Africa.[253]

Lastly, in addition to international human rights instruments, constitutions often resemble one another because of the role of the drafters. Some constitutional drafters draw moral values and advocate the transfer of foreign constitutional ideas (also known as "constitutional borrowing") without appreciating the socio-economic, legal, cultural, political, and historical differences of countries in transition.[254] Gunther Frankenberg criticized constitutional drafters who advocate for legal transplants and harmonization, as complicit in Western hegemony.[255] When

249. *See* Claude Ake, *The African Context of Human Rights*, 34 AFR. TODAY 5, 5 (1987) (discussing the meaning of human rights which tend to be individualistic but in the African context human rights might take a group rights perspective); *see generally* Michelo Hansungule, *The Historical Development of International Human Rights*, *in* AN INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW 1 (Azizur Rahman Chowdhury & Jahid Hossain Bhuiyan eds., 2010) (discussing how all societies have variations of human rights norms).

250. Amartya Sen, *Universal Truths: Human Rights and the Westernizing Illusion*, 20 HARV. INT'L REV. 40 (1998).

251. *Id.* at 40–41.

252. *Id.* at 43 (criticizing the Asian values argument).

253. Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States, 1969–1986*, 111 POL. SCI. Q. 127 (1996) (discussing the politics of the anti-apartheid activism in the United States shows the slow stance that the United States took to oppose apartheid in South Africa). On the contrary, see Gay Seidman, *Armed Struggle in the South African Anti-Apartheid Movement*, *in* THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS 224, 226 (Jeff Goodwin & James M. Jasper eds., 3d ed. 2014) (providing a chronology of the anti-Apartheid movement in South Africa).

254. Anne Smith, *Internationalisation and Constitutional Borrowing in Drafting Bills of Rights*, 60 INT'L & COMP. L.Q. 867 (2011) (criticizing constitutional borrowing that does not consider the local needs).

255. *See* GÜNTER FRANKENBERG, COMPARATIVE CONSTITUTIONAL STUDIES (2018); Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. 563 (2010); Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).

comparativists examine foreign constitutional provisions, they may inadvertently adopt unconscious biases by focusing solely on formal constitutions when assessing the value, consistency, and efficiency of foreign constitutional law.[256] Whether the result of constitutional borrowing or the impact of international human rights provisions, it is evident that contemporary constitutional provisions tend to share similar characteristics.[257] The universalization of constitutional provisions raises questions about whether decolonial constitutionalism involves overhauling these provisions and, secondly, whether it is feasible to overhaul them throughout the continent.

D. Decolonization of Comparative Constitutional Law

Post-colonial African states have adopted constitutionalism as a hallmark of self-determination and statehood; however, they face challenges in implementing decolonial constitutionalism.[258] For

256. Maxim Bönnemann & Laura Jung, *Critical Legal Studies and Comparative Constitutional Law*, OXFORD CONST. L. ONLINE (Apr. 2017).

257. *See* Matthew D. Adler, *Can Constitutional Borrowing Be Justified? A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 352 (1998) (discussing if constitutional borrowing could be justified); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1243 (2011) (discussing how constitutions share similar content).

258. What is self-determination? Self-determination is a right explicitly stated under Article 20(1) of the African Charter on Human and Peoples' Rights. Article 20(1) states: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." African Charter on Human and Peoples' Rights art. 20(1), June 27, 1981, 1520 U.N.T.S. 217. S. Kwaw Nyameke Blay defined self-determination as the "principle by virtue of which a people freely determine their political status and freely pursue their economic, social and cultural development." S. Kwaw Nyameke Blay, *Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights*, 29 J. AFR. L. 147, 147 (1985). Blay inquired if the concept of self-determination persists in post-colonial Africa. *Id.* By bringing the examples of the conflict in Biafra and Katanga in the 1960s and Eritrea and South Sudan and discussing the Organization of African Unity's decision to solidify and freeze colonial boundaries, Blay eloquently analyzes this combined effect as a possible rejection of post-European colonialism self-determination claims in Africa. *Id.* Article 20(2) of the African Charter on Human and Peoples' Rights provides that "[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community." African Charter on Human and Peoples' Rights art. 20(2), June 27, 1981, 1520 U.N.T.S. 217. From here, it is possible to imply that self-determination as a right exists in the post-colonial context, but, in practice, it is met with resistance and rigidity. *See* Richard Gittleman, *The African Charter on Human and*

decades, decolonial constitutionalism was debated as a struggle for constitutional legitimacy, which internalized constitutional issues within domestic causes without analyzing the impact of colonialism on constitution-making. For some scholars, for instance, H. Kwasi Prempeh, the role of colonialism in post-colonial Africa has no direct correlation with contemporary constitutional legitimacy.[259] For Prempeh, the post-colonial authoritarian heads of state led to Africa's constitutional legitimacy crisis and not necessarily Africa's colonial past.[260] Prempeh details how the enactment of laws criminalizing dissent by Kwame Nkrumah in Ghana's post-colonial period led to constitutional illegitimacy.[261]

Similarly, Adem Abebe argued that constitutional legitimacy is often challenging in Africa because power is concentrated in a *de facto* hegemonic political party.[262] Contemporary, *de facto* one-party states in Africa are rooted in the early post-colonial era.[263] For instance, Julius Nyerere, the first President of the United Republic of Tanzania, believed that a one-party hegemony would lead to a united and prosperous Tanzania.[264] Despite Nyerere's justifications, the post-colonial one-party hegemonic government

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Peoples' Rights: A Legal Analysis, 22 VA. J. INT'L L. 667, 677–83 (1982) (discussing economic and political self-determination).

259. H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1245 (2006) (Prempeh discusses how the post-colonial constitutional legitimacy results from "successful mobilization by Africa's political elites . . . to underwrite their authoritarian projects.").

260. *See id.*

261. *Id.*

262. Adem Kassie Abebe, *The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding*, 19 ASIAN J. COMP. L. 473, 473 (2024) (discussing how hegemonic political parties exploit constitutional amendments to maintain power).

263. *See* Nyarko John Abbam, *Emergence of One-Party States in Africa, Tanzania and Burkina Faso in Perspective*, 3 INT'L J. AFR. STUD. 24 (2023).

264. *See* Julius Nyerere, *One Party Government*, TRANSITION, Dec. 1961, at 9–10 (arguing for a one-party government in Africa); *see generally* Benjamin Neuberger, *Classless Society and One-Party State Ideology in Africa*, 14 AFR. STUD. REV. 287, 287–88 (1971) (discussing how many African leaders in the early 1960s associated multi-party governments with class struggle, and since several of them believed that there was no class structure in Africa, they argued that multi-party governments are less relevant). For instance, B. Onuoha argued that "[t]he idea of social classes, of a closed group, whose privilege it was to enjoy the best of everything and an underprivileged group of whom anything was good enough is foreign to Africa." *Id.* Slightly differently, and with recognition, the Malian political activist Madeira Keita notes that there is some class stratification in Africa, but its impact is minuscule and negligible. *Id.* This does not mean that African thinkers espoused the idea that African societies are egalitarian.

structure was oppressive and persecuted dissent.[265] Even in the 1990s and beyond, which is claimed to be the era of African multi-party governments, the concept and practice of hegemonic party systems still dominated.[266] Abebe does not define hegemonic political party systems or *de facto* dominant party systems and uses both phrases as synonyms.[267] However, Abebe clearly defines the parameters of his study, focusing explicitly on the legitimacy of constitutional amendments, and also provides examples of what Abebe categorizes as illegal constitutionalism, or ostensibly enacted new constitutions through "referendum" in the Republic of Congo and the Republic of Guinea.[268] Abebe uses these examples to highlight what he recognizes as one of the sources of illegitimacy in post-colonial African constitutions or constitutional amendments, drawing a direct link between illegality and illegitimacy.[269] For Abebe, the second source of illegitimacy of African constitutions does not necessarily emanate from illegality, but rather is illegitimate because the hegemonic political party dominates the constitutional amendment process, "making the

265. *See* Abbam, *supra* note 263. Post-independence Burkina Faso and Tanzania supported one-party government to promote national unity. *Id.* Nevertheless, in Tanzania, although the one-party government provided political stability, it punished dissenters and political opponents and engaged in grave human rights violations. *Id.*

266. *See generally* Nicolas van de Walle, *Presidentialism and Clientelism in Africa's Emerging Party Systems*, 41 J. MOD. AFR. STUD. 297, 297 (2003) (discussing dominant party or hegemonic party trend in the 1990s and beyond).

267. Abebe, *supra* note 262. Scholarship on the meaning of hegemonic political parties is diverse and many. For instance, Caroline Lancaster analyzes hegemonic party systems as systems when "dominant parties veer into authoritarian practices." Caroline Lancaster, *Ideology and Hegemonic Party Rule in South Africa, Hungary, and Turkey*, 17 POL. RELIGION & IDEOLOGY 370, 370 (2016). On the other hand, Jerzy J. Wiatr adopts a contrasting definition of the hegemonic party system. Wiatr, discussing the Polish Party system, defined the hegemonic party system as a system that "stands mid-way between the mono-party systems and the dominant party systems." Jerzy J. Wiatr, *Political Parties, Interest Representation and Economic Development in Poland*, 64 AM. POL. SCI. REV. 1239, 1239 (1970). For Wiatr, a hegemonic party system is a multi-party system that creates a coalition government that includes all political parties. *Id.* Still, only one of the political parties is uncontestably accepted as the coalition's leader.

268. Abebe, *supra* note 262, at 476 (Denis Sassou Nguesso of the Republic of Congo and Alpha Conde of the Republic of Guinea used the referendum to create a new constitution in their respective countries to extend the Presidential term limit. Here, Abebe rightfully noted how the presidents of the Republic of Congo and the Republic of Guinea used the referendum to evade clear and legally binding constitutional provisions that prohibited any constitutional amendments that would extend presidential term limits.).

269. *See id.* at 476.

reform inherently non-inclusive and lacking broad participation."[270]

Although Abebe's assertions are correct, it seems that Abebe, like Prempeh, internalizes all the sources of constitutional illegitimacy as manipulative and non-inclusive actions taken by African political actors.[271] One of the significant sources of illegitimacy in African constitutions that Abebe does not engage with is the impact of colonialism on African constitutions.[272] On the contrary, the illegitimacy of African constitutions is deeply rooted in their history as objects of colonialism and later as colonial laws or acts of decolonization. Therefore, the post-colonial African constitutions are not social contracts, epistemologically and ontologically, as the African state was a colony, and its citizens were subjects of the colonial power.[273]

Muna Ndulo demonstrated that post-colonial African constitutions were, in fact, a form of legislation imposed by the colonists, declaring the end of their colonial holdover on the African state.[274] Ndulo eloquently noted the experience of post-colonial African constitutionalism, as colonial powers led the constitution-making process as part of the decolonization process.[275] Similarly, Madlingozi laments the so-called "transformative-constitution" of South Africa and criticizes its failure to bring redistribution and equality for the majority of Black

270. *See id.* at 477 (discussing constitutional but illegitimate constitutional amendments).

271. *See* Prempeh, *supra* note 259; Abebe, *supra* note 262.

272. *See* Abebe, *supra* note 262.

273. The assertion that African Constitutions are social contracts between the State and citizens is flawed, not just epistemologically, but also ontologically when forming the post-colonial African State. As Makau wa Mutua has noted, the juridical statehood of African states is the result of the European colonists delineating the territorial integrity of these states and not necessarily a gradual synthesis and choice of Africans. Mutua, *supra* note 150. Nevertheless, some scholars, such as Henok Kebede Bekele, use Rousseau's social contract theory to analyze and conclude that the 1995 Ethiopian Constitution fails to be a social contract. Henok Kebede Bekele, *Constitution as a Social Contract in Contemporary Ethiopia: The Need to Re-construct Political Arrangements*, 15 MIZAN L. REV. 41 (2021). Bekele argues that because of its lack of inclusivity, the 1995 Ethiopian Constitution does not reflect the consensus of all Ethiopians and Ethiopian societies. *Id.*

274. Muna Ndulo, *Constitutions and Constitutional Reforms in African Politics*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (July 29, 2019), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1324.

275. *Id.*

South Africans.[276] However, Madlingozi's call for a decolonial or liberatory constitution fails to capture other forms of social oppression, for instance, gender, that exist on the continent.[277] Jackie Dugard and Angela María Sánchez criticize Madlingozi's narrow focus on "race" as the dividing line for liberatory or decolonial constitution in South Africa and argue for a multi-focal lens encompassing gender and class.[278]

In the debates among African constitutional scholars listed above, a commonality emerges: They focus on African issues and efforts to reform, decolonize, or create inclusive and multi-focal constitutions for African states.[279] Taking a departure from this approach and adopting a different intellectual engagement, Phillip Dann examines decolonial constitutionalism as a dialectical process of engagement, not just among the Global South states, but also Global North states.[280] For Dann, this dialectic approach acknowledges constitutional laws past as a colonizing tool but also sensitizes the populace of some colonizing states, such as Germany, to their colonial past.[281] However, Dann's scholarly mission is bigger than reminding the populace and future comparativists from the global north that the field of comparative constitutional law is in dire need of what Dann calls the "Southern Turn."[282] For Dann, this "Southern Turn" would allow the field of comparative constitutional law to understand "the asymmetries and injustices,

276. Madlingozi, *supra* note 229.

277. Jackie Dugard & Angela María Sánchez, *Bringing Gender and Class into the Frame: An Intersectional Analysis of the Decoloniality-As-Race Critique of the Use of Law for Social Change*, 32 STELLENBOSCH L. REV. 24 (2021).

278. *Id.*

279. *See* Ndulo, *supra* note 274; Madlingozi, *supra* note 229.

280. Philipp Dann, *Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies*, 1 COMP. CONST. STUD. 174 (2023). Note that I have reservations about the Global South versus Global North divide adopted by Philipp Dann. This is a point that Dann has encountered from other authors. For now, and for the sake of efficiency, I will use the terms that Dann used in this article to address different concerns I have about his work.

281. *Id.* at 175 (Dann eloquently notes that in the "Global North (especially in Europe), the legacies of colonialism have been disregarded until very recently, and domestic legal academia (in constitutional but actually all fields of law) has mostly ignored not just de-/postcolonial theory but also the history of colonialism itself.").

282. One might ask what the "Southern Turn" is. Dann notes that the Southern Turn is a double turn. Dann, *supra* note 280, at 175. It is a turn "to the South and then to the North and the world." *Id.* Dann further notes that the Southern Turn is about taking "colonial legacies and Southern experiences and how this might affect our understanding of constitutionalism(s) in the South and the North." *Id.*

and engage with the Southern experience more seriously to be able to develop adequate approaches."[283] For this, Dann calls on scholars from both the Global South and North to engage and refocus the gaze of comparative constitutional law to the South.[284]

Although this Article agrees with Dann's call for scholars from the Global North to take a Southern Turn, I have the following reservations. Dann acknowledges and dismisses three criticisms of his conception and use of the Global South and North.[285] Dann's binary categorization of the Global North and South has an underlying assumption of what colonialism is or was.[286] Dann's categorization seems to focus on European colonial ambitions towards the global South and entirely ignores, for instance, Third World colonialism.[287]

Secondly, Dann's call for scholars from the Global South and the Global North could also suffer if scholars from the Global North engage in the dialectic of the Southern Turn with a Northern gaze.[288] Does the turn start from the North or the South? Dann

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283. *Id.* at 174.

284. *See id.*

285. *Id.* at 182. Dann summarizes the three major criticisms as follows:

> First, it is argued that colonialism historically had so many different facets and instantiations that speaking of "colonialism" is a crude simplification and unhelpful. It is secondly argued that assuming one bloc of countries as "the South" and juxtaposed to "the North" is a dramatic oversimplification that ignores regional and local histories and trajectories and as such grouping them together is unhelpful, if not wrong. Finally, different people have argued that using the notion of the South ultimately only reifies and stabilizes the categories of South and North, instead of overcoming them.

Id.

286. Here, I think Dann's binarity implies that the Global South represents former colonies of the Global North. This is the classical understanding of Western colonialism, which conceptualized colonialism as the "imposition of white rule on alien peoples inhabiting land separated by salt water from the imperial center." Emerson, *supra* note 21.

287. For a discussion on the meaning and manifestation of third-world colonialism, see Luwam Dirar, *Rethinking the Concept of Colonialism in Bandung and Its African Union Aftermath*, *in* BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 355 (Luis Eslava et al. eds., 2017). *See also* Walker, *supra* note 21.

288. I am mindful and cognizant that scholars from the Global South could also be the instigators of the Northern gaze, as, for many, their legal education emphasizes Eurocentric legal regimes. In many African law schools, there is a minimal emphasis on African law, and when it is present, it tends to be a Eurocentric conception of African law. Charles Manga Fombad, *Africanisation of Legal Education Programmes: The Need for Comparative African Legal Studies*, 49 J. ASIAN & AFR. STUD. 383, 384 (2014) (discussing the need for comparative African legal studies).

notes that the Southern Turn is a double turn.[289] It is a turn "to the South and then to the North and the world."[290] This makes one wonder about the starting point of Dann's conceptualization of the Southern Turn. Here, it appears that there is an implicit assumption that the Southern Turn originates from the North, which is problematic on numerous levels. The Southern Turn, if it starts from the North, might exacerbate the fact that, quite often, comparativists suffer from the phenomenological perspectives of their home state or the familiar legal system.[291] Suppose the Southern Turn becomes a victim of the northern gaze. In that case, it will also have a built-in top-down vantage point that helps preserve the epistemological hegemony of Eurocentric legal systems.[292] Alternatively, this call for Northern scholars to take a Southern Turn could allow Northern scholars to engage in a minimalist empirical quest of the South. It could lead to the survival and possible spread of Eurocentrism, limiting the decolonial groundwork necessary for Africa-centric constitutionalism.

Dann further notes that the Southern Turn is about taking "colonial legacies and Southern experiences and how this might affect our understanding of constitutionalism(s) in the South and the North."[293] Here, it is unclear whether the word "our" for Dann refers to his positionality or, more generally, to scholars in the

289. *See* Dann, *supra* note 280.

290. *See id.* at 175.

291. Comparative constitutional law as a field of study has bias issues. This bias could result from what Ran Hirschl describes as a lack of proper case selection and a coherent methodological approach in comparative constitutional law. *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005). As Tushnet has excellently shown, comparative constitutional law has shown a preference for a universalist approach, and quite often, as Ramona Vijeyarasa has demonstrated, this preference tends to be a bias towards English-speaking legal systems or the so-called universalization of English-speaking norm entrepreneurship without necessarily examining the respective norms in other parts of the world. Mark Tushnet, *Comparative Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1039 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); Ramona Vijeyarasa, *Comparing Whose Laws? Interrogating Biases in Comparative Law and Scholarship Through the Lens of Domestic Violence Workplace Leave*, 40 INT'L J. COMP. LAB. L. & INDUS. REL. 2 (2024) (discussing bias towards domestic and English-speaking legal systems as norm entrepreneurs).

292. *See* Tushnet, *supra* note 291; Vijeyarasa, *supra* note 291; Hirschl, *supra* note 291; *see generally* Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L. L.J. 411 (1985).

293. *See* Dann, *supra* note 280.

Global North or perhaps even the Global South. It is doubtful that Dann means scholars from the Global South, and equally doubtful that he is speaking only of his own endeavor. The most likely conclusion would then be that Dann's use of the word "our" focuses on scholars from the Global North. This approach centers on the North, and scholars from the Global North are decolonizing African constitutions.

Thirdly, Dann's call for collaborative engagement overlooks the role of constitutional legal scholars in perpetuating colonial and oppressive constitutionalism in Africa. Law can be an instrument of oppression, and historically, as Part II of this Article showed, constitutional law was a tool for legitimizing colonial imperial ambitions. Furthermore, Dann's call for Global South scholars to engage in a dialectical scholarship in their Southern Turn assumes that scholars of societies that have been subject to colonialism and Eurocentrism again bear a responsibility to educate the privileged Northern scholars of the Global North's responsibility for all the atrocities of genocide and colonialism, to name a few. It is not this Article's contention that scholars from the Global North are responsible for historical wrongs. This idea that decolonial constitutionalism needs a "Southern Turn" minimizes the role of European colonists in perpetuating harm to the colonized.

IV. CONCLUSION & NEXT STEPS

This Article attempted to show how constitutional law in Africa was a colonial tool. In this endeavor, this Article explored how different colonial powers, namely the Italian, British, and French colonists, utilized law in general and constitutional law to exploit and subjugate Africa and its inhabitants. By adopting broader conceptions of colonialism that extend beyond nineteenth century European colonialism, this Article also explores Third World colonialism and Settler colonialism, as illustrated by the experiences of Eritrea and South Africa, respectively. Irrespective of who the colonist was, be it European, Settler, or Third World, colonialism subjugated Africa and transformed its inhabitants from African citizens into subjects. Colonialism also racialized Africans and created a racial hierarchy that dehumanized Africans. Colonists, in addition to territorial and human exploitation, also engaged in epistemological and linguistic hegemony and

minimized and degraded the precolonial norms, laws, and epistemes of Africans.

This Article also shows the complexity of the post-colonial constitution-making. The first post-colonial constitution of several African states was a colonial act in which the colonists renounced their "colonial responsibility." As a colonial construct, the first post-colonial constitution, at times, reflected not only the norms of the colonizer but also established a British monarch as the head of state. Although several African states severed the formal link, whether with the British monarch or their former colonizer, the post-colonial African constitution faces complex issues. This Article examines the contemporary struggle to decolonize African constitutions, which is sometimes framed in liberatory decolonial language and at other times in terms of legitimacy questions. This Article examined two examples of constitution-drafting processes and how they aimed to create a decolonial constitution that reflected the history, past, and present of the societies they sought to serve. It specifically looked at the experiences of the Eritrean and South African societies. Unfortunately, in the drafting process and in contemporary African constitutions, the precolonial laws and norms of African societies remain marginalized. Despite its limitations and colonial legacy, the postcolonial African constitution granted outward self-determination but fell short of being entirely an African decolonial constitutionalism.

Lastly, this Article explored the work of African and non-African comparative constitutional law scholars. In this process, this Article highlights the difficulties of existing comparative constitutional law methodologies and how some of these methodologies may perpetuate Eurocentric norms. Then what role should comparative constitutional lawyers play in decolonizing African constitutions? Or what should be the methodology? Comparative constitutional lawyers must adopt a multifocal approach that examines constitutionalism as a process that evaluates the past, present, and future of a particular African state. Decolonial comparative constitutional law should also adopt a multidisciplinary approach that interrogates constitutionalism as a multifaceted process that extends beyond law and history, while also engaging with existing social oppression.